

Rolling Back of Nursing Home Resident Protections: Chronology

DATE	REQUEST OR ACTION	SOURCE
October 17, 2016	Nursing home industry action: Files lawsuit to block implementation of rule requiring ban on forced pre-dispute arbitration agreements in nursing homes	AHCA press release , 10/17/16
November 7, 2016	Court action: Mississippi Federal District Court issues preliminary injunction prohibiting rule on arbitration from going into effect	Court Order – AHCA v Burwell
December 15, 2016	<p>Nursing home industry request: Asks Congress to use the Congressional Review Act (CRA) to repeal the revised regulations.</p> <p>Requests that the Administration give them relief from “regulatory burden. “ Specific requests include:</p> <ul style="list-style-type: none"> • Repeal previous guidance (S&C: 16-31-NH) about enforcement penalties • Halt CMPs and other penalties from being applied for past noncompliance • Change criteria for revoking training program for certified nursing assistants • Make staff in CMS Regional Office accountable to the CMS Central Office • Delay further submissions of payroll-based staffing data until problems can be fixed, Problems should be addressed in a way that does not result in undue burden to providers. • Work with CMS to decide what aspects of nursing home rules are “essential” to keep after complete repeal 	AHCA letter to President-Elect Trump , 12/15/16
March 9, 2017	<p>Nursing home industry request:</p> <p>Asks for “regulatory relief.” Specific requests include:</p> <ul style="list-style-type: none"> • Stop use of fines retroactively and for citations unrelated to resident harm • Stop revocation of training programs for certified nursing assistants for citations unrelated to resident harm • Issue new policies to end use of retroactive CMPs (replace previous policies: S&C: 16-31-NH) • Delay new survey process • Implement new phase-in timeline for Requirements of Participation • Create a new rule • Change following sections of the rule that are overly burdensome and do not help with resident care: <ul style="list-style-type: none"> ○ ban on binding arbitration ○ an annual in-depth facility assessment to establish staffing requirements ○ behavioral health resources to take care of the chronically mentally ill (e.g. schizophrenia) ○ release of peer-review and root cause analyses to surveyors 	American Health Care Association letter to Secretary Price , 3/9/17

	<ul style="list-style-type: none"> ○ conversions of room sizes and bathrooms whenever construction/renovations are made ○ extensive documentation by physicians on their prescribing decisions ● Give nursing facility survey and enforcement responsibility to CMS Office of Clinical Standards and Quality and the Survey and Certification Division, not the Regional Offices. ● Incentivize Regional Offices and State Survey Agencies based on improved outcomes for the nursing homes in their region, (not on the number and severity of deficiencies and CMPs) 	
<p>May 4, 2017</p>	<p>CMS action: Agency solicits comments on three possible areas where nursing home standards might be reduced:</p> <ol style="list-style-type: none"> 1. Notice to Ombudsman Program. Federal regulations released in 2016 require nursing homes to notify the local ombudsman program whenever the nursing home proposes to evict a resident, so that the ombudsman program can counsel the resident on his or her options, including appeal rights. CMS now proposes to eliminate the notice-to-ombudsman requirement. 2. Handling Resident Grievances. The federal regulations from 2016 require nursing homes to establish procedures for addressing grievances from residents. Among other things, the nursing home must designate a grievance official to oversee the handling of grievances. CMS now proposes to be less specific about grievance official duties, and about how the nursing home addresses grievances. 3. Developing Quality Improvement Programs. The federal regulations from 2016 require nursing facilities to develop and maintain quality improvement programs. CMS now proposes to make these requirements less specific as to how a nursing facility will identify problems, develop corrective actions, and monitor effectiveness. <p>CMS also states that it is “interested in receiving feedback regarding any additional areas of burden reduction and cost savings in [nursing homes].”</p>	<p>Federal Register / Vol. 82, No. 85 / Proposed Rules, 5/4/17</p>
<p>June 8, 2017</p>	<p>CMS action: Agency issues proposed rule to reverse ban on forced pre-dispute arbitration agreements in nursing homes and to permit facilities to <i>require</i> arbitration as a condition of receiving nursing home care.ⁱ</p>	<p>Federal Register / Vol. 82, No. 109 / Proposed Rules, 6/8/17</p>
<p>June 26, 2017</p>	<p>Nursing home industry request:</p> <p>Delay Phases II and III of Requirements of Participation</p> <p>Revise Requirements of Participation to be more flexible and cost-effective</p> <p>Specific requests:</p> <ul style="list-style-type: none"> ● Eliminate the requirement for a facility assessment ● Change infection control provisions <ul style="list-style-type: none"> ○ Give greater flexibility in designing infection control programs 	<p>Leading Age comments in response to May 4, 2017 CMS solicitation of comments on three possible areas where nursing home standards might be reduced</p>

	<ul style="list-style-type: none"> ○ Allow existing staff to serve as infection control officer ○ Permit the infection control officer to serve multiple nursing homes ○ Permit tele-visits for facilities in rural areas as well as those areas experiencing workforce shortages. ● Allow up to 24 hours to report instances of alleged abuse, neglect, mistreatment, or exploitation ● Require notice of transfer/discharge to be given to the State Long-Term Care Ombudsman only in situations involving involuntary transfers or discharges. ● Revise Quality Assurance and Performance Improvement requirements to allow nursing homes to: <ul style="list-style-type: none"> ○ Focus on what they see as their most pressing compliance and quality challenges ○ Prioritize continuous quality improvement activities centered on resident outcomes and both quality of care and life ● Give flexibility to the grievance process ● Give flexibility in staff training 	
<p>June 30, 2017</p>	<p>CMS action: In response to provider concerns, the agency announces it will limit enforcement penalties for some of the nursing home requirements that are to go into effect in November 28, 2017 (called “Phase 2” requirements). Instead of fines, denial of payment and termination, CMS will only use a directed plan of correction and directed in-service training.ⁱⁱ The goal is to “educate” facilities about specific Phase 2 regulations.</p> <p>CMS decides to “freeze” for one year the health inspection star ratings for any surveys conducted after November 28, 2017.</p>	<p>CMS Survey and Certification memo: 17-36-NH</p>
<p>July 7, 2017</p>	<p>CMS action: CMS changes its policies regarding fines, called Civil Monetary Penalties (CMPs),ⁱⁱⁱ in a way that will result in lower and less frequent fines.</p> <p>CMS policy had been to use Per Day fines in all but a few limited circumstances.</p> <p>CMS has now completely reversed its policies. Currently, Per Instance fines are to be used instead of Per Day fines except under certain very limited and extreme conditions, primarily when residents have suffered harm. In general, Per Day fines end up being larger than per instance fines, which creates a greater incentive for nursing homes to correct the problem quickly and stay in compliance.</p> <p>Other changes include:</p> <ul style="list-style-type: none"> ● Using only per instance fines for past noncompliance 	<p>S&C 17-37-NH</p>

	<ul style="list-style-type: none"> • Distinguishing whether a resident has suffered harm when calculating Per Instance CMPs for violations classified as Immediate Jeopardy.^{iv} • Making it much easier for a facility’s financial condition to be considered in deciding to lower a CMP.^v 	
October 11, 2017	<p>Congressional request: 120 Members of the US House of Representatives send letter to CMS.</p> <p>The letter:</p> <ul style="list-style-type: none"> • States that the requirements are an unfunded mandate; may direct resources away from the quality care residents deserve; are a financial burden on the profession and that some regulations are duplicative • Requests CMS re-evaluate the nursing home requirements of participation rules to allow for thoughtful revisions and to give providers more time to comply 	Letter to CMS from 120 Members of the US House of Representatives
October 26, 2017	<p>Senate request: 24 Members of the US Senate send letter to CMS.</p> <p>The letter:</p> <ul style="list-style-type: none"> • States that requirements put a financial burden on providers; some of the regulations appear duplicative; and some requirements place one size fits all mandates on facilities • Requests CMS delay for one year the overly burdensome parts of the rule 	Letter to CMS from 24 Members of the US Senate
October 26, 2017	<p>CMS action: Agency launches Patients Over Paperwork Initiative to revise or eliminate regulations to reduce burden to providers.</p>	CMS press release
October 27, 2017	<p>CMS action: Agency proposes to: repeal S&C: 16-31-NH; give facilities more opportunities to delay - and possibly avoid - CMPs; and limit when fines can be issued for the most serious violations.</p> <p><u>Immediate imposition of remedies^{vi}</u> CMS has changed its policies to make it easier for nursing homes to avoid immediate imposition of remedies. For instance:</p> <ul style="list-style-type: none"> • Violations that occurred in the past are no longer required to have penalties immediately imposed. Regional CMS offices are authorized to make the determination. • Factors such as whether the violation is considered a “one time mistake” or an intentional action can be taken into account <p><u>Limiting when a fine can be issued for the most egregious violations</u> In the past, a CMP had to be issued when there was an Immediate Jeopardy violation - a violation that caused or was likely to cause serious injury, harm, impairment or death.</p>	S&C: 18-01-NH

	Now, under revised CMS policies, a fine only has to be imposed when there is serious injury, harm, impairment or death. If such a level of harm is likely but does not actually occur, a CMP is optional.	
October 27, 2017	<p>CMS action: Agency eases up on the criteria for revocation of training programs for certified nursing assistants.</p> <p>Under previous policy, a facility could not operate a training program if CMPs of a certain amount were imposed.</p> <p>This policy has been revised. Now nursing homes can operate a training program if the CMPs don't relate to direct "hands-on" care of residents and CMS grants them a waiver.</p>	S&C: 18-02-NH
November 24, 2017	<p>CMS action: Agency:</p> <p>-Imposes moratorium on key enforcement measures for certain Phase 2 regulations:</p> <ul style="list-style-type: none"> • F655 (Baseline Care Plan) • F740 (Behavioral Health Services) • F741 (Sufficient/Competent Direct Care/Access Staff-Behavioral Health) • F758 (Psychotropic Medications) related to PRN Limitations • F838 (Facility Assessment) • F881 (Antibiotic Stewardship Program) • F865 (QAPI Program and Plan) related to the development of the QAPI Plan • F926 (Smoking Policies) <p>-Freezes the current health inspection star rating on Nursing Home Compare website for any surveys occurring between November 28, 2017 and November 27, 2018.</p> <p>-Changes how health inspection star ratings are calculated to include less information. In the past, the health inspection rating was based on 3 most recent finds for standards health inspections and 3 most recent years of complaint inspections. For at least a year rating will be based on only 2 years of data.</p>	S&C: 18-04-NH
Fall 2017	<p>CMS action: Agency indicates intent to propose a rule that would reform the requirements that CMS has identified as unnecessary, obsolete, or excessively burdensome. The date of the proposed rule is June 2018. This proposed rule is in accordance with the January 30, 2017 Executive Order Reducing Regulation and Controlling Regulatory Costs (E.O. 13771).</p>	Unified Agenda of Regulatory and Deregulatory Actions

December 15, 2017	CMS action: Agency holds closed listening session to hear from SNF providers about regulatory burden. One advocate permitted to attend after pushing hard for permission.	
January 18, 2018	CMS action: Patients over Paperwork newsletter states CMS heard and responded to what providers said about delays and fines.	January 2018 Patients over Paperwork Newsletter
February 12, 2018	Nursing home industry action: Announces intention to seek further regulatory reduction in response to possible .03% decrease in originally scheduled payment hike	Article McKnights LTC News

ⁱ A “pre-dispute” arbitration agreement requires that all future disputes be settled by private arbitration, rather than through a lawsuit. The term “pre-dispute” means that the agreement applies to all future disputes involving the nursing home and the nursing home resident. When a nursing home resident is seeking compensation for an injury suffered in a nursing home, the resident generally is better off bringing the claim in court, rather than in a private arbitration. To protect residents’ interests, the federal regulations from 2016 prohibit a nursing home from obtaining a pre-dispute arbitration agreement, based on CMS’s conclusion in 2016 that residents were being deceived into signing broad arbitration agreements during the admissions process.

ⁱⁱ “Directed” means that the State or CMS determines what the facility must do to correct the violations or what type of training it needs.

ⁱⁱⁱ There are two types of fines, called Civil Monetary Penalties (CMPs), that can be imposed when a facility does not comply with a regulation: 1) Per instance fine – a fine that is a set amount for a particular violation; and 2) Per day fine – a fine amount that accumulates every day the violation is determined to exist until it’s corrected.

^{iv} An Immediate Jeopardy violation is a violation that caused, or is likely to cause, serious injury, harm, impairment, or death to a resident. Actual harm does not have to occur for a violation to be considered immediate Jeopardy. However, under the revised policy, a per instance fine for an immediate jeopardy violation is lower if no harm occurred.

^v Before the standard was high: a CMP could only be lowered if the facility lacked sufficient assets to pay the CMP without going out of business. Under the revised policy, no specific standards are set forth. The only requirement is that a CMS review prove that a reduction is necessary or not necessary.

^{vi} Up until recently, nursing homes have been given an opportunity to fix violations and avoid penalties under most circumstances. This means that when the state inspectors go back into the facility to see if the violation has been corrected, no penalties are imposed if the problem has been addressed. However, if there are violations that meet certain criteria (they fall into certain categories of regulations and are severe and/or widespread enough), the facility is not given a chance to correct the problem and avoid the penalty (Called immediate imposition of remedies).