

The Future of Long-Term Care Regulations, Federal Oversight and Changes to Practice Standards in the Wake of COVID-19

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The COVID-19 Public Health Emergency precipitated the Trump Administration's unprecedented array of temporary regulatory waivers and new rules to equip the American health care system with maximum flexibility to respond to the pandemic. While these waivers highlighted the existing complex regulatory system and temporarily eased some of the restrictions on long-term care nursing facilities (LTCs), the health emergency did invoke new requirements for LTCs, including reporting requirements to the Centers for Disease Control & Prevention (CDC), national nursing home training programs for COVID-19, and the development of new standards of practice focusing on infection control. This regulatory reform and oversight likely will be revisited and expanded on in the wake of COVID-19.

BACKGROUND

Medicare and Medicaid in 1965 led to more federal involvement in nursing home regulation and the establishment of federal criteria to certify such facilities. Regulatory changes were adopted in the Federal Nursing Home Reform Act of 1987, which implemented service and administration requirements. These regulatory changes increased paperwork and implemented additional clinical practice standards. Service requirements included, among numerous others, the implementation of resident care plans, resident assessments, nurses' aide training and reporting nurse staffing information. Administration requirements addressed licensing and life safety code, sanitary and infection control, and physical environment standards.

In 2016, the Obama Administration initiated new nursing home regulations. On October 4, 2016, the Centers for Medicare & Medicaid Services (CMS) issued a final rule, "Medicare and Medicaid programs; Reform of Requirements for Long-Term Care Facilities" (81 FR 68688), which significantly revised and increased the requirements that LTCs must meet to participate in the Medicare and Medicaid programs. The 2016 regulations included a competency requirement for determining staffing sufficiency, new staff training program requirements, and requirements for facility quality assurance and performance improvement programs. Relevant to the current pandemic, the 2016 regulations required facilities to establish an infection prevention and control program to help prevent the development and transmission of communicable diseases, and a separate 2016 regulation required facilities to have a written emergency preparedness plan. While the 2016 regulations were enacted to address quality of care in LTCs, the regulations were criticized by many as containing

provisions that were unnecessarily burdensome and costly.

President Trump's January 30, 2017, Executive Order 13777, "Reducing Regulation and Controlling Regulatory Costs," directed all federal agencies to eliminate regulations that are outdated and unnecessary and further reduce regulations that impose costs exceeding benefits. In compliance with Executive Order 13777, CMS identified a number of existing long-term care requirements that if simplified or eliminated could reduce unnecessary burdens on facilities.

In April 2019, CMS Administrator Seema Verma proposed the adoption of a five-part approach for improved safety and quality measures, which included proposed changes to save time and resources for LTCs so they could focus on caring for residents. Included in the "putting patients over paperwork" initiative were (1) provisions reducing the frequency with which LTC facilities are required to conduct a facility assessment and (2) provisions reducing the requirements and frequency of review for individuals responsible for compliance and ethics programs. Prior to the COVID-19 outbreak, Verma announced that CMS was implementing the five-star approach with great success.'

COVID-19 RESPONSE MEASURES

In response to the COVID-19 crisis, CMS announced temporary regulatory waivers to address immediate needs arising from the pandemic. Anticipating the need for beds and medical coverage for COVID-19 patients, CMS temporarily waived (1) participation and certification requirements for opening a skilled nursing facility and (2) the requirement for a three-day prior hospitalization before the application of Medicare coverage for skilled nursing facility services. In line with CMS's pre-COVID-19 initiative to ease paperwork burdens on nursing homes, CMS announced waivers on the time frames for LTCs to complete Care Plans and Minimum Data Set assessments for residents transferred for COVID-19-related reasons, (allowing for completion as soon as practicable). CMS further announced the temporary waiver of administrative requirements for skilled nursing homes to submit staffing data through the Payroll Based Journal system and the delay of deadlines for filing cost reports with CMS.

Despite easing some paperwork requirements, CMS implemented new reporting, testing and training requirements for LTCs. In May 2020, CMS invoked requirements for reporting infectious disease information to the CDC through the National Healthcare Safety Network (NHSN) system, as well as notifications to residents, resident representatives and families. LTCs were required to weekly report suspected and confirmed infections among residents and staff, total deaths and COVID-19 deaths among residents and staff, as well as information on personal protective equipment (PPE), resident beds and census, COVID-19 testing and staffing shortages. On August 25, 2020, a previous CMS recommendation for LTCs to test staff routinely was made a requirement for participation in the Medicare and Medicaid programs.

In the initial response to the COVID-19 crisis, CMS issued guidance on best practices for states to mitigate COVID-19 in nursing homes. In May 2020, CMS issued information toolkits, updated during the pandemic, that provided detailed resources and outlined best practices for a variety of subjects ranging from infection control to workforce and staffing. In late August, CMS announced that an unprecedented infection control training program was available for nursing home staff, titled "CMS Targeted COVID-19 Training for Frontline Nursing Home Staff." The program, part of a \$5 billion coronavirus relief funding, includes five training modules for staff members and ten modules for management. Session topics cover establishing an infection prevention program, establishing a dedicated COVID-19 center, cohorting (gathering people to be treated as a group) strategies, and best practices for hand hygiene and PPE.

SUMMARY

The COVID-19 crisis has focused attention on long-term care, the methods of caring for patients, and regulatory and funding difficulties facing long-term care institutions. In the wake of the crisis, further regulatory reform and new federal oversight of nursing homes is probably inevitable. As to regulatory reform, it remains to be seen whether reform will continue to include initiatives “putting patients over paperwork” to ease burdens on long-term care institutions and allow nursing staff to spend more time with patients at the bedside. Future federal oversight on nursing home quality of care through clinical guidance and training programs may expand beyond infectious disease and control. With increased clinical guidance and direction, long-term care providers will need to stay apprised of new clinical recommendations. More importantly, providers will need to implement the recommended practices in individualized resident care plans to avoid lawsuit claims and scrutiny by state survey agencies.

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