

Current Survey and Enforcement Actions & Compliance Efforts Post- Pandemic

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This presentation is not intended to constitute legal advice. The information provided is intended for education purposes only and does not represent the official opinion of any individual or entity.

Any examples discussed are meant for illustrative purposes only.

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COVID-19 and Surveys

- CMS suspended standard LTC survey process
 - Focus was on infection control surveys and complaint surveys
- June 2020 – 8% of nursing homes had gone 16 months or longer without a standard survey

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COVID-19 and Surveys (CON'T)

- June 1, 2020 memo sent to state survey agencies directing that 20% of nursing homes in a state must receive a focused infection control survey in FY 2021
- August 2020 – CMS authorizes states to resume standard surveys “as soon as they have the resources to do so.”
 - Surveys COVID-19 focused

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LTC Survey Process

- January 2021 – CMS released updated LTC Survey Process materials
- Survey includes five new factors that can trigger a Focused Infection Control Survey
 - Low staffing
 - Multiple weeks with new COVID cases
 - Selection as a Special Focus facility
 - Concerns related to conducting outbreak testing per CMS requirements
 - Allegations or complaints that pose a risk of harm or IJ

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OIG Report

- July 2021 report found that States' survey backlogs grew during pandemic.
- As of May 31, 2021, 71% of nursing homes had gone 16 or more months without a standard survey
 - States varied
 - 22% - NM; AR 23%; NE 36%
 - 96% CT; GA, VT, OR above 90% without surveys
 - KY – 85%, IN 83%; VA 80%, TN 84%; WV 64%; IL 47%; OH 87%

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Current Focus

- Vaccine education
- Proper reporting – National Healthcare Safety Network and KDPH
- Infection control and prevention
- Care plans – development, timing, revisions
- Surveys taking more time

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Current Focus Nationally

As of March 1, 2021, the following F-Tags made up the top 10:

- F0884 Reporting - National Health Safety Network(NHSN)
- F0880 Infection Prevention & Control
- F0886 COVID-19 Testing-Residents & Staff
- F0689 Free of Accident Hazards/Supervision/Devices
- F0684 Quality of Care
- F0580 Notify of Changes (Injury/Decline/Room, etc.)
- F0883 Influenza and Pneumococcal Immunizations
- F0885 Reporting-Residents, Representatives & Families
- F0686 Treatment/Services to Prevent/Heal Pressure Ulcers
- F0609 Reporting of Alleged Violations

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LTC Survey Process (CON'T)

- Enhanced enforcement related to infection control deficiencies
 - \$5,000 fine for low-level infection control deficiencies (one citation at F880 in past year or last standard survey)
 - Up to \$20,000 for on-going violations (two or more citations at F880 in past 2 years or last 2 standard surveys)

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Potential Liabilities

- Civil Monetary Penalties and Fines
- Denial of payment
- Monitoring by state or another group
- Admission moratorium
- Loss of license or certification
- Personal liability

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Potential Liabilities – Litigation

- Personal injury cases often follow state or CMS citation of regulatory deficiencies
- One insurance company reports $\frac{3}{4}$ of PI cases follow citations for falls, skin breakdowns, quality of care
- Plaintiff's counsel know how to get SODs and sometimes allowed in court as evidence of "breach of standard of care"

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The Survey

- Identify the surveyors and their team
- Identify the type of survey - complaint, annual
- Help the surveyors set-up
- Assign a staff person to assist surveyors
- Accompany surveyors if at all possible
 - Check in often

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The Survey (CON'T)

- Provide requested information/documentation as quickly as possible
 - But not privileged information
- Debrief with employees who were interviewed by the surveyors
- Try to preserve an accurate account of the interview

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The Survey (CON'T)

- Difficult situations:
 - Always be professional and cooperative. Do not want to give perception that facility is impeding the survey
 - Try to diffuse tense situations
 - Call legal counsel if really troubling behavior/issue

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Exit Conference

- Take good notes during the exit conference regarding deficiencies
- Look for opportunities to refute a tag and ask if additional information can be submitted after the survey
 - Additional facility records which were not previously considered
 - But make sure the documents do not create additional issues
 - Clarification for documents already given to survey team

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Exit Conference (CON'T)

- Begin to implement corrective actions as soon as possible and start plan of correction
- Consider whether facility will challenge citations
- Begin gathering documentation

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CMS Form 2567

- Carefully review – what deficiencies were cited and what level
- Can the facility challenge the citations
 - Plan of correction should not contain arguments on the merits of the citations

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Plan of Correction

- Ample time to draft plan of correction
 - Use of disclaimer
- Goal is to demonstrate that the facility understands and is able to address concerns

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Plan of Correction (CON'T)

- Acceptable plan of correction to include:
 - How corrective action will be accomplished for the residents affected by the deficient practice
 - How other residents potentially affected by the deficient practice will be identified
 - What measure/systemic change will be implemented to ensure the deficient practice does not occur again

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Plan of Correction (CON'T)

- How the facility will monitor its performance
 - Dates certain
- Make sure the facility's plan of correction is feasible
- Use specifics – date, person responsible, action, training length of monitoring

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Informal Dispute Resolution

- Facility has the option of requesting an IDR meeting
- IDR request should be thorough and document all citations the facility wants to challenge as well as the reasoning
 - Must include supporting documentation

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Informal Dispute Resolution (CON'T)

- Cannot challenge:
 - The survey process, including scope and severity assessments (except those that constitute substandard quality of care or IJ)
 - Conduct of surveyor
 - The sufficiency of the IDR process

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Informal Dispute Resolution (CON'T)

- Develop strong arguments that show the facility met the regulatory requirements
- Create outline
- Have supporting documentation well prepared and assign roles

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Informal Dispute Resolution (CON'T)

- Recommendation to the Inspector General to:
 - Uphold the cited deficiency
 - Modify the cited deficiency by deleting the finding
 - Modify the cited deficiency by lowering the scope and severity assessment
 - Modify the cited deficiency by changing the tag number
 - Delete the cited deficiency
 - If done, request "clean" CMS Form 2567

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Additional Appeals

- Within 20 days of the SOD by written request
- Secretary of the Cabinet appoints hearing officer
- One, none or several pre-hearing conferences
- Opinion issued within 60 days of hearing
- Further appeals appealed in Franklin Circuit Court

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Additional Appeals

- Facilities may appeal civil monetary penalties or other enforcement actions
 - Denial of payment
 - Termination

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Additional Appeals - CMS (CON'T)

- Appeal must be filed within 60 days of receipt of the letter from CMS imposing penalties
- Appeal to Administrative Law Judge
- Facility must state the findings of fact and conclusions of law that it disagrees with and the basis for the appeal

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Additional Appeals (CON'T)

- Was the facility in substantial compliance
- Are the time periods appropriate
- Are CMPs reasonable
- With immediate jeopardy findings, was the finding warranted

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Additional Appeals (CON'T)

- Departmental Appeals Board
- If either CMS or a provider are dissatisfied with the findings of the ALJ, the decision can be appealed
- 60 days from the date of the ALJ's decision

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Additional Appeals (CON'T)

- CMS may not appeal unfavorable DAB rulings
- A provider can appeal to Federal Court
 - U.S. Court of Appeals for CMPs
 - U.S. District Court for appeals of termination

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Settlement

- Attorneys for CMS have the ability to settle matters
 - Reduced scope and severity
 - Deletion of deficiencies
 - Reduced penalties
 - Automatic 35% reduction of CMP to forgo appeal rights

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Best Practices Post Survey

- Focus on maintaining compliance with regulations rather than acting reactively
- Be sure to monitor the effectiveness of new policies and procedures
 - Including those adopted as part of a plan of correction
 - Be sure to follow the timeframes placed in a plan of correction

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Best Practices

- Engagement of employees
- Thorough policies and procedures
- Training
- Self-assessment and mock surveys
- Documentation – set standards and audit for compliance

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Best Practices (CON'T)

- When an incident or reportable event occurs analyze and look for a way to cite a deficiency
- Be thorough in investigations
- Everyday root cause analysis
- Use the opportunity to review policies for effectiveness
 - Revise when appropriate

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Post-COVID Enforcement

- Emphasis on continued infection control practices
- Arbitration agreements
- Staffing issues
- Vaccines

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Questions?

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