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Via Email Transmission

Re: Hospice Conditions of Participation – Criminal Background Checks

Dear Dr. Straube, Mr. Hamilton and Mr. Wilson:

This letter concerns the interpretation of 42 C.F.R. §418.114(d) to require criminal background checks on employees of all entities or organizations that are contracted to provide services to patients of a Medicare participating hospice. We request that this interpretation be re-evaluated. We believe that the regulation does not support that interpretation. Alternatively, the rule was not validly promulgated if that interpretation stands because the impact analysis performed was limited to the impact of the rule applied only to direct employees of the hospice. Accordingly, any requirement that mandates criminal background checks for employees of certain entities that contract with a hospice should be postponed, suspended, or eliminated.

While hospices have limited use of contracted services in the home setting, there is extensive use of contracted services for general inpatient and inpatient respite hospice services. These services are provided by inpatient hospital facilities and skilled nursing facilities. A hospice may also contract for hospice related services from nursing facilities where the hospice patient resides.

Requiring hospices to assure that individuals employed by hospital and nursing facility contractors is neither necessary nor consistent with the conditions of participation.

The pertinent regulation, 42 CFR §418.114(d) provides:

“(d) Standard: Criminal background checks.

(1) The hospice must obtain a criminal background check of all hospice **employees** who have direct patient contact or access to patient records. Hospice contracts must require that all contracted entities obtain criminal background checks on contracted **employees** who have direct patient contact or access to patient records.” (emphasis added)

The operative word in this rule is “employees.” Under the rule defining “employee,” 42 CFR 418.3, there is a distinction between the person that is directly under the control of the hospice and individuals who are employed by and under the direct control of other entities. In response to a public comment suggesting the replacement of the term “staff” for the term “employee,” the suggestion was rejected on the basis that it “may include individuals who are contracted through an outside entity, supervised by that outside entity, and primarily responsible to that outside entity.” 73 F.R. 32088, 32091 (June 5, 2008). With contracted hospitals and nursing facilities, those entities employ and directly supervise and control their staff. A hospice should not be put in the position to direct how those entities manage and employ their own employees.

The employees of contracted entities, such as hospitals and nursing facilities, can be contrasted with individuals that come from outside entities and function as contract employees of the hospice. For example, to fill an emergency need for nursing services, a hospice may contract with a temporary staffing company that places nurses with the hospice under the direct supervision and control of that hospice. Ensuring that those contracted entities have conducted a criminal background check on the temporarily-assigned nurses is consistent with the definition of “employee” under 42 C.F.R. §418.3.

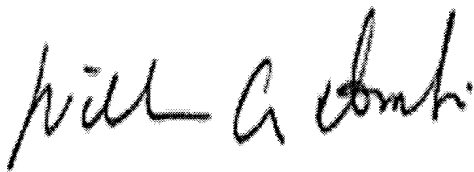
The regulatory impact analysis bears out the accuracy of the above interpretation of the rule. In the Notice of Proposed Rulemaking, 70 F.R. 30840 (May 27, 2005), it definitively states that the proposed regulation is not expected to affect any other providers outside of hospices. *Id.* at 30878. Further, that Proposed Rule evaluated the financial impact of the background check requirement solely by calculating the cost of a background check on direct employees of those hospices operating in those states that do not already require a background check.

The Final Rule includes an impact analysis that is consistent in methodology and content with that set out in the proposed rule. That analysis evaluates the impact of the background check requirement by focusing exclusively on the number of employees maintained directly by the hospices, at no time including the vastly greater number of employees of entities providing contracted inpatient general services, inpatient respite care, and bed and board for the dual-eligible Medicaid patient population. It can be safely assumed that employees of those entities far outnumber the estimated average of 40 hospice employees utilized in the impact analysis. With the inpatient hospital and the nursing facility setting, it is conceivable that all staff of those facilities have potential access to the hospice patients, access to patient records, or both. If these individuals are subject to the criminal background check requirement, the cost is exponentially greater than that estimated using a 40-employee standard. It must be anticipated that the hospice will be forced to bear the cost of the hospice-driven background check requirement rather than having the contracted entities cover that cost without an increased rate of payment from the hospice.

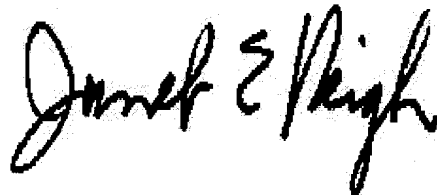
If the Centers for Medicare & Medicaid Services hold to the position that employees of all contracted services are subject to the background check requirement, NAHC recommends that that element of the rule be postponed until such time as the appropriate Paperwork Reduction Act and Regulatory Flexibility Act analyses are performed, displayed, and subject to public comment. Otherwise, the rule with such interpretation may be invalid. That analysis should include all paperwork costs along with anticipated changes in the financial aspects of the contract between the hospice and the contract entity. Further, the analysis should include a review of state law requirements, if any, regarding these facilities obligation to conduct employee background checks.

Thank you for your time and consideration of these comments. We are open at any point to further discuss this matter.

Very truly yours,



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Vice President for Law



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Cc: Mary Rossi-Coajou, Danielle Shearer