



CMS to take Active Role in Ensuring Adequate RN Staffing in Nursing Facilities

Jennifer L. Hilliard

In Quality, Safety and Oversight (QSO) Group Memorandum QSO 19-02-NH, dated November 30, 2018 (the “November Memorandum”), the Centers for Medicare & Medicaid Services (CMS) stated that it would begin providing CMS Regional Offices and State Survey Agencies (SSAs) with a list of nursing facilities for which data submitted as part of the Payroll Based Journal (PBJ) reporting system indicated potential nurse staffing issues, particularly on the weekends.

Specifically, CMS stated in the November Memorandum that it is requiring SSAs to conduct at least fifty percent (50%) of standard health surveys during the weekend or off-hours (defined as before 8:00 a.m. or after 6:00 p.m.) using the list of facilities for which the PBJ data indicate a potential staffing issue. Previously, the State Operations Manual required states to conduct at least ten percent (10%) of standard health surveys during such times.

Additionally, CMS is instructing surveyors, during any standard or complaint survey, to investigate compliance by facilities with the requirement at 42 C.F.R. § 483.35(b)(1) to provide the services of a Registered Nurse (RN) onsite for eight (8) consecutive hours a day, seven (7) days a week.

CMS became concerned with RN staffing after PBJ data analysis referred to in QSO Memorandum 18-17-NH, dated April 6, 2018 (the “April Memorandum”), indicated that some facilities exhibited “recurring instances or aberrant patterns of days with no RN onsite.”¹ In the April Memorandum, CMS cited data showing that six percent (6%) of facilities that submitted complete data had seven (7) or more days where no hours for RNs were reported. Further, it noted that 80% of all days with no RN hours were during the weekend.

In the April Memorandum, CMS specified that facilities reporting seven (7) or more days in a quarter with no RN hours would receive a one-star staffing rating, which in turn, would result in a one-star drop in the facilities’ overall star rating.

While CMS recognized in the April Memorandum that emergency situations sometimes arise that can lead to the temporary absence of an RN from the facility or errors in reporting can occur, it remains to be seen whether SSAs will have any latitude not to cite a facility for noncompliance and, indeed, given CMS’s sense of urgency regarding the risk to quality resident care occasioned by staffing issues, it is likely that the SSAs will enforce the requirements of 42 C.F.R. § 483.35(b)(1) quite rigorously.

The November Memorandum also touched on other compliance issues raised originally in the April Memorandum, such as accurately reporting meal breaks and treatment of so-called “universal workers” that spend time performing additional duties outside of the role that would be reportable under PBJ. CMS noted that it had updated language in the PBJ Policy Manual and the PBJ Policy FAQs to reflect current policy.

Finally, the November Memorandum notes that CMS has created two reports for providers to help ensure that PBJ data is submitted accurately and in a timely manner. Those reports are the MDS Census Summary Report, which allows providers to retrieve the daily MDS-based resident census for each day in a quarter, and the MDS Census Detail Report, which provides a list of the residents

¹ CMS QSO Memorandum, 18-17-NH (Apr. 6, 2018), at 4.

that the MDS-based census is comprised of on a given date or dates. Both reports are available on the [CASPER Reporting User's Guide For PBJ Providers web page](#).

The November Memorandum takes effect immediately. AGG recommends that providers familiarize themselves with the memoranda as well as the underlying policy documents before the next PBJ reporting deadline of February 14, 2019.

Authors and Contributors

Jennifer L. Hilliard
Of Counsel, DC Office
202.677.4900
jennifer.hilliard@agg.com

not *if*, but *how*.[®]

About Arnall Golden Gregory LLP

Arnall Golden Gregory (AGG), an Am Law 200 law firm with 165 attorneys in **Atlanta** and **Washington, DC**, takes a “business sensibility” approach when advising clients. AGG provides industry knowledge, attention to detail, transparency and value to help businesses and individuals achieve their definition of success. AGG’s transaction, litigation, regulatory and privacy counselors serve clients in healthcare, real estate, litigation, business transactions, fintech, global commerce, government investigations and logistics and transportation. AGG subscribes to the belief “not if, but how.”[®]
Visit us at www.agg.com.

Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: <http://www.agg.com/subscribe/>

©2018. Arnall Golden Gregory LLP. This legal insight provides a general summary of recent legal developments. It is not intended to be, and should not be relied upon as, legal advice. Under professional rules, this communication may be considered advertising material.