



# policy break

Knowledge. Action. Change

June 27, 2018

## **CMS rolls back enforcement policies**

On June 15, 2018 CMS released a Quality, Safety and Oversight (QSO) (formerly Survey and Certification - S&C) memo, setting forth final revised policies that further weaken enforcement. This memo, [QSO 18-18-NH](#), replaces [S&C memo 16-31-NH](#). This new guidance goes into effect July 15, 2018.

Below are a few key highlights of this memo:

### **Use of CMPs with Immediate Jeopardy**

This guidance reverses current policy requiring the imposition of a civil money penalty (CMP) for all Immediate Jeopardy violations. Now, under the new guidance, if the Immediate Jeopardy does not result in serious injury, harm, impairment, or death, a CMP is optional, based on the discretion of the CMS Regional Office. This creates a distinction within Immediate Jeopardy violations, defined as noncompliance that “has caused, or is likely to cause, serious injury, harm, impairment, or death to a resident” (42 CFR 488.301), and a perception that some of these violations are less serious than others.

This revised policy creates a two-tiered level of penalties for Immediate Jeopardy that is contrary to the purpose of the enforcement system - to prevent harm in the first place.

### **Changes how remedies are selected and factors to consider**

Previously, remedies were chosen based on scope and severity of deficiency. For each scope/severity designation, there were remedies the CMS Regional Offices (ROs) were required to impose, and others that were optional. Now ROs have

discretion to choose remedies that they believe will bring about compliance quickly. Also, in making a determination about imposition of remedies, the RO is advised to consider the extent to which the noncompliance is the result of a “one-time mistake.”

### **Immediate imposition of remedies**

CMS has changed its policies about when remedies must be immediately imposed. When a deficiency has been cited, facilities are generally permitted an “opportunity to correct” before a remedy is imposed. However, under certain circumstances - for instance egregious situations or poor performing facilities - the sanction can be imposed immediately.

The revised policy eliminates situations that previously would have triggered immediate imposition of remedies, such as 1) a Special Focus Facility with food safety requirements violations at F or higher; or 2) any deficiency from the current survey at levels “D,” “E,” or “F” that falls into any of the regulatory sections that constitute Substandard Quality of Care (these include Quality of Care, Quality of Life, and several additional sections). In addition, the revised policy allows CMS Regional Office (ROs) to have discretion in determining whether to apply the immediate imposition of remedies to past noncompliance at all.

**Summary: Overall, these policy changes are likely to result in fewer and less frequent penalties, particularly CMPs.**

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