

CMS REVISES POLICY AS TO SURVEYS TO BE CONDUCTED FOLLOWING COMPLAINT INVESTIGATIONS RESULTING IN CONDITION-LEVEL NONCOMPLIANCE

The Centers for Medicare & Medicaid Services ("CMS") recently released a [Survey and Certification Letter](#) updating the State Operations Manual ("SOM") guidelines on surveys of deemed status long-term care ("LTC") providers when the provider has been found to have a condition level instance of noncompliance, including immediate jeopardy ("IJ"), in a complaint survey. This change in policy only applies to "deemed status providers." Deemed status is available when an approved accrediting organization ("AO"), separate from CMS, determines the provider is in compliance with Medicare conditions. This "deemed status" will largely exempt the provider from routine surveys by the State Agency ("SA") but still requires the provider to comply with all applicable Medicare conditions. Nursing facilities are largely not eligible for deemed status; however, home health agencies ("HHAs") and hospice and rehabilitation agencies are eligible.

Requirements in 42 C.F.R. 488.7(d) state that deemed status providers are subject to a full survey when they are found to have condition-level instances of non-compliance. While CMS has automatically performed a full survey in these situations, the revised guidelines allow the CMS Regional Office ("RO") to determine if a full survey is warranted on a case-by-case basis. When the RO receives a timely and acceptable plan of correction from the provider/supplier, it directs the SA to conduct either a full survey or an IJ follow-up survey, which is a focused, revisit-type survey, before the scheduled termination date in order to confirm that the IJ has been removed and that the provider/supplier is in substantial compliance. In determining whether a full survey is required, the RO may consider the manner and degree of noncompliance identified as a result of the complaint investigation, the provider's/supplier's compliance history, recent changes in the provider's/supplier's ownership or management, whether the resources required to conduct a full survey are available in the timeframe needed and/or the length of time since the provider's/supplier's last accreditation survey. If the RO does not require a full survey, the RO can take enforcement action based on the complaint survey. In other words, the deemed provider/supplier will be placed on either a 23-day or 90-day termination track, depending on whether or not there was an IJ that was not removed while the survey team was onsite. If the IJ was not removed while the survey team was onsite, the SOM already calls for proceeding immediately to enforcement action with a 23-day termination track. However, the revised SOM policy provides that the RO will also have the discretion to authorize a first revisit instead of a full survey prior to the scheduled 23-day termination date.

CMS has additionally agreed to take steps to ensure the complaint information and SA survey findings are communicated to the applicable AO. The existing policy will not change:

- 1) CMS Form 2567 and Plan of Correction to be uploaded in ASPEN (when applicable) for every onsite survey conducted, including those where no deficiency findings were cited; and
- 2) ROs are to forward the applicable AO copies of all survey findings and accompanying correspondence that had been sent to the deemed status providers. The copies must be sent to the AO at the same time as they are issued to the provider or supplier and must be sent via email, using the AO email contact information provided by the CMS Central Office.

Should you have any questions, please contact your regular Hall Render attorney.