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Insights

Nursing Homes: Immediate Enforcement Action and New COVID-19 Testing and Reporting Requirements

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On August 25, 2020, CMS issued an **Interim Final Rule** ("New Rule") revising regulations for numerous provider types in response to the COVID-19 public health emergency. With respect to Skilled Nursing Facilities for Medicare and Nursing Facilities for Medicaid (collectively, "Nursing Homes"), the New Rule enhances enforcement of COVID-19 reporting requirements through increased civil monetary penalties ("CMP") and adds requirements for Nursing Homes to test facility residents and staff. Another noteworthy change for Nursing Homes is that the New Rule revises previous policy regarding order requirements for COVID-19 testing.

Enforcement of COVID-19 Reporting Requirements

In response to the public health emergency and via a previous **interim final rule** published on May 8, 2020 ("May Rule"), CMS required Nursing Homes to report COVID-19 related information at least weekly to the CDC's National Healthcare Safety Network ("NHSN"). Under the May Rule, compliance was monitored weekly. Nursing Homes failing to comply were cited with a "scope" indicator of "widespread", and a severity factor of "no actual harm with potential for more than minimal harm that is not immediate jeopardy." Those citations constituted level "F" deficiencies.

Under the New Rule, CMS will begin immediately enforcing the reporting requirements through imposition of CMPs each time a Nursing Home fails to report required COVID-19 data to the NHSN. The minimum CMP will be $1,000 for the first occurrence, with a $500 incremental increase for each subsequent weekly incident of noncompliance. The maximum CMP fine imposed will be capped at $6,500 for each incident after 12 occurrences of noncompliance.

Testing Nursing Home Staff and Residents

The New Rule revises the infection control regulations for Nursing Homes to require COVID-19 testing of all Nursing Home residents and onsite staff, including individuals providing services under arrangement and volunteers. Any staff, including individuals providing services under arrangement and volunteers, providing services solely off-site will not fall under the testing requirement. Resident and staff testing for COVID-19 must be conducted based on parameters established by the Secretary and in accordance with the testing guidelines published by CMS on August 26, 2020 via a State Survey Agency Directors Letter, which may include the following considerations:

- Testing frequency;
- The identification of any facility resident or staff diagnosed with COVID-19 in the facility;
- The identification of any facility resident or staff with symptoms consistent with COVID-19 or with known or suspected exposure to COVID-19;
- The criteria for conducting testing of asymptomatic individuals, such as the positivity rate of COVID-19 in a county;
- The response time for test results; and
- Other factors specified by the Secretary that help identify and prevent the transmission of COVID-19.

Documentation of all testing results, including those provided by individuals providing services under arrangement and volunteers, must be retained in each individual's file at all Nursing Homes. The same reporting requirements of suspected and confirmed COVID-19 infections applies to both Nursing Home residents and staff. For any instance where either Nursing Home residents or staff refuse testing, CMS is requiring that Nursing Homes establish procedures for addressing such situations and to take steps to maintain the health and safety of others at the facilities.

Limits on COVID-19 and Related Testing and Expansion of Testing Authority

The May Rule previously authorized COVID-19 testing (and certain other diagnostic testing furnished in conjunction with a COVID-19 diagnostic laboratory test) for Medicare beneficiaries, without an order from a physician or other applicable practitioner. **However, the New Rule now limits such authorization of COVID-19 testing without an order to one single COVID-19 diagnostic test and one each of certain other COVID-19 related diagnostic laboratory tests.** All additional tests for each Medicare beneficiary will require an order. The New Rule will also now allow for pharmacists or other healthcare professionals to provide an order for COVID-19 and other related diagnostic tests, provided such practitioners are authorized to order diagnostic laboratory tests in accordance with state scope of practice laws. These changes are only permitted throughout the duration of the public health emergency.

If you have any questions or would like additional information regarding enhanced compliance requirements for Nursing Homes to address and respond to COVID-19, please contact **Andrew W. Breck** or **Meghan M. Linvill McNab**.