CMS REVISES CMP POLICIES AND ANALYTIC TOOL CMS USES TO IMPOSE FINES – OPPORTUNITIES EXIST FOR FACILITIES TO REDUCE CMPS

On July 7, 2017, the Survey and Certification Group at Centers for Medicare & Medicaid Services ("CMS") issued a memorandum, "Revision of Civil Money Penalty ("CMP") Policies and CMP Analytic Tool" ("S&C Memo") detailing revisions to policies and the analytic tool used to assess and determine CMPs for skilled nursing facilities. The stated goal is to increase national consistency in imposing CMPs. Opportunities exist for facilities to reduce CMPs.

BACKGROUND

The Omnibus Budget Reconciliation Act of 1987 modernized the survey process for long-term care facilities and provided a range of remedies that CMS could impose to encourage a swift return to substantial compliance and sustained compliance going forward, including CMPs. CMS imposes two types of CMPs: (1) Per Day CMPs; and (2) Per Instance CMPs. Per Day CMPs are divided into two ranges. The upper level range CMPs must be used when facility noncompliance puts resident health and safety in immediate jeopardy. Lower level CMPs must be used for facility noncompliance that results in actual harm to residents or poses the potential for more than minimal harm to residents.

When selecting an enforcement remedy, the CMS Regional Office reviews the survey findings and determines the most appropriate remedy for the noncompliance. Remedies available to the CMS Regional Office include CMPs, directed plans of correction, directed in-service training and others. If the CMS Regional Office imposes a CMP, it will use an analytic tool to calculate the amount based on the type of noncompliance. CMPs are intended to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance.

In the S&C Memo, CMS details revisions to the policy and the analytic tool used to assess and determine CMPs:

1) Past Noncompliance

CMS Regional Offices will impose a Per Instance CMP for past noncompliance. Past noncompliance is an event that occurred before the current survey but has been fully addressed and the facility is back in compliance with that area.

2) Per Instance CMP Is the Default for Noncompliance that Existed Before the Survey

CMS Regional Offices will generally impose a Per Instance CMP retroactively for noncompliance that still exists at the time of the survey but began before the survey. A Per Day CMP will be used to address noncompliance that occurred where:

- A resident suffers actual serious harm at the immediate jeopardy level;
- A resident was abused; or
- The facility had persistent deficient practices violating federal regulations.

3) Per Day CMP Is the Default for Noncompliance Existing During the Survey and Beyond

Per Day CMPs will be the default CMPs for noncompliance identified during the survey and beyond because there is an urgent need to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance. Exceptions allowing Per Instance CMPs will be made for facilities with good compliance histories and where a single isolated incident causes harm to a resident unless abuse has been cited.

4) Revisit Timing

CMS Regional Offices should consider the timing of the revisit survey to certify compliance when imposing the final CMP amount. CMS has added language specifying this consideration.

5) Review of High CMPs

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CMS Central Office will review CMPs of $250,000 or greater prior to a determination.

6) Required Central Office Prior Approval for any Adjustment to Final Calculated CMP Amount of More than 35 Percent

If the CMS Regional Office believes that the circumstances involved in the specific case require an adjustment to the CMP amount, the CMS Regional Office may increase or reduce the CMP by no more than 35 percent. If the CMS Regional Office makes such an adjustment, in each instance, it must provide a rationale for that adjustment when completing the analytic tool.

This 35 percent adjustment is not the same as, and does not affect, the 35 percent discount for waiving appeal.

A 50 percent reduction will occur if the facility meets all of the following six elements.

- The facility must have self reported the noncompliance to CMS or the state before it was identified by CMS or the state and before it was reported to CMS or the state by means of a complaint lodged by a person other than an official representative of the nursing home.
- Correction of the noncompliance must have occurred on the earlier of either 15 calendar days from the date of the self-reported circumstance or incident that later resulted in a finding of noncompliance or 10 calendar days from the date (of CMS's notice to the facility) that a CMP was imposed.
- The facility waives its right to a hearing.
- The noncompliance that was self reported and corrected did not constitute a pattern of harm, widespread harm or immediate jeopardy or result in the death of a resident.
- CMP was not imposed for a repeated deficiency that was the basis of a CMP that previously received a reduction.
- The facility has met mandatory reporting requirements for the incident or circumstance upon which the CMP is based as required by federal and state law.

ENFORCEMENT AND EFFECTIVE DATE

The requirements in the S&C Memo are effective immediately for all enforcement cases where the CMS RO determines that a CMP is an appropriate enforcement remedy.

PRACTICAL TAKEAWAYS

- Facilities should refresh their understanding of the elements and factors identified in the revised CMS CMP analytic tool.
- Significant reduction opportunities exist for facilities to reduce CMPs. Also, significant risks exist that CMPs could be increased at discretion of the CMS Regional Office. Facilities should seek assistance to defend and advocate for facility when facing CMPs to maximize opportunities to reduce the penalty.
- If the CMS Regional Office believes that the circumstances involved in the specific case require an adjustment to the CMP amount, the CMS Regional Office may increase or reduce the CMP by no more than 35 percent.

The S&C Memo can be found here.

If you have questions or would like additional information about this topic, please contact:

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