

New CMS Surveyor Interpretive Guidelines

Effective **October 24, 2022**, recent changes to the CMS surveyor interpretive guidelines will begin to impact Skilled Nursing Communities. The new guidelines are intended to provide ongoing clarity to surveyors for CMS regulations that have been in place since 2016 (total overhaul of Part 483 to Title 42 of the Code of Federal Regulations) and 2019 (initial arbitration surveyor guidance). Community leaders can expect these new areas of inquiry to become a part of future surveys and citations.

Below I highlight a few of the new (and significant) burdens these guidelines will place on Skilled Nursing Communities:

- **Abuse** will continue to be a point of surveyor attention. Performing a timely and thorough investigation, taking appropriate remedial action to avoid future abuse, and augmenting the care plan in response to the abuse has always been required. What the new guidance does in this area is to **expand the definition of abuse** in Section 485.21(b)
 - Abuse includes physical harm, emotional distress, anguish, or pain. Abuse occurs when the facility is aware of, should have been aware of, or was indifferent to the need to provide services or goods and failed to do so. In addition, harm resulting from or could have resulted from the failure to provide appropriate services. Abuse may be a one-time event or a pattern of events.
 - In the context of mitigating lawsuits, I have written in the past on the need to enhance (and not cut or eliminate) **adequate transition time** between shifts to foster communication regarding resident conditions, needs, and interventions. The failure to now provide this adequate time to communicate on such matters will be a new form of abuse and surveyor attention and will be an area of deficiency surveyors look for.
- **Inadequate staffing** has always been the holy grail in plaintiff's professional liability lawsuits. Payroll Based Journals (or PBJ) has been a facility's obligation to maintain since 2016. These PBJ documents have been used by plaintiffs in their lawsuits to show nursing staff compliance inadequacies. Moving forward, these documents will become a more significant part of the surveyor's jurisdiction.
- **Arbitration Agreements** have long been a regular topic for discussion among all senior living entities across all levels of acuity. In 2019, CMS provided a multi-part guideline for the adequacy of arbitration agreements. I have written and trained on this in the past. Suffice it to say, this will now become the focus of surveyor attention. Do you use arbitration agreements, and do they comply with CMS guidance? One of those tests is whether the facility adequately explained the agreement: Was it clear, and was the explanation well documented? My observation is that this leg of the requirements is too often missing. New to the process is that **facilities now will likely need to demonstrate not only that the resident acknowledged their understanding of the explanation, but that you can corroborate why or how they understood**. Communities will need to assess the resident's level of capacity to understand. We recommend asking the resident a few questions to confirm their understanding of the agreement as well as documenting how you communicated to them in their native language if that is an obvious issue. Not a lot different than what is asked when a person attests to the content of a will. This level of inquiry will become a part of the surveyor's work. Our CAC Team can provide your team the training to meet these enhanced requirements.

- **Complaints and facility reported events** have always been a trigger for a state survey or investigation. Written policies and training that direct the reporting of almost any circumstance is required, along with a documented and timely / immediate investigation for any serious events. A surveyor merely needs to conclude whether non-compliance *was identified* and need not substantiate the same. **The guidelines also provide a number of examples relating to unobserved events warranting an investigation.** The unobserved injury has long been a focal point of resident lawsuits, which by their nature have always been difficult to defend. That defense will get more difficult if there is a failure to comply with these investigative obligations.
- **Documented training has always been a requirement.** Surveyors (and plaintiff's lawyers) will be probing into your training of new and existing staff on these and other regulations, policies, and procedures. Operating entities with 5 or more facilities must show their training and those who attended once a year. Best advice here is that all entities regardless of size should perform and document this training every year.
- Finally, there will be a renewed emphasis, if not requirement, that the skilled nursing community have an **onsite infectious disease preventionist**. This person is charged with ensuring that the community's infectious disease policies and practices are compliant and adequate to minimize disease. This does not need to be a full-time FTE position, but strong accountability for this oversight by a specially trained infectious disease professional will be required.

CONCLUSION

While this is not an exhaustive review of the new regulatory guidance topics, leaders should satisfy themselves that they are doing the things surveyors will soon be probing in more detail. In doing so, you will also be providing your communities additional defenses when (and not if) a lawsuit is filed. Conversely, the failure to lean into these new practices will provide more fodder for regulatory citations and give plaintiff's counsel more room to claim negligence.

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