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SKILLED NURSING COMPLIANCE UPDATE: CMS HANDS SURVEYORS REVISED DETAILS ON HOW TO REVIEW THE STAFF VACCINE REQUIREMENT

The Centers for Medicare & Medicaid Services ("CMS") has retooled guidance it armed surveyors with regarding how to survey skilled nursing facilities for compliance with the CMS staff vaccine requirements. The revisions address condition-level and actual harm determinations to ensure that deficiency citations recognize good faith efforts by providers. On October 26, 2022, CMS issued this guidance as an update to its Guidance for Staff Vaccination Requirements effective October 26, 2022 (the "Surveyor Guidance"). CMS is replacing QSO memoranda 22-07-ALL Revised, 22-09-ALL Revised and 22-11-ALL.

BACKGROUND

On November 5, 2021, CMS issued an interim final rule with comment period (86 FR 61555) titled "Medicare and Medicaid Programs; Omnibus COVID-19 Health Care Staff Vaccination" (also referred to herein as the "staff vaccination requirement"), which revised the requirements to establish COVID-19 vaccination requirements for staff at applicable Medicare and Medicaid certified providers and suppliers.

KEY SURVEYOR GUIDANCE REVISIONS

Enforcement

Medicare and Medicaid-certified skilled nursing facilities are expected to comply with all applicable regulatory requirements, and CMS has a variety of established enforcement remedies. For skilled nursing facilities, this includes civil monetary penalties, denial of payments and—as a final measure—termination of participation from the Medicare and Medicaid programs.

CMS expects all skilled nursing providers' staff to have received the appropriate number of doses of the primary vaccine series unless exempted as required by law, or delayed as recommended by Centers for Disease Control.

Surveyor Review

While Federal, state agencies ("SAs"), Accrediting Organizations ("AOs") and CMS-contracted surveyors may expand any survey to include staff vaccination requirement compliance review, SAs and AOs will only be expected to perform compliance reviews of the staff vaccination requirements as part of initial certification, standard recertification or reaccreditation surveys and in response to specific complaint allegations related to the staff vaccination requirements. Surveyors may modify the staff vaccination compliance review if the provider/supplier was determined to be in substantial compliance with this requirement within the previous six weeks.

Vaccination Enforcement - Flexibility

CMS expects all skilled nursing facilities' staff to have received the appropriate number of doses by the timeframes specified in the memorandum unless exempted as required by law. Skilled nursing facility staff vaccination rates under 100% of unexcepted staff constitute noncompliance under the regulations. Noncompliance does not necessarily lead to termination, and skilled nursing facilities will generally be given opportunities to return to compliance. For example, CMS provides that a skilled nursing facility that is noncompliant and has implemented a plan to achieve a 100% staff vaccination rate would not be subject to enforcement action.

Under 42 CFR Section 483.80(i)(3)(iii), skilled nursing facilities are required to ensure those staff who are not yet fully vaccinated, who have a pending or have been granted an exemption or who have a temporary delay as recommended by the CDC, adhere to additional precautions that are intended to mitigate the spread of COVID-19. Skilled nursing facilities have the discretion to choose which additional precautions to implement that align with the intent of the regulation which is intended to "mitigate the transmission and spread of COVID-19 for all staff who are not fully vaccinated."

National Health Safety Network ("NHSN") Data

Under the Surveyor Guidance, surveyors have the discretion to verify the accuracy of NHSN data on surveys based on a complaint report or if concerns are identified. CMS and CDC conduct quality checks of skilled nursing facility NHSN data submissions each week in an effort to

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identify trends or indicators of data reporting issues.

Scope and Severity of Citations for Noncompliance

F-888 is the citation tag that was created under 42 CFR Section 483.80(i), the regulation that details the requirements related to COVID-19 vaccination of facility staff. 42 CFR Section 483.80(i) has multiple elements that call for skilled nursing facilities to develop and implement policies and procedures that will ensure all staff are fully vaccinated against COVID-19. CMS is directing that the level of severity and scope for noncompliance at F-888 will be cited at severity level 1, with a scope of widespread, or "C." Noncompliance is based on the failure to implement policies and procedures at 42 CFR Section 483.80(i)(3)(ii).

CMS sets out that in situations indicating egregious noncompliance, such as a complete disregard for the requirements, should be cited at severity level 2, with a scope of widespread, or "F." Examples of egregious noncompliance could include: (1) more than 50% of staff being unvaccinated (unless exempted, or temporarily delayed); and/or (2) no policies or procedures as required.

CMS calls for surveyors to closely investigate infection prevention and control practices at F-880 and ensure proper practices are in use, such as proper use of personal protective equipment, transmission precautions that reflect current standards of practice and/or other relevant infection prevention and control practices are in place, which are designed to minimize transmission of COVID-19.

Documentation of Good Faith Compliance Efforts

The Survey Guidance sets out that skilled nursing facilities must submit a plan of correction demonstrating a good faith effort to correct the noncompliance.

Examples of skilled nursing facility actions that demonstrate a good faith effort include: (1) if the skilled nursing facility has no or has limited access to the vaccine, and the skilled nursing facility has documented attempts to obtain vaccine access (e.g., contact with the health department and pharmacies); and (2) if the skilled nursing facility provides evidence that they have taken aggressive steps to have all staff vaccinated, such as advertising for new staff, hosting vaccine clinics, etc. For example, if the plan of correction demonstrates that the skilled nursing facility's staff vaccination rate is 90% or more, and all policies and procedures were developed and implemented, CMS states that this would be considered a good faith effort and the deficiency could be cleared, with the skilled nursing facility returned to substantial compliance.

NEXT ACTIONS

- Skilled nursing facilities should promptly document their access to vaccines and steps taken to have all staff vaccinated to establish its good faith efforts at compliance.
- Skilled nursing facilities should also review their policies and procedures to ensure that they accurately reflect the process for requesting a vaccination exemption.
- Skilled nursing facilities should not lose track of the reporting, testing and education requirements introduced in regulations earlier in the public health emergency, as this data is reviewed by surveyors ahead of a survey.

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

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- Your primary Hall Render contact.

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