

## **Two Recent Directives from the Centers for Medicare and Medicaid Services (CMS) Could Add to the Pain for Medicare and Medicaid Long-Term Care Providers**

Article By:

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First, CMS announced on April 5, 2013, that due to the across-the-board federal budget reductions (aka “sequestration”), effective immediately, State Survey Agencies must obtain approval from the CMS Regional Office before doing any second onsite revisit when a provider is not found in substantial compliance during the first revisit. State Survey Agencies were also directed to inform providers that there “may be longer wait times before revisits are conducted.” These measures will be of particular concern to providers who are under a Denial of Payment for New Admissions, or who have a Per Day Civil Monetary Penalty in effect.

The second CMS directive, published March 22, 2013, and effective as of April 1, is described by CMS as “guidance to promote consistent application of enforcement remedies” for facilities. What that translates to is an effort by CMS to:

- Force State Survey Agencies to impose CMPs “Per Day,” rather than “Per Instance,” except in limited circumstances; and
- Impose federal CMPs in situations where States may have elected to either not use CMPs, or to utilize State CMPs.

Except in states with harsher CMP practices, CMPs under the new edict are likely to be much more costly than providers have experienced in the past.

CMS’s directive states:

*Failure of a State to recommend a CMP or other remedy, or a State policy of not recommending CMPs, are not acceptable reasons for not imposing such remedies. In such a case, the RO must on its own review the survey findings and impose the appropriate remedy.*

In states such as Missouri, which has generally issued only “Per Instance” CMPs, the new federal approach is likely to lead to far more costly Per Day CMPs, which could have an even greater impact if staffing or budget shortfalls delay revisits.

Under the new CMS procedures, for deficiencies with a Scope and Severity (S/S) level of “G” or above, and deficiencies with a S/S of “F” involving substandard quality of care (SQC), CMS Regional Offices “must evaluate each case and consider whether or not to impose a CMP in addition to or instead of other available remedies.”

The “Base Per Day” CMPs established by CMS are as follows:

<i>Immediate Jeopardy</i>	J - \$3050	K - \$4,050	L - \$5,050
<i>Actual harm</i>	G - \$250	H - \$600	I - \$1,000
<i>Potential for more than minimal harm</i>			F - \$200

CMS’s edict says that the Base Per Day CMP is to be increased with the following “add-on” amounts:

- \$100 – \$500 per day if a facility has been cited for a “G” or above in the past three years.
- \$50 – \$150 per day for “repeat deficiencies,” i.e., deficiencies “in the same regulatory grouping” cited in the last survey.
- \$50 – \$500 per day for SQC deficiencies.
- \$50 – \$550 per day depending on the number of deficiencies.
- \$100 - \$2000 per day “if culpability is a factor,” and if it is, another \$250 per day for deficiencies at J, K or L, and an additional \$500 per day “if it can be documented that the administrator, facility owners, management agency and/or the facility’s governing body knew of problems but failed to act.”

Per Day CMPs are capped as follows:

- If there’s no Immediate Jeopardy, and no “repeat deficiencies,” \$3000 per day is the cap.
- If there’s Immediate Jeopardy, and no “repeat deficiencies,” \$10,000 per day is the cap.
- If there are “repeat deficiencies,” there is no cap.

There are many unanswered questions at this point, but long-term care providers would be well-advised to keep the following in mind:

- Even if the State Survey Agency does not assess CMPs, the CMS Regional Office may determine that CMPs are necessary under the new CMS edict. Since you probably won't get that bad news immediately, you need to take that possibility into consideration when you respond to the survey findings and decide whether to pursue Informal Dispute Resolution.
- Maintaining compliance is always the goal, of course, but the new procedures also increase the importance of making sure that your staff understand the survey process and understand how best to communicate that the facility is indeed in compliance.
- Although you will expect attorneys to say this, we believe that early consultation with an experienced attorney can save you much greater expense and misery later.

*Copies of the CMS Memo on Sequestration, and the CMS Memo on CMPs, together with the accompanying "Civil Monetary Penalty (CMP) Analytic Tool Calculation Worksheet" and instructions, can be accessed [here](#) and [here](#).*

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