



CMS' FINAL HOSPICE SURVEY REFORMS: IMPLICATIONS FOR PROVIDERS

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Survey and Enforcement Requirements for Hospice Programs

- Impetus: 2019 OIG Reports
- Congressional response: Hospice survey reforms implemented as part of the CAA 2021 (P.L. 116-260)
- CMS' regulations published in Proposed and Final CY2022 Home Health Payment Rule: 9 new survey and enforcement provisions for hospice programs
- Forthcoming: CMS revisions to surveyor training and guidance

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Survey and Enforcement Requirements for Hospice Programs

- Effective dates: vary widely --12/27/2020, 10/1/2021, 12/27/2021 and 10/1/2022
- Recent CMS memo: Enforcement using new requirements cannot start until 60 days following effective date of rule (1/1/2022)
 - QSO-22-01-Hospice issued 10/20/2021

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AO Submission/Public Reporting of AO and SA Survey Findings

- § 488.5(a)(4)(x) requires AO submission of survey findings in CMS-2567 format – **effective 10/1/2021**
- § 488.7(c) requires public posting of State and AO survey findings (CMS-2567) in a manner that is “prominent, easily accessible, readily understandable, and searchable” by public, and allows for timely updates, for **surveys conducted on/after 10/1/2022**

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AO Submission/Public Reporting of AO and SA Survey Findings

- Public Display
 - First step: posting CMS-2567
 - Next: Standard framework that identifies key survey issues and other relevant data
 - CMS may utilize TEP, other vehicle
 - Will involve stakeholders to address selection, presentation of data

New Subpart M: Survey and Certification of Hospice Programs

- Definitions created at § 488.1105
 - **Abbreviated standard survey:** a focused survey or other than a standard survey that gathers information on a hospice program's compliance with specific standards or CoPs. An abbreviated standard survey may be based on complaints received or other indicators of specific concerns. Examples of other indicators include media reports or findings of government oversight activities, such as OIG investigations.
 - **Complaint survey:** a survey that is conducted to investigate substantial allegations of noncompliance a defined in 488.1.

Definitions

- **Condition-level deficiency:** noncompliance as described in § 488.24.
- **Deficiency:** a violation of the Act and regulations contained in 42 CFR part 418, subparts C and D, is determined as part of a survey, and can be either standard or condition-level.
- **Noncompliance:** any deficiency found at the condition-level or standard-level.

Definitions

- **Standard-level deficiency:** noncompliance with one or more of the standards that make up each condition of participation for hospice programs.
- **Standard survey:** a survey conducted in which the surveyor reviews the hospice program's compliance with a select number of standards and/or CoPs to determine the quality of care and services furnished by a hospice program.
- **Substantial compliance:** compliance with all condition-level requirements, as determined by CMS or the State.

Survey Frequency/Hospice Hotline

- Survey Frequency at § 488.1110
 - Codifies permanent requirement for standard survey at least every 36 months
 - § 488.1110(b)(1) – A standard or abbreviated survey required in response to complaint allegations to CMS, State, or local agency

Survey Frequency/Hospice Hotline

- Hospice Hotline at § 488.1110(b)(2):
 - State or local agency must establish a hospice hotline, **effective 12/27/2021**:
 - Collect, maintain, update info regarding certified hospices in jurisdiction
 - Receive complaints and answer questions regarding hospices in jurisdiction
 - States must already have unit to respond to complaints
 - Hotline may be connected to or separate from HHA hotline

Surveyor Qualifications/ Conflicts of Interest

- Surveyor Qualifications (§ 488.1115)
 - CMS must establish a training and testing program for State, Federal and AO surveyors, **effective 10/1/2021**
 - Surveyor must complete CMS basic training, testing in order to conduct surveys
 - Until rule is finalized, AO training will suffice

Surveyor Qualifications/ Conflicts of Interest

Separate from rule, CMS has been working on survey issues:

- Updates to surveyor training and SOM to emphasize assessment of quality of care in four "core" CoPs:
 - § 418.52: Patient's rights
 - § 418.54: Initial and comprehensive assessment of the patient
 - § 418.56: IDG, care planning and coordination of care
 - § 418.58: QAPI

Surveyor Qualifications/ Conflicts of Interest

- **Effective 10/1/2021**, § 488.1115 prohibits surveyors from conducting surveys for agencies with which they have a conflict of interest:
 - Employed by or served as consultant to hospice in previous 2 years
 - Has a financial/ownership interest or has an immediate family member with a financial/ownership interest or who is a patient of the program to be surveyed

Surveyor Qualifications/ Conflicts of Interest

- Conflicts of Interest
 - **New element included in final rule:** surveyors must disclose actual or perceived conflicts of interest prior to participating in a hospice program survey and be provided the opportunity to recuse themselves

Survey Teams

- § 488.1120 Use of multidisciplinary survey teams, **effective 10/1/21:**
 - If single surveyor, must be RN
 - If more than one surveyor, one must be RN and additional team members must be drawn from disciplines that comprise IDT -- physicians, nurses, medical social workers, and pastoral or other counselors (bereavement, nutritional, and spiritual)
 - To ensure multidisciplinary, other surveyors should be drawn from other disciplines

Consistency of Survey Results

- CAA of 2021 requires that CMS and States implement programs to measure/reduce inconsistency in hospice survey results, **effective upon enactment**
- CMS: should also reduce discrepancies between State and AO surveys

Consistency of Survey Results

- § 488.1125: SA or AO must provide a corrective action plan for any disparity rates that are greater than the threshold established by CMS
- These requirements will be mostly fulfilled through the sub-regulatory process

Consistency of Survey Results

- Additional CMS action:
 - Enhance State Performance Standards System (SPSS) such that states must measure degree of accuracy between surveyors' findings and regulation/supervisor's determinations
 - Whether a survey finding aligns with the selected deficiency or failure to cite
 - Results will determine need for corrective action/education

Consistency of Survey Results

- Additional CMS action (cont.)
 - Conduct validation surveys on a representative sample of SA surveys to identify percentage of surveys that that have condition-level deficiencies that were not identified when the initial survey was conducted – called the “disparity rate”
 - Analyze “disparity rate” trends among states and AOs
 - Require formal corrective plan as part of SA or AO Quality Assurance Program
 - Create objective measures of survey accuracy

Special Focus Program

- § 488.1130
- Special Focus Program (SFP) to address issues that place hospice beneficiaries at risk for poor quality of care through increased oversight, and/or technical assistance

Special Focus Program

- TEP
- CMS hopes to include a proposal for FY 2024 rulemaking

New Subpart N – Enforcement Remedies

- Enforcement remedies for hospice programs with deficiencies that are not in compliance with Medicare participation requirements.
- Remedies applied on the basis of noncompliance with one or more conditions of participation and
 - may be based on failure to correct previous deficiency findings as evidenced by repeat condition-level deficiencies

New Subpart N – Enforcement Remedies

- Remedies can be imposed instead of, or in addition to, termination
- For a period not to exceed 6 months
- Accrediting organizations cannot recommend or implement enforcement remedies

Enforcement Remedies

- Civil money penalties not to exceed \$10,000 per day of noncompliance
- Payment suspension
- Temporary management
- Directed plan of correction
- Directed in-service training

New Subpart N – Enforcement Remedies

- Notice period
 - At least 2 calendar days if Immediate Jeopardy is identified
 - At least 15 calendar days if no Immediate Jeopardy is identified
- Content
 - Intent
 - Statutory basis
 - Nature of noncompliance
 - Proposed effective date
 - Appeal right
 - For CMPs: amount to be imposed

New Subpart N – Enforcement Remedies

- Appeals – hospices can appeal the determination of noncompliance leading to imposition of a remedy
- A pending hearing would not delay the effective date of the remedy(ies)
- CMPs
 - Accrue during the pendency of an appeal
 - Not collected until the administrative determination is final

New Subpart N – Enforcement Remedies

- Factors for selection of enforcement remedy(ies)
 - Extent to which the deficiencies pose IJ to patient health and safety.
 - Nature, incidence, manner, degree, and duration of the deficiencies or noncompliance
 - Presence of repeat deficiencies (defined as condition-level), the hospice program’s compliance history in general, and specifically concerning the cited deficiencies, and any history of repeat deficiencies at any of the hospice program’s additional locations

New Subpart N – Enforcement Remedies

- Extent to which the deficiencies are directly related to a failure to provide quality patient care.
- Extent to which the hospice program is part of a larger organization with documented performance problems
- Whether the deficiencies indicate a system-wide failure of providing quality care.

Enforcement Remedies – Temporary Management

- Temporary appointment by CMS or authorized agent of substitute manager or administrator
- Under the direction of the governing body
- Authority to
 - Hire, terminate or reassign staff
 - Obligate hospice program funds
 - Alter hospice program procedures
 - Manage hospice program to correct deficiencies

Enforcement Remedies – Temporary Management

- Condition-level deficiency(ies)
- Deficiencies or hospice's management likely to impair ability to correct deficiency(ies)
- Refusal to relinquish control would result in termination
- Hospice bears cost of the temporary management

Enforcement Remedies – Payment Suspension

- Suspend payments for new admissions
- May not charge a newly admitted hospice Medicare beneficiary unless the hospice program can show that, before initiating care, it provided oral and written notice of the suspension of Medicare payment in a language and manner that the beneficiary or representative can understand.

Enforcement Remedies – Payment Suspension

- Payments resume *prospectively* on the date that CMS determines that the hospice program has achieved substantial compliance with the conditions of participation

Enforcement Remedies - CMPs

- Noncompliance with one or more conditions of participation
- Imposed per day or per instance
- Could impose CMPs for each day of IJ
- May impose CMPs for the number of days of noncompliance since the last standard survey, including the number of days of immediate jeopardy.
- Not to exceed \$10,000 per day
 - Upper, middle and lower ranges
 - Adjusted annually

Enforcement Remedies - CMPs

- Considerations for penalty amount
 - Size of the hospice program and its resources
 - Evidence of a self-regulating quality assessment and performance improvement (QAPI) system that indicates ability to meet the conditions of participation and to ensure patient health and safety.

Enforcement Remedies - CMPs

- Adjustments downward
 - Substantial and sustainable improvement eventhough not in compliance
- Adjustments upward
 - Inability/failure to correct deficiency(ies)
 - Presence of system-wide failure of quality care
 - Determination of IJ with actual harm v. potential harm

Enforcement Remedies - CMPs

- Low range
 - For repeated and/or condition-level deficiencies that did not constitute IJ and were deficiencies in structures or processes that did not directly relate to poor quality patient care, within the range of \$500 to \$4,000 per day of noncompliance.
- Middle range
 - For repeat and/or a condition-level deficiency that did not pose IJ, but is directly related to poor quality patient care outcomes, we would assess a penalty within the range of \$1,500 up to \$8,500 per day of noncompliance with the CoPs
- Upper range
 - deficiency that poses IJ to patient health and safety, penalty within the range of \$8,500 to \$10,000 per day of condition-level noncompliance.

Enforcement Remedies - CMPs

- Per instance
 - may be assessed for one or more singular events of condition-level deficiency that are identified and where the noncompliance was corrected during the onsite survey
 - Range \$1,000 - \$10,000 per instance, not to exceed \$10,000 each day

Enforcement Remedies - CMPs

- Administrative hearing
 - 60 calendar days from receipt of written notice to request hearing OR
 - To provide notice of intent to waive right to an administrative hearing and receive a 35% reduction in CMP amount
 - Due within 15 calendar days of written request

Enforcement Remedies – Directed Plan of Correction

- One or more condition-level deficiencies OR fails to submit acceptable plan of correction
- Imposes specific action the hospice must take to bring it back into compliance and correct deficient practices
- Could be directed by CMS or the temporary manager

Enforcement Remedies – Directed In-service Training

- Condition-level deficiencies
- Implemented where staff performance resulted in noncompliance and in-service training program would correct the deficient practice
- Instructors would need to have in-depth knowledge of the area(s) that require specific training
- Hospices would need to utilize well-established education and training services (I.e. schools of medicine or nursing, centers for aging, etc.)
- Hospice responsible for payment

Enforcement Remedies - Termination

- CMS would terminate the provider agreement if the hospice program
 - Failed to correct condition-level deficiencies within 6 months unless the deficiencies constitute IJ
 - Failed to submit an acceptable POC
 - Failed to relinquish control to the temporary manager
 - Failed to meet the eligibility criteria for continuation of payments

Enforcement Remedies – Continuation of Payments

- An enforcement remedy or remedies (with the exception of suspension of all payments) have been imposed on the hospice program and termination has not been imposed
- Hospice has submitted a POC which has been approved by CMS; and
- Hospice agrees to repay the payments received should the hospice program fail to take the corrective action as outlined in its approved POC

Enforcement Remedies – Continuation of Payment

- CMS may continue payments to a hospice program with condition-level deficiencies that do not constitute IJ up to 6 months from the last day of the survey if :
 - An enforcement remedy, or remedies, has been imposed on the hospice program and termination has not been imposed.
 - The hospice program has submitted a plan of correction approved by CMS.
 - The hospice program agrees to repay the Federal Government payments received if corrective action is not taken in accordance with the approved plan and timetable for corrective action

Enforcement Remedies - Termination

- Termination of the provider agreement would end all payments to the hospice program, including any payments that were continued
- Would end enforcement remedies imposed against the hospice program, regardless of any proposed timeframes for the remedies originally specified.

Enforcement Remedies - Termination

- If terminated, the hospice is responsible for providing information, assistance, and arrangements necessary for the proper and safe transfer of patients to another local hospice program within 30 calendar days of termination.

Resources

- OIG Reports: <https://oig.hhs.gov/newsroom/media-materials/media-materials-2019-hospice/>
- CAA of 2021(Section 470):
<https://www.congress.gov/bill/116th-congress/house-bill/133/text>
- CY2022 PROPOSED Home Health rule:
<https://www.federalregister.gov/documents/2021/07/07/2021-13763/medicare-and-medicaid-programs-cy-2022-home-health-prospective-payment-system-rate-update-home>

Resources

- CY2022 FINAL Home Health rule: <https://www.federalregister.gov/public-inspection/2021-23993/medicare-and-medicaid-programs-cy-2022-home-health-prospective-payment-system-rate-update-home>
- QSO-22-01-Hospice: <https://www.cms.gov/files/document/qso-22-01-hospice.pdf>
- Quality, Certification and Oversight Reports (QCOR) site: <https://qcor.cms.gov/main.jsp>
- Quality, Safety, and Education Portal: <https://qsep.cms.gov/>

Resources

- State Operations Manual: <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/Internet-Only-Manuals-IOMs-Items/CMS1201984>
- Appendix M: https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_m_hospice.pdf
- Fiscal Year (FY) 2020 State Performance Standards System (SPSS) Guidance: <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/AdminInfo-20-02-ALL.pdf>

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