Compliance’s New Role in the Survey Process

HCCA Compliance Institute 2019

Session Objectives

• Understand the obligations of mandated compliance program within context of SNF survey process

• Discuss creating a proactive approach within the compliance committee to address survey issues

• Analyze and understand ramification of new CMS survey enforcement guidance
Disclaimer

• This presentation is current as of February 25, 2019

• CMS has not yet issued its guidance for Phase 3 of the Requirements of Participation (ROPs) through the State Operations Manual (SOM), Appendix PP

• Typical of compliance, we don’t know what we don’t know

F895: Compliance & Ethics Program
(42 CFR 483.85)

• Expectation: Compliance and ethics standards, policies and procedures to follow that are reasonably capable of reducing the prospect of criminal, civil, and administrative violations under the Act and promote quality of care.....
483.85 Compliance and Ethics Program (CEP) Elements

- Written CEP standards, policies, and procedures capable of reducing the prospect of criminal, civil, and administrative violations and promoting quality of care
- Assignment of specific high-level personnel with responsibility to oversee compliance
- Sufficient resources and authority to the individual responsible to oversee the compliance and ethics program

Elements of CEP

- Effective communication of the standards, policies and procedures to entire staff, individuals providing services under a contractual arrangement, and volunteers, consistent with their expected roles
- Auditing and/or monitoring and an anonymous reporting mechanism
Elements of CEP

- Enforcement through appropriate discipline
- Take all reasonable steps to respond appropriately to violations and to prevent future violations
- Conduct an annual review of CEP

5 or More SNFs

- Mandatory annual staff training
- Compliance officer who reports to governing body and is not subordinate to general counsel, chief financial officer, or chief operating officer
- Compliance liaison at each facility
**How Is That Operationalized in the Survey Context?**

- Compliance is about risk mitigation
  - Financial
  - Reputational
  - Civil/criminal
  - Other?

- Risk areas in survey performance and sanctions

- Compliance has different role than QAPI

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**Potential Tensions**

- Compliance is not Operations
- Compliance is not QAPI

- Concern
  - Not to create an over reaching compliance program
  - How does compliance assist in moving the organization forward in its operational and financial success
Immediate Steps

• Review existing program against regulatory requirements

• Make sure Code of Conduct includes discussion of
  ▪ Ethics
  ▪ Quality of Care

Measures For Compliance Monitoring

• Incident reports or rata?

• Facility Assessment

• Prior surveys and plans of correction

• Deficiency trends (federal and state)
Survey Process

• Unknown
  ▪ What will be needed to validate program
    ‣ Minutes; org chart; job descriptions
  ▪ Surveyors with little knowledge of compliance

• Concerns –
  ▪ Access to minutes of Compliance Meetings
  ▪ Hotline log
  ▪ Facility Assessment
  ▪ Quality reporting

Survey Process - Compliance

• Large organizations –
  ▪ Corporate level Compliance Officer
  ▪ In-facility Compliance Liaison
    ‣ Limited or no authority
  ▪ Flow of survey information through QAPI
    ‣ QAPI centered focused

• Compliance role?
### Federal Scope and Severity Grid

<table>
<thead>
<tr>
<th></th>
<th>Isolated</th>
<th>Pattern</th>
<th>Widespread</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Immediate Jeopardy To Resident Health Or Safety</strong></td>
<td>J</td>
<td>K</td>
<td>L</td>
</tr>
<tr>
<td>PoC Required: Cat. 3</td>
<td>Optional: Cat. 1</td>
<td>Optional: Cat. 2</td>
<td></td>
</tr>
<tr>
<td>Optional: Cat. 2</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>Actual Harm That Is Not Immediate Jeopardy</strong></td>
<td>G</td>
<td>H</td>
<td>I</td>
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<tr>
<td>PoC Required: Cat. 2</td>
<td>Optional: Cat. 1</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Optional: Cat. 1</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td><strong>No Actual Harm With Potential For More Than Minimal Harm That Is Not Immediate Jeopardy</strong></td>
<td>D</td>
<td>E</td>
<td>F</td>
</tr>
<tr>
<td>PoC Required: Cat. 1</td>
<td>Optional: Cat. 2</td>
<td></td>
<td></td>
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<td></td>
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<td></td>
</tr>
<tr>
<td><strong>No Actual Harm With Potential For Minimal Harm</strong></td>
<td>A</td>
<td>B</td>
<td>C</td>
</tr>
<tr>
<td>No PoC</td>
<td>No remedies</td>
<td>Commitment to Correct</td>
<td>No remedies</td>
</tr>
<tr>
<td>No remedies</td>
<td>Not on CMS-2567</td>
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<td></td>
</tr>
</tbody>
</table>
Impact of Inflation Adjustment Act

• CMS CMPs for surveys have increased astronomically

<table>
<thead>
<tr>
<th></th>
<th>Pre-August 2016</th>
<th>August 1, 2016</th>
<th>February 3, 2017</th>
<th>October 1, 2018</th>
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<tbody>
<tr>
<td>Cat. 2 Per Day</td>
<td>$50 - $3,000</td>
<td>$103 - $6,188</td>
<td>$105 - $6,289</td>
<td>$107 - $6,417</td>
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<tr>
<td>Cat. 2 Per Instance</td>
<td>$1,000 - $10,000</td>
<td>$2,063 - $20,628</td>
<td>$2,097 - $20,965</td>
<td>$2,140 - $21,393</td>
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<tr>
<td>Cat. 3 Per Day</td>
<td>$3,050 - $10,000</td>
<td>$6,291 - $20,628</td>
<td>$6,394 - $20,965</td>
<td>$6,525 - $21,393</td>
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<tr>
<td>Cat. 3 Per Instance</td>
<td>$1,000 - $10,000</td>
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</tr>
</tbody>
</table>

Financial Hardship Requests

• Possible reduction of CMPs or 12 month repayment plan

• Analytic tool options: facility’s documentation proves that:
  - (1) “the facility lacks sufficient assets to pay the CMP without having to go out of business,” or
  - (2) “the facility does not lack sufficient assets to pay the CMP without having to go out of business.”
Financial Hardship Requests

- “[N]ot CMS's intent to impose CMPs that could, in and of themselves, put providers out of business.”

- Providers can file “compelling evidence of financial hardship,” which CMS “is willing, in the interest of the Medicare and Medicaid programs and their beneficiaries, to consider.”

- Must be filed within 15 days of CMS CMP letter

How to Read the 2567

- What are the deficiencies?

- What are the regulatory violations?
  - Federal
  - State

- What is the best way to respond?
“Required” POC Elements

• What corrective action(s) will be accomplished for residents affected by the deficient practice?

• How will you identify other residents having the potential to be affected by the same deficient practice and corrective actions?

“Required” POC Elements

• What measures will be put in place or system changes will you make to ensure that the deficient practice does not recur?

• How will the corrective action be monitored to ensure the deficient practice will not recur, i.e., what quality assurance programs will be established?

• Dates when the corrective action will be completed
Proving Past Noncompliance

• Identified during a current survey with a S/S at "G" or above, or SQC findings at a S/S at "F" that meets all of the following three criteria:

1. Not in compliance with the specific regulatory requirement(s) at the time the situation occurred


Strategies for Preparing Effective POCs

• Less is more

• Read the F Tags and the state tags

• Don't be afraid to have your POC rejected

• Be responsive and responsible
  ▪ Don't overpromise
  ▪ Don't admit liability
Strategies for Preparing Effective POCs

• Don’t go overboard with policies, procedures and plans of correction

• Keep your date of compliance as short as possible
  ▪ Begin implementing corrective action during the survey and document corrections (e.g., inservicing of staff)

Proving Past Noncompliance

2. The noncompliance occurred after the exit date of the last standard (recertification) survey and before the survey (standard, complaint, or revisit) currently being conducted
Proving Past Noncompliance

3. There is sufficient evidence to support that the facility corrected the noncompliance and is in substantial compliance at the time of the current survey for the specific regulatory requirement(s)

What is Sufficient Evidence?

• Resident?

• Other residents?

• Prevention?

• Monitoring?
Important Documentation

- In-service training
  - Include titles/position of employees
  - Keep copies of training
  - Don’t forget about off-duty staff

- Thorough witness statements
  - Staff and residents

- Auditing and monitoring
  - QAPI

Options for Refuting Findings

- IDR or IIDR
  - 10 days from receipt of 2567
  - Must still file POC
  - Can only challenge federal tags
  - Limited ability to challenge scope and severity

- Federal IIDR
  - 10 days from receipt of federal CMP
  - Does not impact right to get 35% CMP reduction
Options for Refuting Findings

- Waiver of federal appeal rights
  - Must be filed within 60 days of receipt of federal CMP
  - Results in 35% reduction of federal CMP

- Federal appeal
  - Must be filed within 60 days of receipt of federal CMP
  - Must escrow total CMP amount unless a waiver is granted

What is Compliance’s Role

- Auditing and Monitoring Activities
- Engaging the Compliance Committee
- Reporting to Board or Owners

Where do we go from here?
Questions

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