

## Summary of CMS's Updated Nursing Home Guidance

In 2016, the Centers of Medicare & Medicaid Services (CMS) updated the Medicare Requirements for Participation for Nursing Homes. Implementation of the updated regulations occurred in three phases. As a result, CMS planned to issue updated guidance to state surveyors also in three phases. Phase 1 guidance was released in November 2016 and Phase 2 guidance was issued in November 2017. Due to delays as a result of the COVID-19 pandemic, [CMS is releasing the Phase 3 guidance](#) along with revisions to the Phase 2 guidance.

The updated guidance, released on June 29, 2022, appears in the State Operations Manual, which state oversight agencies are required to follow when surveying and assessing facility compliance with the federal regulations, specifically in Appendix PP. The guidance is 847 pages long, however, CMS has highlighted the updated guidance by using red font. The guidance will go into effect on October 24, 2022.

Below you will find a summary of the revisions to the guidance, including commentary on its impact on nursing home residents. Overall, the guidance will increase protections for nursing home residents in a variety of areas.

Consumer Voice has grouped together the guidance under broad themes, such as visitation and staffing. Each section contains an F-Tag, which is a number CMS assigns to particular issues, along with the relevant regulatory citations. Clickable links will bring you directly to the corresponding section in the updated guidance.

### Visitation

#### **[Visitation Considerations During a Disease Outbreak, F563, 42 C.F.R. § 483.10\(f\)\(4\) p. 27](#)**

The updated guidance addresses the issue of visitation during a disease outbreak. CMS offers a variety of suggestions to nursing homes to help facilitate visitation, including

- Outdoor and virtual visitation.
- Designated indoor visitation areas.
- Appropriate infection control.
- Contacting local health departments.

During the COVID-19 pandemic, limitations on visitation resulted in significant harm to residents, both physically and emotionally. Nothing could replace the need for nursing home residents to be able to visit with family and loved ones in person. Consumer Voice [documented](#) the terrible effects visitation bans had on nursing home residents.

Despite the known negative effects of visitation bans on residents, CMS does not state in the guidance that nursing home residents have a right to have family visit at all times. 42 C.F.R. § 483.10(f)(4)(ii) clearly states that a facility must provide immediate access to a resident by immediate family at all times. This access is only subject to limitation by the resident's right to

refuse that visit. It is only in 42 C.F.R. 483.10(f)(4)(iii) that the regulations provide for other considerations, such as clinical or safety restriction, when allowing access to a resident, but this is only for non-family member visitors. Despite the regulation's clear intent to grant family member's access at all times, in the new guidance CMS states that a resident's right to visit a family member is subject to clinical and safety restrictions. This statement directly contradicts the regulations.

Consumer Voice is deeply concerned that the limitation of a resident's right to visit with a family member at all times will 1) result in a recurrence of the devastation caused by CMS' visitation lockdown during the COVID-19 pandemic, and 2) violates the Code of Federal Regulations. All nursing homes must have the adequate staffing and resources to allow residents to meet with their family members at all times. This right is essential to the well-being of nursing home residents.

### **Visitation and Illegal Substance Abuse, F563, 42 C.F.R. § 483.10(f)(4), p. 27**

CMS has added guidance regarding reasonable and clinical safety restrictions that may be placed on visitation to include denying access or providing supervised visitation to individuals who have a history of bringing illegal substances into a facility. CMS cautions facilities that they may not act as an arm of law enforcement, but must take steps to ensure safety of residents, through increased supervision and the monitoring of signs of drug use. Nursing homes are not allowed to search a resident or a resident's possessions for illegal drugs, absent the resident's consent.

## **Freedom from Abuse, Neglect, and Exploitation**

CMS has made significant updates to its guidance in the area of resident abuse, particularly in the areas of a facility's obligation to report a reasonable suspicion of a crime and for surveyors to consider the psychosocial harm abuse may have on a resident.

### **Abuse, F600, 42 C.F.R. § 483.12 p. 68**

### **A facility must take immediate action to remove residents from additional abuse, p. 79**

CMS reminds facilities that failing to take immediate steps to protect residents from abuse once it is identified could result in increased enforcement action.

### **Sexual Activity, p.75**

CMS states that facilities must ensure residents are protected from sexual abuse by ensuring they are capable of consenting to sexual activity.

### **Neglect, F600, 42 C.F.R. § 483.12 p. 79**

### **Identifying Neglect, p. 80**

Although the guidance previously contained significant guidance regarding resident neglect, CMS made additions for state surveyors. CMS incorporates the definition of neglect from 42 C.F.R. § 483.5 into the guidance, which is a "the failure of the facility, its employees or service

providers to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish or emotional distress.”

CMS states that neglect occurs when:

“the facility is aware of, or should have been aware of, goods or services that resident(s) requires but the facility fails to provide them to the residents(s), **that has resulted in or may result in or may result in physical pain, mental anguish, or emotional distress. Neglect includes cases where the facility’s indifference or disregard for resident care, comfort or safety, resulted in or could have resulted in, physical harm, pain, mental anguish or emotional distress.**” (Emphasis indicates new guidance).

In its examples of neglect, it adds a facility’s failure to implement an effective communication system, which includes failure to respond to call lights in resident rooms.

### **Psychosocial Harm, F600, 42 C.F.R. § 483.12(a)(1) p. 86**

CMS has added guidance on the negative psycho-social effects, whether observed or not, on residents of abuse and neglect. When determining how to categorize the level of harm suffered by residents as the result of a deficiency, surveyors must consider the psychosocial effects the facility’s actions or inaction have had on a resident. In addition to the updated guidance in Appendix PP, CMS also updated its [Psychosocial Outcome Severity Guide](#).

Psychosocial is defined as “the combined influence of psychological factors and the surrounding social environment on physical, emotional, and/or mental illness” (psychosocial guide page 1). To determine the severity of psychosocial harm a resident might experience because of a deficiency, surveyors must use the “reasonable person concept.”

The reasonable person concept requires the surveyor to consider:

- The resident may consider the facility to be his/her “home”, where there is an expectation that he/she is safe, has privacy, and will be treated with respect and dignity.
- The resident trusts and relies on facility staff to meet his/her needs.,
- The resident may be frail and vulnerable.

Surveyors are required to not only document actual evidence of harm that a resident may exhibit (bruises, emotional distress), but also to consider whether a reasonable person in the resident’s position would experience psychosocial harm. As an example, CMS cites a sexual assault where a resident did not exhibit a change in behavior (for any variety of reasons), yet a reasonable person in the resident’s position would experience distress or psychosocial harm.

In another example, CMS cites a facility’s repeated failure to respond to call lights, particularly on the night shift. Residents were told to urinate in their beds and the staff would change the sheets in the morning. Additionally, staff disconnected call lights in residents’ rooms. Because a reasonable person would find this type of treatment by a facility humiliating and embarrassing, a surveyor should find this to be severe psychosocial harm and a surveyor must find immediate jeopardy.

Consumer Voice applauds CMS for devoting such significant attention to harm experienced by residents. By requiring surveyors to go further than just observing outward signs of trauma and psychosocial harm and using an objective reasonable person standard, there will be increased accountability for poor care that harms residents.

### **Crime Reporting, 1150b of the Affordable Care Act, F607, 42 C.F.R. 483.12(b)(5) p. 135**

Over 12 years ago, as part of the Affordable Care Act, Congress made it a requirement that nursing home staff report to law enforcement any reasonable suspicion of a crime against a nursing home resident. Despite its passage, CMS did not promulgate implementing regulations until 2016, and is only now issuing guidance to state surveying agencies on how to enforce the requirement. As a result, many nursing homes and state survey agencies have failed to follow the law.

The section of the Affordable Care Act, often referred to as 1150b, requires all “covered individuals” to report to law enforcement any reasonable suspicion of a crime against a nursing home resident. The guidance explains that “covered individuals” is defined broadly to capture most, if not all, people working in a nursing home facility. The reporting requirement falls on the individual, herself, not just the facility, and requires the individual to report to not only the state survey agency, but to one or more local law enforcement agencies. The reporting must be done within two hours if a resident has suffered serious bodily injury, or 24 hours, otherwise.

The guidance directs state surveyors to make certain that each facility has developed policies and procedures to ensure all covered individuals are notified annually of their duty to report and that retaliation against reporting individuals is prohibited.

Importantly, when a state survey agency develops a reasonable suspicion of a crime against a resident and the facility has not or refuses to report the crime to local law enforcement, the state survey agency must report the potential crime to law enforcement immediately.

CMS offers significant guidance that we encourage you to review, including breaking down the various kinds of incidents that must be reported, including requiring all staff to resident abuse must be reported to law enforcement. Other categories of incidents, include resident to resident altercations, suspicions injuries of unknown source, potential neglect, misappropriation of resident property and exploitation, and mistreatment. Although not all events within this category will be reportable to law enforcement, CMS gives significant guidance on when they must.

For years, resident advocates have been calling for guidance regarding reporting requirements of 1150b of the Affordable Care Act. Its implementation will be a significant increase in protections for nursing home residents.

### **E-Cigarettes, F689, 42 C.F.R. § 483.25(d)**

While the use of electronic cigarettes is allowed, facilities must ensure that residents have the ability to operate them correctly and that their use does not interfere with other resident's care.

### **Bed Rails F700, p 429**

CMS offers guidance on the use of bed rails at F604 (p. 112), when it discusses the use of physical restraints. Bed rails, although potentially helpful in limited circumstances, can act as a physical restraint that prevents residents from independently getting out of bed or result in harm to residents when a part of a resident's body becomes stuck in the bed rail.

At F700, CMS updated its guidance on bed rails to include a requirement that before using bed rails facilities must explore other options, for instance roll guards, foam bumpers, lowering the bed, and using a concave mattress. Additionally, informed consent must be obtained from the resident or the resident's representative.

## Transfer and Discharge

### **Transfer and Discharge, F623, 42 C.F.R. § 483.15(c)(3), p. 184**

CMS offers significant updates to its guidance on notice requirements prior to the discharge or transfer of a nursing home resident, including:

- Requiring state survey agencies to investigate instances when residents leave a facility against medical advice to ensure the resident was not forced, pressured, or intimidated to leave.
- Nursing homes must reissue a discharge notice and provide an additional 30 days for discharge when significant changes are made to the notice, for instance a change to a discharge location.
- State surveyors must investigate situations where a facility discharges a resident for allegedly being unable to meet the resident's need. Particularly, why the needs cannot be met and whether there are residents with similar care needs still residing in the facility.

Additionally, CMS added guidance on when nursing homes must issue certain notices:

- A Notice of Medicare Non-Coverage (NOMNC) must be given to all Medicare beneficiaries at least two days prior to the end of a Medicare Part A covered stay or when all Part B therapies are ending.
- A Skilled Nursing Facility Advanced Beneficiary Notice of Non-Coverage must be given to a Medicare beneficiary who intends to continue services, but the nursing home believes the services may not be covered under Medicare.

Importantly, CMS reminds nursing homes and state survey agencies that the Medicare Notice of Non-Coverage requirements are separate from and not related to the admission and discharge rights of a resident under 42 C.F.R. § 483.15. This guidance is extremely important, because it is common practice for nursing homes to use a NOMNC as discharge notice and forgo the requirements under the regulation that provide for separate notice and other discharge rights.

Lastly, CMS added additional language on state and federal bed-hold policies. Federal bed hold policies apply when a resident wants to return to a facility from a hospital that has Medicare or Medicaid coverage. However, state bed hold policies apply to all residents, regardless of payment source.

## Assessments

### **Accuracy of Assessment, F641, 42 C.F.R. § 483.20(g) p. 211**

#### **Improper Schizophrenia Diagnoses, (p. 212)**

In an important note in this section, CMS states it is aware of the phenomenon of nursing home practitioners falsely diagnosing residents with schizophrenia. This practice has become more common in recent years to mask the use of antipsychotics as chemical restraints. A chemical restraint is when a nursing home uses medications to sedate a resident rather than provide care to address symptoms such as anxiety or distress. CMS measures the use of antipsychotics in long-stay residents (residents in a facility for over 100 days) but excludes residents with diagnoses of schizophrenia, Tourette's Syndrome, and Huntingdon's Disease. As a result, there has been a steady increase in schizophrenia diagnoses over the past ten-years, to hide the use of anti-psychotics to sedate residents.

To its credit, CMS acknowledges this practice and requires surveyors to investigate instances where residents are inappropriately diagnosed with schizophrenia-even recommending that state surveyors report practitioners to State Medical Boards or Nursing Boards for discipline.

### **Comprehensive Care Plans F656 42 C.F.R. § 483.21(b)(3), p. 229**

#### **Culturally Competent Care, (p. 233)**

CMS defines cultural competence as a person's ability to interact effectively with persons of different cultures different from their own. "It means being respectful and responsive to the health beliefs, practices and cultural and linguistic needs of diverse population groups, such as racial, ethnic, religious, or social groups.

To ensure residents are receiving culturally competent care, surveyors must review care plans to ensure it reflects a resident's cultural preferences. For examples, CMS states that care plans should reflect certain cultural competencies, including:

- Food preparation and choices.
- Clothing preferences such as hair covering or exposed skin.
- Physical contact or provision of care by a person of the opposite sex.
- Providing reading materials, movies, newspapers in the resident's preferred language.

CMS requires that "resident-specific approaches must be developed and included in the resident's care plan." Importantly, facilities must account for and identify residents with unique cultural characteristic during its annual facility assessment, and ensure they are providing for these cultural needs.

### **Trauma Informed Care, p. 233**

State surveyors must ensure facilities are providing for trauma-informed care. Facilities are required to identify residents with histories of trauma. Additionally, facilities must include in care plans person-centered care that is conscious of potential triggers for residents and uses

care techniques to avoid these triggers—for instance, avoiding loud sounds, care providers of a resident’s preferred sex, or avoiding large groups.

The guidance is a strong step towards person-centered care that treats all residents with dignity and respect.

## Staffing

### **Nursing Services, F725, F727, 42 C.F.R. § 483.35, p. 456, 469**

CMS updated its language on sufficient staffing, particularly focusing on the requirement that facilities have enough staff to meet the acuity needs of residents. Importantly, it acknowledges the substantial impact staffing has on care quality and health outcomes, particularly that of Registered Nurses. CMS tells state surveyors that even though a nursing home meets a state minimum staffing standard it still may not meet the federal requirement that facilities have sufficient staff. Rather, surveyors should use staffing information from the Payroll Based Journal along with the acuity needs of residents to determine whether facilities have sufficient staff to meet residents’ needs.

CMS places significant emphasis on ensuring facilities have licensed nurses present 24 hours per day and reminds facilities that although federal law only requires nursing homes have an RN present 8 hours per day, some facilities will likely need more, based on resident acuity levels and the facility size.

When investigating whether facilities have or had sufficient staff, facilities must use the Payroll Based Journal to identify dates where facilities appeared to have insufficient staff. Surveyors should interview residents, direct care staff, and management to ascertain whether sufficient staff was present.

Consumer Voice notes that currently there is no federal minimum staffing standard, and that federal law only requires a facility to have “sufficient” staffing. This opaque and vague standard results in significant variations in staffing levels across the country—with many homes not having enough staff to care for residents. However, CMS is currently in the process of creating a minimum staffing standard and will be proposing a standard next year. As a result, state surveyors will be able to more accurately assess the sufficiency of facility staff and residents will have increased protections.

### **Posting of Staff information, F732, 42 C.F.R. § 483.35(g), p. 479**

State surveyors must ensure that each nursing home daily posts information on staffing. This information must include:

- Current date
- Total number actual hours worked for licensed and unlicensed nurse staff
- Resident census.

While Consumer Voice supports the daily posting of staffing information, we strongly believe it would be more informative to residents and their families if facilities were required to post the

ratio of direct care staff to residents. Absent ratios, the number of hours worked lacks context when trying to ascertain the level and amount of care each resident is receiving.

### **Behavioral Health Services, F740/F749, 42 C.F.R. § 483.40, p. 481**

The guidance states that all residents must be screened for mental health disorders and facilities must have sufficient behavioral health staff to meet their residents' needs. In addition to individual screening, facilities must annually assess the behavioral health needs of the population they serve and also whether they have sufficient staff to meet these needs.

CMS cautions facilities on the use of behavioral health contracts. These contracts, which are designed to reward residents' behaviors, can be construed as meeting the definition of abuse because it includes the withholding of services. CMS states that these contracts should only be used with residents who have the capacity to understand them.

### **Residents with Substance Abuse Disorder, F741, 42 C.F.R. § 483.40(a), p. 490**

Through the updated guidance CMS provides additional requirements for the treatment and care of individuals with a substance abuse disorder (SUD). Facilities must work to identify residents with SUD by being familiar with signs of the disorder. Care plans must reflect treatment and intervention with residents who have SUD, including offering access to 12 step meetings and other treatment resources. Importantly, facilities must be prepared to treat residents who have suffered overdoses

## **Medications**

### **Psychotropic Drugs F758, 42 C.F.R. § 483.45(e), p. 557**

CMS updated its guidance regarding the use of psychotropic medications. A psychotropic medication is "any drug that affects brain activities associated with mental processes and behaviors." 42 C.F.R. § 483.35(c)(3). CMS gives as examples of these medications, antipsychotics, antihistamines and medications used to treat seizures and mood disorders.

In the guidance, CMS cautions that the use of psychotropic drugs should not be used to replace the use of antipsychotics. Both medications may be used to sedate residents, or control or change behavior, in lieu of facilities using non-pharmacological interventions. As an example, CMS describes a resident who is given valproic acid (a psychotropic medication), despite not having a history of seizures. Instead, the medicine was being used as a chemical restraint to treat agitation.

A new note in the guidance states that in instances where surveyors find a resident is being prescribed medication without a corresponding diagnosis and evidence shows the medication is being used to discipline a resident or for staff convenience, surveyors should evaluate whether the facility should be cited for the improper use of a chemical restraints.

The inappropriate use of psychotropic medications, could warrant a referral to State Medical Boards or Boards of Nursing for discipline.



### **Binding Arbitration Agreements, F847/F848, 42 C.F.R. § 483.70, (p. 683).**

Pre-dispute arbitration agreements require nursing home residents to agree to take any future dispute they may have with a nursing home to arbitration. Consumer Voice has written extensively in opposition to these agreements, as they take advantage of residents at a vulnerable time, require them to forgo a day in court, and take a dispute into a confidential setting that invariably favors the nursing home over the nursing home residents. The nursing home Requirements of Participation, however, allow for these agreements with specific requirements.

CMS's updated guidance acknowledges that these agreements can be confusing to residents. They are often presented to residents during the admissions process, when residents are physically or mentally unwell and concerned more with receiving care than reviewing documents. Despite these facts, CMS acknowledges that they are allowed but require that:

- They be consented to and agreed to voluntarily by residents.
- Explained in a manner that a resident or her representative understands.
- Allow for 30 days to rescind the agreement.
- Be distinguishable from other intake documents.
- Cannot be a condition of admission or a reason to transfer or discharge a resident.
- Must provide for a neutral arbiter.
- Facilities must keep a copy of the arbitration agreement and any arbitration decision for five years, should a dispute go to arbitration.

CMS tasks surveyors with ensuring residents with these agreements be interviewed to make certain they knew what they were signing and what it meant for their rights. Residents should be asked:

- Do they understand they are giving up their right to litigate in court?
- Were they told they had to sign to be admitted or remain in the facility?
- Did they feel pressured to sign?
- Was it explained?

To ensure facilities are complying with these requirements, surveyors should interview residents, family and resident counsels, long-term care ombudsmen, and staff to ascertain whether facilities are following the requirements.

### **Quality Assurance and Performance Improvement Programs, F865/F944, 42 C.F.R. § 753.75(a), p. 713**

CMS lays out in the guidance the requirements for all nursing homes to have a Quality Assurance and Performance Improvement Program (QAPI). The program is designed to address the care systems and management practices of all facilities. All facilities are required to submit QAPI program plans to CMS that include plans and policies to address care quality and deficiencies in the home, performance improvement projects, and other steps facilities will take to address care quality in the nursing homes.

QAPI programs must use data and other information to identify areas of improvement and to develop policies to address these issues. CMS offers extensive guidance to facilities on the

composition of the QAPI program governors, subcommittees, and the steps they must take to satisfy the requirements. CMS also requires a facility's infection preventionist be a member of the Quality Assurance Committee that is required to be formed as part of the program.

## **Infection Control**

### **Infection Control, F880 42 C.F.R. § 483.80, p. 736**

CMS updates its guidance on infection control and infection control preventionists. In light of the catastrophic failures of nursing homes to protect residents from COVID-19 CMS has added guidance, including adding definitions for transmission-based precautions and their use, contact precautions, and guidance on cleaning linens and other care equipment.

Facilities must have policies in place that explain to staff standard precautions and their application during resident care activities. Facility policies must include information on routine environmental cleaning and disinfection of the facility and of resident care equipment.

CMS also added significant guidance on the prevention of water born disease, particularly Legionella. Facilities must demonstrate efforts to minimize the risk of Legionella by having a water management system that is based on nationally accepted standards. CMS provides resources that may be used to develop and implement a water management system.

### **Infection Control Preventionist F882, 42 C.F.R. § 483.80(b), p. 774**

The guidance lays out the requirements for each facility's infection control preventionists (ICP). An ICP must be professionally trained in nursing, medical technology, microbiology, epidemiology, or other related field. CMS gives examples of physicians, pharmacists, and physician's assistants as other related fields of training that are appropriate for ICP.

Although the regulations only require facilities to have a part-time ICP, the facility must ascertain the infection control needs of its facility, which may require that an ICP serve full time in those positions. The ICP must work on-site in the facility. Additionally, the ICP must have specialized training in infection control, and CMS provides areas of training necessary and resources to obtain it.

While this guidance is much needed, Consumer Voice strongly believes that all facilities should have full time ICPs. We have seen the devastating effects of poor infection control in nursing homes. Prior to the COVID-19 pandemic, 82% of facilities had infection control violations, with over half of those having repeated problems. To avoid the repetition of the COVID-19 pandemic increase resources and efforts must be made in the infection control area.

### **Compliance and Ethics Programs, F895/F946, 42 C.F.R. § 483.35, p. 786**

All facilities must have a compliance and ethics program that is likely to be effective in detecting criminal, civil, and administrative violations. Additionally, it must promote quality of care.

### **Resident Call System, F919, 42 C.F.R. § 483.90(g), p. 808**

All facilities must have a functioning resident call system that a resident can access while:

- In bed or other sleeping accommodation.
- On the toilet or in the shower.
- Lying on the floor.

The failure to have a functioning system can be treated as Immediate Jeopardy, as demonstrated in other areas of the guidance.

## Training Requirements

### **Communication, F941 42 C.F.R. § 483.95(a), p. 815**

All staff must be trained on how to properly communicate with residents-including in a language they can understand. Some examples include

- Extra time
- Identifying oneself each time
- Maintaining eye contact while sitting face to face

### **Resident Rights, F942, 42 C.F.R. § 483.95, p 815**

All staff must be trained in residents rights. Facilities must document this training and develop staff performance assessments. CMS states that there must be a process in place to validate when this training was done and whether it was done individually or in a group.

If surveyors become concerned that staff lack sufficient knowledge regarding resident rights, surveyors should:

- Interview staff to determine if they've received training on rights of residents and facility responsibilities.
- Observe staff interactions with residents.
- Review training documentation on resident rights and facility responsibilities.
- Interview various staff, from different department and disciplines, about their knowledge of resident rights and facility responsibilities.



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