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CMS Revises Guidance on Immediate Jeopardy Citations in Long-Term Care Facilities

On March 5, the Centers for Medicare and Medicaid Services (CMS) released revised [guidelines](#) for determining immediate jeopardy (IJ) and a [memo](#) (QSO-19-09-ALL) outlining the revisions.

The guidelines are contained in Appendix Q of the CMS State Operations Manual. The 2019 revised Appendix Q, called “Core Appendix Q,” has been modified to apply not just to nursing homes, but to all providers and suppliers that accept Medicare and/or Medicaid funding. CMS has also created a “subpart” to address specific nursing home concerns. According to CMS, the purpose of the revisions is to clarify and increase consistency in identification of IJ. The guidelines are summarized below.

Note: While the Core Appendix Q applies to all providers and suppliers, we are writing this with a nursing home focus.

Core Appendix Q

The regulatory definition of IJ in nursing homes is “a situation in which the provider’s noncompliance with one or more requirements of participation has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident.”

Components of Immediate Jeopardy

To determine that IJ exists, the following three elements must be present:

1. Noncompliance

Surveyors must establish that the nursing home failed to meet one or more requirements of participation and provide sufficient evidence to support the noncompliance. This is a significant change from previous guidance in which the facility's culpability had to be determined in addition to noncompliance. This change brings the IJ criteria in line with the regulatory definition which does not require culpability. It also makes it easier to cite IJ.

Sometimes when there is noncompliance at the IJ level for one regulation, there may also be noncompliance at the IJ level for other, related regulations. In the past, surveyors could apply the same set of facts to multiple IJ violations. Now they must ensure that each IJ deficiency contains some facts that are unique to that specific deficiency.

Surveyors are also instructed to cite noncompliance even if a nursing home claims a "rogue" employee violated a regulation. CMS states, "An entity cannot disown the acts of its employees, operators, consultants, contractors, or volunteers or disassociate itself from the consequences of their actions to avoid a finding of noncompliance."

2. Serious injury, serious harm, serious impairment or death has occurred or is likely to occur

Surveyors must determine the outcome or impact the noncompliance had or is likely to have on the resident. Use of the term "likely" differs from previous use of the term "potential." This change brings the IJ requirement in line with the regulatory definition which refers to "likely."

Serious injury, serious harm, serious impairment or death is defined as: adverse outcomes which result in, or are likely to result in: death; a significant decline in physical, mental, or psychosocial functioning, (that is not solely due to the normal progression of a disease or aging process); loss of limb, or disfigurement; avoidable pain that is excruciating, and more than transient; or other serious harm that creates life-threatening complications/conditions. **Only one resident needs to have suffered or be likely to suffer for IJ to exist.**

If harm is likely, surveyors do not need to prove when the serious harm will occur or that it will occur within a certain timeframe. Furthermore, surveyors do not have to show that the noncompliance is the sole factor contributing to the adverse outcome or making a serious adverse outcome likely. It is enough for the noncompliance to be a factor in causing or making such an outcome likely.

Harm to residents is not limited to physical harm. Appendix Q now provides considerable guidance about determining psychosocial and/or mental harm. For instance, the guidance acknowledges that there are situations when psychosocial harm might be difficult to determine. In those cases, surveyors are instructed to interview the resident's family, legal representative, or other individuals involved in the resident's life to understand how the resident reacted or would have reacted to the noncompliance. If these interviews are not possible or in situations in which the psychosocial outcome to the resident is incongruent with what would be expected, surveyors are to apply the "reasonable person" concept (how a reasonable person in the resident's position would be impacted by the noncompliance).

3. Immediate Action is Needed.

The surveyors must decide if corrective action must be taken right away so that the serious adverse outcome will not occur or recur. CMS clarifies that action must be taken even if the resident is no longer in the facility or has died.

Calling Immediate Jeopardy

Surveyors are now required to use an "IJ Template" to determine if IJ exists and to communicate the IJ finding to the nursing home (the IJ template is in Section XII of Appendix Q). The IJ Template identifies the three key components of IJ, and requires surveyors to identify their substantiation of each as "yes/no," and to provide a preliminary fact analysis to support the existence of a key component.

After determining the presence of IJ, the survey team must consult with their State Agency (SA) for confirmation that IJ exists and seek direction. In some cases, the CMS Regional Office is also contacted for confirmation. Surveyors then must immediately notify the nursing home administrator and deliver the completed IJ Template.

Removing Immediate Jeopardy

Development of a Removal Plan: The facility must complete a "removal plan" which: 1) identifies the residents who have suffered, or are likely to suffer, a serious adverse outcome as a result of the noncompliance; 2) specifies the action the entity will take to change the process or system failure to prevent a serious adverse outcome from occurring or recurring; and 3) indicates the date the action will be complete. The removal plan differs from a plan of correction because the facility doesn't have to correct all noncompliance – just the noncompliance contributing to the serious harm.

Approval of the Removal Plan: The SA, or the survey team in consultation with the SA, determines whether, if implemented appropriately, the removal plan will remove the likelihood that serious harm will occur or recur.

IJ Removal: To remove IJ, surveyors must determine onsite that the nursing home took immediate action to prevent a serious adverse outcome from occurring or recurring and no resident is currently experiencing serious injury, serious harm, or serious impairment; and/or serious injury, serious harm, serious impairment, or death is not likely. If the plan is not fully implemented, the IJ will continue until the removal plan is fully implemented and the likelihood of serious injury, serious harm, serious impairment, or death no longer exists. NOTE: If the harm cannot be remedied (e.g., death or serious harm has already occurred), the removal plan must address how additional serious harm will be prevented. **Offsite desk/telephone review for removal of IJ is not permitted.**

Nursing Home Subpart to Core Appendix Q

This new subpart to Appendix Q contains guidance about IJ specifically for nursing homes. Some key points include:

- Duration. IJ starts at the time noncompliance caused serious harm or made serious harm likely to occur and continues until it has been removed or corrected.
- Past noncompliance (PNC): Surveyors can cite past noncompliance at the IJ level when it occurred after the last standard survey and before the current survey and the facility has removed the IJ and completely corrected the noncompliance before the start of the survey. In this situation, surveyors must determine when the noncompliance was corrected. No plan of correction is required in cases of PNC.
- Resident vulnerabilities. The vulnerabilities, not just of residents in general, but of individual residents, must be considered in determining IJ. The particular vulnerabilities of a specific resident may make him or her more susceptible to serious harm than other residents.
- Triggers for further investigation into a possible IJ. The guidance identifies possible resident outcomes and/or staff/facility actions which trigger the need for further investigation.

Consumer Voice (CV) Perspective

There are many positive changes in the revised Appendix Q.

CV is pleased to see the repeated guidance to surveyors that an IJ should be called if serious harm **is likely to occur**, not just when it has already occurred. This should better prevent harm from occurring. We also commend CMS for the increased

emphasis on psychosocial/mental harm, which has generally been under-identified. The guidance provides more detail, which should promote greater surveyor understanding of when this type of harm has occurred or is likely to occur. In addition, instructing surveyors to apply the “reasonable person concept” when a resident’s psychosocial outcome is not readily determined is very important. Without this approach, the impact on many individuals would not be adequately evaluated, and many situations of IJ would not be identified.

Other ways in which Appendix Q have been strengthened include:

- Removal of the requirement to demonstrate facility culpability.
- Clarification that a) the facility is responsible for the acts of a “rogue employee;” b) action must be taken to remove the IJ even if the resident is no longer in the facility or has died; and c) only one resident needs to have suffered or be likely to suffer for IJ to exist.
- Requiring that surveyors must be onsite to determine removal of IJ. This is the only way surveyors can truly verify that the removal plan has been implemented and the problem has been corrected.

While we appreciate these revisions, we are nevertheless concerned that there may not be sufficient guidance to surveyors about what to look for in order to identify the presence of IJ. Previous guidance included more detailed direction. Furthermore, we wonder if elimination of the term “potential” and the inability for surveyors to use the same set of facts in multiple IJ deficiencies will mean serious harm or likely serious harm will be unidentified and therefore unaddressed - leaving residents at risk.

Finally, we are disappointed that CMS did not incorporate CV’s recommendation to notify the State Long-Term Care Ombudsman when IJ is determined. This would give the Ombudsman Program the opportunity to check on the welfare of residents in the facility. It would also alert the Ombudsman Program to the possibility of the facility’s termination so it can prepare to assist residents if necessary.

What Can Advocates Do?

- Review the triggers of possible IJ and be alert to whether you see these resident outcomes and/or staff actions. If so, immediately report your observations to the state survey agency and to the administrator.
- Educate residents and families about IJ - what it means, what to look for that might indicate IJ (triggers), what to do if they believe there is an IJ, what happens

if an IJ is called, and what to do if they feel the facility is not taking immediate action to correct the IJ.

- Ombudsmen can ask surveyors or the state survey agency to let them know as soon as possible when there is an IJ.
- If appropriate, ombudsmen can offer to conduct an in-service training for staff on the issue(s) related to the IJ citation(s).
- Ombudsmen can review a facility's survey record to see if there is an IJ the facility is repeatedly receiving. They can then talk with the administrator and staff about the facility's plans to correct the actions that are leading to that IJ.