



policy break

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August 24, 2020

CMS Expands Survey Activities; Ends Suspension of Enforcement Actions

The Centers for Medicare and Medicaid services (CMS) released a memo, [QSO-20-35-ALL](#) on August 17, 2020 announcing revisions in guidance related to survey activities and enforcement.

Survey Activities

This memo expands the surveys State Survey Agencies (SSAs) can conduct in Phase 3 of the Nursing Home Reopening Recommendations or at the state's discretion. It authorizes SSAs to conduct the additional onsite surveys listed below - as soon as they have the resources to do so. Examples of resources include staff and personal protective equipment (PPE).

- Onsite revisits as specified in the revisit policy in the [State Operations Manual](#) (Chapter 7, Section 7317.2) for surveys with end dates on, or after, June 1, 2020
- Complaint investigations that are triaged as Non-Immediate Jeopardy Medium
- Annual recertification surveys required to be conducted within 15 months from a provider's last recertification survey

Enforcement

Below are some of the key points the memo discusses related to enforcement.

Desk Reviews and Plans of Correction

To determine if a facility with one or more deficiencies on a survey has achieved substantial compliance, CMS is directing SSAs to conduct desk reviews instead of onsite revisits for enforcement cases started from March 23, 2020 - May 31, 2020. A desk review is conducted by reviewing a facility's plan of correction (POC) and supporting evidence to determine if the violation has been corrected. The only time a desk review cannot be conducted is if there is Immediate Jeopardy. In that case, an onsite revisit must be done.

From March 23 up to, but not including, June 1, 2020, facilities were permitted to delay submission of their POCs. Now facilities must submit all POCs from that time period unless they are experiencing an outbreak. In that instance, they can request an extension.

If there are concerns about clearing certain deficiencies, that concern can be included in the facility's next onsite survey

Enforcement Actions

CMS is once again processing enforcement cases after having suspended all actions on March 23, 2020. The agency is handling cases differently based on whether the action was started before March 23, 2020; on March 23, 2020 through May 31, 2020; or on or after June 1, 2020. The CMS memo describes how actions started during each time period will be addressed, and how CMPs will be determined.

Highlights include:

- Before March 23: Accruing enforcement remedies, such as per day CMPs, will begin with the start of noncompliance and run either through March 22 or the date of substantial compliance based on a desk review – whichever is earlier.
- On March 23 through May 31: CMPs will only be imposed for noncompliance at actual harm or Immediate Jeopardy levels, and only per instance CMPs will be issued for actual harm.
- On or after June 1, 2020: Regular enforcement processes will be followed, and there will also be enhanced enforcement for infection control deficiencies as indicated in the CMS memo, [QSO-20-31-ALL](#). However, if noncompliance began before the survey started and/or during the period from March 23 - May 31, any per day CMP must start on the beginning date of the survey.

Finally, the amount of a CMP will automatically be reduced by 35% if a facility wanted to waive its right to appeal the fine, but was not able to do so during the survey prioritization period (March 23 – May 31).

Consumer Voice Comments

- Consumer Voice welcomes the expansion of survey activities which we, along with other advocacy groups, have been advocating for with CMS for many months now. It has been too long since surveyors have been in facilities for standard surveys, complaint investigations, and revisits.
- Many complaints from residents and families will still go uninvestigated since they are likely to be triaged as Non-Immediate Jeopardy Low.
- We are very concerned that except for Immediate Jeopardy deficiencies, desk reviews will be used instead of onsite revisits to determine if a facility is back in substantial compliance. This may result in deficiencies being cleared inappropriately. There is a reason that standard enforcement procedures require onsite revisits to confirm the facility is back in compliance - desk reviews are not equivalent to being onsite.

- It is troubling that the overall impact of the enforcement policy changes for the different time periods is likely to be lower fines, resulting in less incentive for facilities to achieve compliance.

Advocacy Tips

- Advocate for your state to resume the full range of survey activities, including investigation of complaints triaged at the Non-Immediate Jeopardy Low level, since CMS has given the SSAs the discretion to do so.
- Ombudsmen should do what they can to determine if deficiencies have been corrected since no onsite revisits will be conducted for enforcement cases started from March 23, 2020 – May 31, 2020 (except for Immediate Jeopardy). If ombudsmen believe noncompliance was cleared inappropriately, they should report it to their SSA and share information with surveyors during the next onsite survey.
- Residents and families should continue to file complaints with SSAs since more complaints will be investigated.
- Individual residents and family members, as well as resident and family council members, should do whatever they can to talk with surveyors when they are onsite to share their experiences/problems/concerns.