CMS Changes Policy Regarding Enforcement Actions

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On October 27, 2017, the Centers for Medicare and Medicaid Services (CMS) issued a draft Survey and Certification Memo (S & C Memo)[1] in which it announced its intention to reverse a previous policy regarding "immediate jeopardy" and federal enforcement actions.

As providers are painfully aware, CMS Regional Offices have been imposing high 6-figure civil money penalties (CMP), and frequently CMPs well in excess of $1 million, for alleged deficiencies that constitute immediate jeopardy. The aggressive approach by CMS regarding CMPs was fueled, in part, by an S & C Memo from July 29, 2016. The new draft policy significantly revises the previous position of CMS and offers a more equitable and pragmatic approach to enforcement actions.

CMS is authorized to impose either a per instance or a per day CMP for noncompliance with the Requirements of Participation. When CMS alleges that immediate jeopardy existed for months prior to a survey and opts to impose a per day CMP instead of a per instance CMP, the financial impact of that decision can be devastating. The draft S & C Memo reflects a major policy shift that may offer relief for providers alleged to have noncompliance at the immediate jeopardy level.

Instead of reflexively imposing a per day CMP whenever immediate jeopardy is alleged, which has been the practice of many CMS Regional Offices, the new policy states that "when the current survey identifies Immediate Jeopardy (IJ) that does not result in serious injury, harm, impairment or death, the CMS Regions may determine the most appropriate remedy." Additionally, in a July 2017 S & C Memo,[2] CMS stated that the default position for immediate jeopardy without resultant harm would be a per instance, not a per day, CMP. Providing that level of discretion allows for a more flexible approach.[3]

CMS notes that "The purpose of federal remedies is to encourage the provider to achieve and sustain substantial compliance." This approach seems more in tune with Congress's intent that the purpose of the CMS enforcement remedies it authorized in OBRA '87 was to "incentivize" providers to achieve and maintain compliance rather than to punish providers with draconian CMPs that actually divert funds from resident care.

The draft policy does not change statutorily required remedies such as a mandatory denial of payment for new admissions (DPNA) when there is 90 days of noncompliance and termination from the Medicare program when there is six months of noncompliance. It does however, recommend that the CMS Regional Offices use "the type of remedy that best achieves the purpose based on the circumstances of each case." That enlightened view represents a radical departure from the previously inflexible approach employed by some CMS Regional Offices.

CMS emphasized that when there is immediate jeopardy without resultant serious harm or death,

1 A copy of this memo is available at: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-18-01.pdf (last visited Nov. 6, 2017).
2 A copy of this memo is available at: https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Downloads/Survey-and-Cert-Letter-17-37.pdf (last visited Nov. 6, 2017).
3 The author published an article several weeks ago, *Immediate Jeopardy: True or False?* which sheds light on some of the issues involving immediate jeopardy. That article is available at: https://www.iadvanceseniorcare.com/blogs/alan-horowitz/regulatory-compliancecms/immediate-jeopardy-true-or-false (last visited Nov. 6, 2017).

"the [CMS] RO [Regional Office] must impose a remedy or remedies that will best achieve the purpose of attaining and sustaining compliance." Such a refreshing policy statement connects the type of remedy with the underlying facts rather than using a cookie-cutter per day CMP approach to enforcement. It reflects serious thought and a practical approach that will better enable providers to achieve, maintain, and sustain substantial compliance with the Requirements for Participation.

Perhaps the most salient and welcome statement in the draft policy is CMS's declaration that for immediate jeopardy where there is no serious harm or death, "*CMPs may be imposed, but they are not required*." That statement represents nothing less than a sea change in CMS policy. CMS Central Office, in the draft policy, advises the Regional Offices to "consider the extent to which the noncompliance is a one-time mistake or accident, the result of larger systemic concerns, or a more intentional action or disregard for resident health and safety." Such a judicious policy is long overdue and kudos to CMS for recognizing that not all allegations of immediate jeopardy warrant a severe CMP.

Among the remedies CMS may impose are the following: Directed In-Service Training; a Directed Plan of Correction; Temporary Management; Denial of Payment for New Admissions (DPNA); Denial of Payment for all Medicare and Medicaid Residents (DPAA); State Monitoring; and Termination of the Medicare Provider Agreement. Note that State survey agencies may also impose a Directed Plan of Correction, State monitoring, and Directed In-service Training and in some cases, State-imposed CMPs.

We are aware of small, family-owned facilities that were forced to close in the face of CMPs in excess of $1 million, even when there was no actual harm to any resident; a per day CMP based on months of alleged noncompliance led to outrageously exorbitant CMPs forcing facilities to simply go out of business. Hopefully, if the draft policy becomes finalized, such counterproductive outcomes – which needlessly disadvantage residents - will no longer occur.

The provider community, acting through professional organizations, elected officials, and individual counsels, has been raising concerns with CMS about the inappropriate imposition of per day CMPs in the context of alleged immediate jeopardy. CMS has listened to the constructive criticism and should be given full credit for adopting a more reasonable approach that in the long run, actually benefits residents.

Providers and all interested stakeholders have an opportunity to comment on the draft policy by writing to dnh_triageteam@cms.hhs.gov by December 1, 2017. We encourage providers to comment on the draft policy and to express support for those positive changes which enable facilities to use their resources in a more productive manner thus benefiting residents.

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