

Nursing Facilities and CMPs: The Latest Fight

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On January 18, 2021, a lawsuit was filed against the U.S. Department of Health and Human Services (“HHS”) and the Centers for Medicare and Medicaid Services (“CMS”) challenging a CMS policy change dating back to 2017. The plaintiffs, the National Consumer Voice for Quality Long-Term Care and the California Advocates for Nursing Home Reform, are non-profit consumer advocacy groups for long-term care. The policy at the heart of the lawsuit concerns a change CMS made as to how civil monetary penalties (“CMP”) are imposed against nursing facilities.

As a bit of background, under the Nursing Home Reform Act of 1987 (NHRA), Congress created a scheme whereby CMS and the states shared responsibility for ensuring states meet federal quality and safety standards of resident care for residents in nursing facilities. Under this scheme, state agencies regularly evaluate a nursing facility’s compliance with the requirements by conducting periodic surveys, often unannounced. The survey findings would then be reported to the CMS regional offices (“RO”) with recommended enforcement actions. Acting on the survey results and the recommendation from the state agency, the ROs would then impose per-day CMPs on facilities for past noncompliance with federal standards.

The 2017 change, however, made clear that ROs, regardless of findings and recommendations from state survey agencies, are to impose a CMP for past noncompliance based only on each instance of noncompliance that occurred but was corrected before the state survey is conducted. “Past noncompliance” is a statutorily defined term which means those situations in which a state finds that a nursing facility meets all of the federal requirements “but, as of a previous period, did not meet such requirements.” With this 2017 policy change, if a facility has corrected that noncompliance just before the survey team shows up at the facility, even if the noncompliance had lasted months, then the facility would not be penalized for each day of noncompliance but rather, would receive a “per instance” CMP.

The plaintiffs in the recently filed litigation argue that, by announcing to the state survey

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agencies that its ROs will assess CMPs only for each instance of past noncompliance and not for each day of past noncompliance, CMS' policy change effectively contravenes Congress' express intent to give the states the direction to recommend (and CMS the discretion to impose) a per-day CMP for past noncompliance.

The complaint alleges that the plaintiffs have been adversely impacted by this change. Per instance CMPs currently range in amount, as adjusted for inflation, from a minimum of \$2,233 to a maximum of \$22,320 for each instance of noncompliance. 42 C.F.R. § 488.438(a)(2); 45 C.F.R. § 102.3. Taking the example of a non-immediate jeopardy deficiency, the maximum per-instance CMP that a nursing facility faces for this type of deficiency is \$22,320, regardless of whether the facility has allowed the deficiency to remain uncorrected for one day, one week, or one month. By contrast, the maximum per day CMP for this type of deficiency begins to exceed, and quickly dwarfs, the maximum per instance CMP whenever the facility has allowed the deficiency to remain uncorrected for four or more days ($4 \times \$6,695 = \$26,780$). The plaintiffs argue that the imposition of only per instance CMPs for past noncompliance will thus encourage nursing facilities to knowingly allow deficiencies to linger for days, weeks, or even months, until the next state survey, because the penalty will be the same regardless of whether the deficiency persisted for a day or a month. As long the facility remedies the deficiency before the next survey (usually 12-15 months apart), the facility can only be fined the per instance maximum of \$22,320.

The human impact of this, as argued in the lawsuit, is that for each day a facility permits a deficiency to persist, whether it be for one week or a number of months, the residents at that facility may be endangered by the deficiency. As a result, the plaintiffs assert that if facilities do not fear the monetary penalties, they will be less inclined to make their facilities safe for residents.

Certainly, nursing facilities across the country will see it very differently from the plaintiffs in the litigation. Because surveys are unannounced, facilities do not "let down their guard" and intentionally allow the facilities to become less safe simply because they know they will be assessed a per instance penalty instead of a per day penalty. Rather, the possibility of getting a per instance CMP (as opposed to a per day penalty) would be an incentive for nursing facilities to identify and correct issues immediately so that such issues will be identified as past noncompliance when the state survey agency does come knocking. While there may be some bad actors out there, most nursing facilities are doing all that they can to avoid noncompliance. In other words, facilities' actions and decisions are not based upon whether they would rather have a per day versus a per instance penalty.

It is also notable that, while the litigation mentions the COVID-19 pandemic, it does not mention the enhanced CMPs that are now available for infection control violations. CMS has been aggressively using these enhanced CMPs to impose large per instance and large per day CMPs for relatively low-level transgressions. For example, having one employee make an error on his/her mask wearing or daily documentation regarding COVID-19 symptoms (even if it does not lead to any adverse consequences) can result

in a \$15,000 CMP if the facility had *any* infection control deficiency in the last two years. A surveyor may see a staff member not following the requirements every time (e.g. not wiping down the face shield after they sit it down for a few seconds, letting their mask fall below their nose, etc.) and may assess severe penalties as a result. While most facilities would agree that infection control is important, these penalties are excessive, especially taking into account they are assessed for some of the more minor and isolated events that may occur.

Facilities should be cognizant of this litigation and the views expressed by the organizations seeking to change the CMP landscape to be harsher than it is now. CMS has already shown its willingness to increase the CMP levels for infection control purposes, and they may seek to expand such penalties on a more permanent basis.

If you have any questions about any of the topics addressed in this post, please contact the authors or any member of the Dorsey & Whitney Health Transactions & Regulations Practice Group.