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Update On CMS And DOH Survey Initiatives

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CMS Proposed SNF Requirements of Participation (ROPs)

- First major overhaul of SNF regulations since 1991 – issued July 16, 2015
- Publication of final rule expected (maybe) September 2016
- Estimated to cost \$726 million in Year One, \$47,000 per facility
- Stay tuned: PHCA will be providing training once ROPs are published as final

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Proposed ROPs – Annual Center Assessments

- Requires annual center-wide assessment of necessary resources to care for residents
- Assessment must address
 - Type of resident
 - Staff competencies
 - Physical plant
 - Ethnic and cultural factors (includes trauma training)

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Proposed ROPs – Comprehensive Person-Centered Care Planning

- Complete within 48 hours from admission
- IDT Team must include Attending Physician, Primary Nurse, CNA, Food Service Worker and Social Worker
 - Consider cost of taking staff from care
- Discharge Planning: required by IMPACT Act
- Requires open visitation



Proposed ROPs – Transitions of Care

- Requires communication of 18 very specific items to any receiving setting
- When transferring resident for their safety and welfare, requires center to document:
 - Specific needs that cannot be met
 - Attempts to meet the needs
 - Services at the receiving setting or facility that will meet the need



Proposed ROPs – Physician Services

- In-person evaluation prior to unscheduled transfer to hospital
- Credentialing residents' attending physicians
- Requiring "any willing provider"
- Increased requirements for responding to consultant pharmacist recommendations



Proposed ROPs – Personnel

- Requires dedicated and trained infection, prevention and control officer (51% time)
- Qualified registered/licensed dietician
- "Qualified mental health professional" in IDT for residents with mental health conditions or prescribed psychotropic drugs
- Should Activities Director have minimum qualification standards?



Proposed ROPs – Sufficient Staffing and Behavioral Health

- CMS requested comments on requiring mandatory nurse staffing
 - Requires facility assessments and staff competencies
- Requires center to evaluate whether their staff is competent to care for residents with mental illnesses or psychosocial disorders
- Congress asks for 4.1 ppd



Proposed ROPs – Pharmacy Services

- Under unnecessary drugs standard, all psychotropic (such as anti-anxiety and hypnotic drugs) must:
 - Be medically necessary to treat a condition and must be gradually reduced unless clinically contraindicated
 - Requires orders for PRN psychotropic to be limited to 48 hours absent doctor justification for continuation



Proposed ROPs – Pharmacy Services

- Expands pharmacist role requiring review of medical chart every 6 months *and* where:
 - Resident is new
 - Resident is readmitted for hospital stay
 - Pharmacist notes resident is on an antibiotic or psychotropic during the monthly drug regime review

- Attending physician must review pharmacist’s drug irregularity report and document his/her review and what he/she did or did not do in response and why



Proposed ROPs – Compliance and Ethics Programs

- Annual review for effectiveness

- Expects volunteers and vendors to be trained

- Facilities in a chain (5 or more)
 - Compliance liaison in each facility
 - Dedicated compliance officer not subordinate to CEO, CFO or general counsel



Proposed ROPs – Quality Assurance and Performance Improvement (QAPI)

- Implements ACA requirements for facility to present its QAPI plan to surveyors at first annual recertification survey after effective date of rule

- Emphasizes that governing body is ultimately responsible for quality

- Proposes that QA Committee consist of:
 - DON
 - Medical Director or designee
 - At least 3 other staff members, at least 1 of which must be the administrator, owner or board member
 - Infection control and prevention officer



Proposed ROPs – QAPI

- Requires disclosure of QAPI and QA information to surveyors where a facility needs to demonstrate compliance with this section
 - Violates principles of QAPI, AQ
 - Violates SOM and state law provisions



Proposed ROPs – Arbitration Agreements

- Arbitration restrictions include:
 - CMS asks for comments on banning arbitration in nursing facilities altogether (contradicts FAA and exceeds CMS’s legal authority)
 - Requires agreement to be separate from admission agreement
 - Admission not contingent on signing
 - Voluntary
 - Clear waiver of right to judicial relief



Proposed ROPs – Physical Environment

- Resident rooms – semi-private only for new construction or renovations
- New construction/renovations or newly certified: room must have own toilet, sink and shower



DOH Surveys: What Happened?

- Kaiser Family Foundation: about 40 percent of PA nursing homes have relatively low 5-star ratings, of 1 or 2-stars (May 2015)
 - See also: <http://www.newsweek.com/you-dont-want-be-old-these-states-333052>
- Community Legal Services of Philadelphia (CLS) report – "CARELESS: How the Pennsylvania Department of Health has Risked the Lives of Elderly and Disabled Nursing Home Residents" (June 2015)



DOH Surveys: What Happened?

- ProPublica reports PA cited fewest serious deficiencies of any state, tied with HI and DE (.02) "Inconsistent Penalties Across the States," updated July 2015
- PA Attorney General staffing investigations



CLS Recommendations to Gov. Wolf

- Conduct thorough investigation into why DOH has failed to properly investigate nursing homes and enforce regulations
- Implement system-wide changes within DOH to ensure enforcement of regulations
- Require all DOH nursing home investigators be retrained on an ongoing basis to ensure patient safety



CLS Recommendations to Gov. Wolf

- Require DOH to provide better transparency to public regarding investigations & characterization of harm
- Provide better information to public about SNFs so prospective SNF residents and families can make informed decisions about care



DOH Response

- Accelerate efforts to evaluate regulatory process to determine what additional measures can be taken to ensure enhance quality
- Engage Auditor General to audit DOH policies and procedures to recommend ways to improve how DOH enforces its statutory enforcement authority
- Form task force charged with identifying ways DOH can advance quality improvement



More Scrutiny of DOH

- PA Auditor General Performance Audit Report: Pennsylvania Department of Health, issued July 26, 2016
- Generated extensive media coverage
 - "Failing the Frail: Bad care leads to dozens of avoidable deaths in Pa. Nursing Homes."*
- Senator Casey requests CMS investigation of PA DOH

* www.pennlive.com/news/page/failing_the_frail_part_1.html (Aug 2, 2016)



More Scrutiny of DOH

- PennLive investigation findings
 - Systematically understating severity of cases where residents died from errors or negligence
 - Rarely chose to punish homes
 - May be failing to properly investigate serious cases of potential negligence
- Auditor General will explore issues if re-elected



Auditor General (AG) Findings – Issue 1: Staffing Review

- DOH's nursing home staffing-level reviews require improvement
- DOH's insufficient review of nurse staffing levels within long-term care facilities may be affecting residents' quality of care and quality of life.
 - Finding 1.1 – DOH lacked policies and procedures for surveyors to follow when conducting staffing sufficiency reviews. CMS also provided little guidance to DOH on how to ensure facilities are adequately staffed
 - Finding 1.2 – A lack of specific guidance by DOH on how and when to conduct facility-staffing reviews led to inconsistent reviews.



AG Findings – Issue 1: Staffing Review

- Finding 1.3 – DOH rarely cites facilities for deficient facility staffing under federal or state regulations.
- Finding 1.4 – Current regulations allow DOH to require nursing homes to increase staffing beyond 2.7 hours of direct care, but DOH has not used this authority.
- Finding 1.5 – DOH did not coordinate with the Department of Labor and Industry to identify instances where staffing shortages may be occurring.
- Finding 1.6 – Pennsylvania's direct nursing care standard of 2.7 hours per resident may be too low and should be reconsidered. [4.1 ppd?]



AG Recommendations – Issue 1: Staffing

- Develop written policies and procedures to guide surveyors for the assessment of facility staffing-level reviews. The policy and procedures should include, but not be limited to, the following requirements:
 - Staffing-level review is always conducted for any relicensure/recertification survey
 - Facility level staffing is reviewed for each 24-hour period and not merely a weekly average
 - Use supporting documentation of actual hours worked and not hours scheduled for determining direct care hours



AG Recommendations – Issue 1: Staffing

- Only count hours related to direct care.
- At a minimum, three weeks are reviewed, and more weeks may be added, if necessary. The weeks should vary and not be consecutive.
- Monitoring of staffing level reviews by management.
- Retain all staffing level review documentation in the survey packets.
- Conduct training for all surveyors on the importance of consistently conducting facility level staffing reviews, in accordance with DOH's new policy and procedures.



AG Recommendations – Issue 1: Staffing

- Conduct periodic quality assurance reviews of completed facility-staffing reviews to ensure that the staffing reviews comply with DOH's policy and procedures and are consistently applied.
- Partner with other states to identify potential best practices for DOH to implement with regard to conducting facility staffing-level reviews.
- Seek guidance and clarification from CMS on how best to cite facilities using federal staffing requirement criteria.



AG Recommendations – Issue 1: Staffing

- Cite facilities that fail to meet the state's 2.7 hours of direct care requirement on a 24-hour basis (not averaged over a week), and ensure the facility institutes a corrective action plan.
- Exercise its authority to mandate additional direct care staffing (above 2.7 hours) where facilities fail to implement a successful corrective action plan related to staffing concerns, or if the facility continues to have other deficiencies related to quality of care.
- Develop written policies and procedures for surveyors to determine when to mandate direct care staffing above the 2.7 hour requirement.



AG Recommendations – Issue 1: Staffing

- Develop a memorandum of understanding or other working agreement with the Pennsylvania Department of Labor and Industry, so that DOH is notified of potential issues related to mandated overtime complaints involving nursing homes.
- Work with the General Assembly, the Governor, and nursing home stakeholders to reevaluate whether Pennsylvania's 2.7 daily hours of direct care ratio should be increased or otherwise amended in DOH regulations.



AG Findings – Issue 2: Complaints

- Poorly written revisions to DOH's policies and procedures may have compromised DOH's ability to receive, respond, and resolve complaints adequately.
- Finding 2.1 – DOH rejected complaints received from anonymous sources, which limited DOH's knowledge about possible nursing home violations.
- Finding 2.2 – Due to staffing reductions, DOH has extended the timeframe for completing complaint investigations.



AG Findings – Issue 2: Complaints

- Finding 2.3 – DOH complaint prioritization policy differs from CMS requirements; thus, DOH may not be as timely as it should be in responding to certain complaints.
- Finding 2.4 – Based on our review of selected complaints, DOH could improve how it communicates with complainants, and how it documents actions taken to resolve complaints.



AG Recommendations – Issue 2: Complaints

- Continue to accept complaints from anonymous sources.
- Replace complement positions that were lost in the DNCF to the extent that budgetary constraints permit.
- Strive to complete complaint investigations within DOH's previous complaint-handling policy of 14 calendar days as additional staffing permits.
- Revise its complaint intake prioritization policies and procedures to be in alignment with CMS guidance.



AG Recommendations – Issue 2: Complaints

- Report complaint priority to CMS based on complaint intake and not based on the length of the investigation.
- Document all actions taken to investigate a complaint regardless of whether (or not) a deficient practice is found.
- Ensure that communications with complainants regarding complaint investigations are clear and accurately reflect the actions taken by the surveyor to investigate the complaint. Further, when applicable, ensure that complainant communications meet all requirements outlined by CMS.



AG Findings – Issue 3: Sanctions

- DOH has considerable discretion in pursuing sanctions against facilities that fail to meet regulatory standards, but rarely imposes penalties under state rules.
 - Finding 3.1 – DOH has issued very few monetary fines, and state fine amounts are lower than amounts in other states we reviewed.
 - Finding 3.2 – DOH adhered to its policies and procedures when ordering sanctions against nursing homes
 - Finding 3.3 – When DOH chooses not to sanction a facility for a deficient practice, it does not document its decision-making, even when resident harm has occurred.



AG Recommendations – Issue 3: Sanctions

- Work with the General Assembly to amend the Health Care Facilities Act of 1979 to provide more stringent civil monetary penalties.
- Update its policies and procedures related to sanctions, to include a requirement that decision-making, including supervisory review, is documented when survey teams decide not to impose sanctions but could have done so when a deficiency is cited which caused actual harm (scope/severity ranked G or above).
- Document how all sanctions-related decisions are made, including the levels of supervisory and managerial review and approval.



AG - Other Recommendations

- Update its web site to supplement data available on CMS's nursing home compare web site.
- Organize and benchmark nursing home performance into a report card that would allow consumers to evaluate Pennsylvania-based nursing home performance.



Mandatory Referrals

- DOH is statutorily required to report immediately to the Pennsylvania Attorney General or local law enforcement whenever it has "reasonable cause to believe" that a care dependent adult has suffered bodily injury or been unlawfully restrained" Act 28 of 1995, Neglect of Care-Dependent Person, 18 Pa.C.S. § 2713
- CMS refers all civil money penalties ("CMPs") to the U.S. Department of Justice pursuant to a Memorandum of Understanding between the agencies



New Complaint Procedures

- Higher number of complaint surveys and citations
- DOH now taking anonymous complaints
- Jan-Dec. 2015 – Total Complaints 2,591
- Jan-June 2016 – Complaints Received 1,592
 - Onsite investigations – 90.14%
 - Substantiated – 34.48%
 - ≥ G – 3.89%



DOH Consumer Complaint Process

- "First course of action is to discuss your concerns or issues with the facility's management and if they are unable to resolve the matter, then you should feel free to contact our Department . . ."
- "We do ask that you have a log of all calls/contact made with the facility in question as well as a listing of what information you were provided by the facility so that we have all background information prior to investigating this matter further"



DOH Consumer Complaint Process

- "include the name of the facility as well as the dates of contact; whom contact was made with and a phone number and/or email address"
- "provide a detailed description of the concerns or issues and how you would like to see it resolved"
- "If you have exhausted your efforts to resolve a problem with a facility/provider, then you can file a formal complaint with the Pennsylvania Department of Health"

• www.health.pa.gov/facilities/Consumers/Complaints/Pages/default.aspx#.V-WDb53D-po (9/23/16)

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Pennsylvania Surveys – D and Higher

	2014	2015	Jan-June 2016
Standard	629	650	331
Complaint	455	703	481
Substandard Quality of Care	1	3	5

Source: PADOH

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Increased Enforcement a Reality

- Marked increase in DOH sanctions
 - 22 Jan-June 2016
 - 43 in 2015
 - 17 in 2014
 - 13 in 2013
- Marked increase in CMS civil money penalties
 - At least 3 federal CMPs in Region 3 >\$1 million

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Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015

- Requires certain agencies with CMP authority to update penalties based on their value in the last update prior to 1996 and the change in the CPI between that date and October 2015
 - Increase in penalties from this "catch up" calculation would be capped at 150% (CMP of \$10,000/per day could increase to **\$20,626**)
- *Requires agencies to adjust their CMPs annually based on changes in the CPI*, using data from October of each year



Federal Civil Penalties Inflation Adjustment Act Improvements Act of 2015

- Allows Secretary of covered agency to increase one or more penalties covered by these provisions by *less* than the new formula through a rulemaking only if:
 - Secretary finds that increasing penalty by required amount will have a negative economic impact or that the social costs outweigh the benefits *and*
 - Director of the Office of Management and Budget (OMB) concurs with this analysis



Increased CMPs (CMS)

Violation	Old CMP	New CMP
Failure of covered individuals to report to Secretary and law enforcement any reasonable suspicion of a crime against a resident or individual receiving care from SNF	\$200,000	\$217,490
Failure of covered individuals to report to Secretary and law enforcement any reasonable suspicion of a crime against a resident or individual receiving care from SNF if such failure exacerbates the harm to victim of the crime or results in the harm to another individual	\$300,000	\$326,235



Increased CMPs (CMS)

Violation	Old CMP	New CMP
Retaliation against any employee because of lawful acts done by the employee or filing a complaint or report with the State professional disciplinary agency against an employee or nurse for lawful acts done by the employee or nurse	\$200,000	\$217,490
Per Day of Category 2 violation of certification requirements	Min. \$50 Max. \$3,000	Min. \$103 Max \$6,188
Per instance of Category 2 noncompliance	Min. \$1,000 Max. \$10,000	Min. \$2,063 Max \$20,628
Per day of Category 3 violation of certification requirements	Min. \$3,050 Max. \$10,000	Min. \$6,291 Max. \$20,628



Increased CMPs (CMS)

Violation	Old CMP	New CMP
Per instance of Category 3 noncompliance	Min. \$1,000 Max. \$10,000	Min. \$2,063 Max. \$20,628
Per day for Category 3 noncompliance with Immediate Jeopardy	Min. \$3,050 Max. \$10,000	Min. \$6,291 Max. \$20,628
Per instance for Category 3 noncompliance with Immediate Jeopardy	Min. \$1,000 Max. \$10,000	Min. \$2,063 Max. \$20,628
Per day failure to meet certification requirements (upper range per day)	Min. \$3,050 Max. \$10,000	Min. \$6,291 Max. \$20,628
Per day failure to meet certification requirements (lower range per day)	Min. \$50 Max. \$3,000	Min. \$103 Max. \$6,188
Per instance failure to meet certification requirements	Min. \$1,000 Max. \$10,000	Min. \$2,063 Max. \$20,628



Increased CMPs (CMS)

Violation	Old CMP	New CMP
Nurse Aide Training Program – if assessed a penalty "not less than \$5,000" trigger penalty for loss of Nurse Aide Training Program	\$5,000	\$10,314
Submitting false claims	\$10,000	\$15,024
Inducement to beneficiaries	\$10,000	\$15,024
Employing or contracting with an excluded individual	\$10,000	\$14,718
False statements of material fact	\$50,000	\$54,372
Knowing of an overpayment and failing to report and return	\$10,000	\$10,874
Certification of a false statement in assessment of functional capacity of resident	\$1,000	\$2,063



Mandatory Immediate Imposition of Federal Remedies

- Actual harm or above on current survey and deficiencies of actual harm or above on the previous standard health or LSC survey OR deficiencies of actual harm or above on any type of survey between the current survey and the last standard survey surveys must be separated by a period of compliance (i.e., from different noncompliance cycles)
- Special Focus Facility (SFF) has a deficiency citation at level "F" or higher on its current survey



Mandatory Criteria for Immediate Imposition of Federal Remedies

Mandatory Criteria for Immediate Imposition of Federal Remedies	Immediate Jeopardy on current survey	Deficiencies of SOC that are not IJ on current survey	Any G level deficiency on current survey in §483.13, §483.15, §483.25	Deficiencies of actual harm on current survey AND IJ OR actual harm on any survey between current survey and last standard survey	Special Focus Facility AND "F" level or higher on current survey
Remedy(ies) considered for immediate imposition by CMS in addition to the CHPs when IJ is cited, mandatory 3 month DDPNA for new admissions or mandatory 6 month termination, as required. NOTE: Multiple remedies may be imposed	Termination CHPs must be imposed immediately DDPNA Temp. Mgmt. State Monitoring Directed Plan of Correction Directed In-service Denial of Payment for All Individuals	Termination CHPs DDPNA Directed Plan of Correction Directed In-service Training Denial of Payment for All Individuals	Termination CHPs DDPNA Directed Plan of Correction Directed In-service Training Denial of Payment for All Individuals	Termination CHPs DDPNA Temp. Mgmt. State Monitoring Directed Plan of Correction Directed In-service Denial of Payment for All Individuals	Termination CHPs DDPNA Temp. Mgmt. State Monitoring Directed Plan of Correction Directed In-service Denial of Payment for All Individuals

CMS Memo Requires New Policies & Procedures for Abuse Prevention

- "Protecting Resident Privacy and Prohibiting Mental Abuse Related to Photographs and Audio/Video Recordings by Nursing Home Staff" issued August 5, 2016, effective for standard surveys after September 5, 2016
- Requires surveyors at the next standard survey to request and review facility policies and procedures that prohibit staff from taking, keeping and/or distributing photographs that demean or humiliate residents



CMS Memo Requires New Policies & Procedures for Abuse Prevention

- Surveyor may request to see written policies during any survey, based upon concerns and/or complaints
- Even if a resident consents, and regardless of the resident’s cognitive status, abuse will be presumed and investigated whenever there is a photograph or recording of a resident, or the manner that it is used, that demeans or humiliates a resident
 - Mental abuse is determined by a “reasonable person” standard



Act 48 of 2016: Carbon Monoxide Detectors

- Surveyors and inspectors (personal care homes) will be looking for approved carbon monoxide alarms not less than 15 feet from any fossil fuel burning device or appliance
- Alarms must be audible to staff on duty
- Additional alarms may be needed on same level as resident bedrooms or living units
- Complete information available on PHCA website at www.phca.org



CMS Emergency Preparedness Requirements

- Published in *Federal Register* September 17, 2016 with effective date November 17, 2017
- Must “install and maintain emergency power systems and strengthen resident elopement procedures”



Emergency Preparedness Rule

- Emergency plan: Based on a risk assessment, develop an emergency plan using an all-hazards approach focusing on capacities and capabilities that are critical to preparedness for a full spectrum of emergencies or disasters specific to your location
- Policies and procedures: Develop and implement policies and procedures based on the plan and risk assessment



Emergency Preparedness Rule

- Communication plan: Develop and maintain a communication plan that complies with both Federal and State law. Patient care must be well-coordinated within the facility, across health care providers, and with State and local public health departments and emergency systems.
- Training and testing program: Develop and maintain training and testing programs, including initial and annual trainings, and conduct drills and exercises or participate in an actual incident that tests the plan.



Emergency Preparedness Rule

- Must be able to account for missing resident
- Must develop an emergency preparedness communication plan, including a method to share information from the emergency plan that is deemed appropriate for residents and families
- Must be able to track on-duty staff and sheltered residents during and after the emergency



Section 1557 of Affordable Care Act: Anti-Discrimination Rules (May 13, 2016)

- Effective July 18, 2016; postings required by October 17, 2016
- Extends sex discrimination protections to health care programs and activities
- Includes gender identity as prohibited basis of discrimination
- Requires reasonable steps to facilitate effective communications to individuals with limited English proficiency (LEP) through language assistance by *qualified* translator or interpreter



Section 1557 Anti-Discrimination Rules

- Requires covered entities to post a notice of consumer civil rights
- Requires covered entities with 15 or more employees to have a civil rights grievance procedure and an employee designated to coordinate compliance
- Requires posting of information telling consumers about their rights and telling consumers with disabilities and consumers with LEP about the right to receive communication assistance



Section 1557 Anti-Discrimination Rules

- Requires posting of taglines in the top 15 languages spoken by individuals with LEP in the state, advising consumers of availability of free language assistance services
- OCR has prepared a model notice and model nondiscrimination statement that covered entities can use
- www.hhs.gov/civil-rights/for-individuals/section-1557/translated-resources/index.html.



Questions???

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