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New CMS Guidance for Long Term Care Facilities with COVID-19 Residents

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April 22, 2020

As long term care (LTC) facility cases of COVID-19 continue to rise, the Centers for Medicare and Medicaid Services (CMS) remains vigilant in its efforts to regulate the delivery of adequate care to those residents with COVID-19, while protecting those residents without the disease.

On April 13, 2020, CMS issued a memo providing additional guidance. CMS clarified that the [prior guidance issued on April 2, 2020](#), was meant to "help mitigate the spread of the 2019 Novel Coronavirus." One suggestion in the prior guidance included the separation of residents based on their COVID-19 status. Recognizing that this may require the transfer of patients from one facility to another, CMS provided additional guidance which provides LTC facilities with information regarding the provisions of reimbursements under three scenarios which would relocate COVID-19 residents to other facilities.

It is important that LTC facilities also adhere to state licensing requirements since these may impose other requirements applicable to cohorting residents within or between facilities. The following scenarios are based on the federal guidance:

Scenario 1: Two or more *certified* LTCs transfer patients between facilities to create a COVID-19 and non-COVID-19 facility.

Scenario 1 is allowed under CMS's Blanket Transfer Waiver and does not require any additional approval. CMS has waived requirements in 42 CFR 483.10(c)(5); 483.15(c)(3), (c)(4)(ii), (c)(5)(i) and (iv), (c)(9), and (d); and § 483.21(a)(1)(i), (a)(2)(i), and (b) (2)(i) (with some exceptions) to allow a LTC facility to transfer or discharge residents to another LTC facility when transferring residents under the circumstances present in Scenario 1.

Under this scenario, each certified facility bills Medicare for the residents in its own facility.

Scenario 2: Transfer residents from one or more *certified* LTC facilities to a non-certified location that is state approved and where residents must be cared for by LTC facility staff.

To effectuate Scenario 2, CMS is waiving certain requirements related to 42 CFR 483.90. Specifically, provided that the state has approved the transferee location as one that sufficiently addresses safety and comfort for patients and staff, CMS is allowing a noncertified LTC building to be temporarily certified and available for use by a LTC facility in the event there are needs for isolation of residents with positive COVID-19 results. This waiver ensures care for those COVID-19 positive residents which may not be feasible in the existing LTC facility structure.

In Scenario 2, Medicare reimbursement remains with the LTC facility caring for patients in the new location. This location could be utilized by multiple LTC facilities, providing care with its own staff.

CMS has also waived the requirements under §483.90 when residents are transferred to another facility (such as in cases of COVID-19 isolation and treatment) where the provision of services is "under arrangement," so

long as it is not inconsistent with the state's emergency preparedness or pandemic plan as directed by the local or state health department. In these instances, the transferring LTC facility is not required to issue a formal discharge as it is still the provider and should bill Medicare for each day of care (requirements pertaining to internal facility relocations such as under state law). It is the duty of the transferring facility to then reimburse the provider accepting its residents during the emergency period.

Scenario 3: Transfer of COVID-19 residents to federal/state run facility staffed with federal or state personnel.

Scenario 3 requires no waiver so long as the transfer of residents is not inconsistent with the state's emergency preparedness or pandemic plan or follows the directions by the local or state health department. No reimbursement is provided to the LTC facility under this scenario.

Baker Donelson is working hard to assist clients in these unprecedented times. Our team of attorneys and advisors continue to monitor and advise on new issues as they develop. For specific guidance or more information on this alert, please contact [Janelle Alleyne](#), [Amy Schrader](#), [Michelle Williams](#) or any member of [Baker Donelson's Long Term Care Team](#). For more information and general guidance on how to address legal issues related to COVID-19, please visit the [Coronavirus \(COVID-19\): What you Need to Know information page](#) on our website.