

PUBLICATION

Long Term Care Facilities Face Stricter CMS Enforcement Actions for COVID-19 Deficiencies

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June 4, 2020

On June 1, 2020, the federal Centers for Medicare and Medicaid Services (CMS) issued both a press release detailing its expansion of enforcement actions against skilled nursing facilities and nursing facilities (LTC Facilities) with infection control deficiencies; and new guidance for states about COVID-19 reporting and infection control. The two releases describe how COVID-19 data collected from individual LTC Facilities will be made available to the public, the timeline by which states will conduct surveys of LTC Facilities, and set out enhanced penalties for infection control deficiencies identified during the surveys.

Specifically, CMS announced that, starting this week, it will take the information LTC Facilities have been reporting to the federal Centers for Disease Control and Prevention (CDC) via the National Healthcare Safety Network about COVID-19 in their facilities and make it public via CMS's Nursing Home Compare website. The information to be reported includes:

- Suspected and confirmed COVID-19 infections among residents and staff, including residents previously treated for COVID-19;
- Total deaths and COVID-19 deaths among residents and staff;
- Personal protective equipment and hand hygiene supplies in the facility;
- Ventilator capacity and supplies available in the facility, resident beds and census;
- Access to COVID-19 testing while the resident is in the facility;
- Staffing shortages; and
- Other information specified by the Secretary of the U.S. Department of Health and Human Services (the Secretary).

The data on the CMS Nursing Home Compare website will be searchable by facility name, will be updated weekly and will be downloadable so that it can be used for research. CMS will also take enforcement action, including imposing civil monetary penalties, against those LTC Facilities (approximated to be 20 percent) that are not reporting their COVID-19 data to CDC. CMS and CDC will continue to monitor the COVID-19 data they receive from LTC Facilities to identify and address facilities with outbreaks.

In conjunction with its increased focus on public reporting, CMS announced also that it will now impose increased penalties on LTC Facilities found in substantial non-compliance with any deficiency associated with infection control requirements. The additional penalties include increased civil monetary penalties, required directed plans of correction (including use of root cause analysis) and imposition of discretionary denial of payment for new admissions. The severity of the penalty will take into account whether an LTC Facility has persistent infection control violations, including the level of such violations to ensure that the deficiencies are "addressed with increased gravity."

To assist LTC Facilities in implementing best practices in infection control, CMS will provide technical assistance through weekly National Infection Control Trainings provided by Quality Improvement Organizations (QIOs) that will focus on all aspects of infection control, prevention and management to help prevent the

transmission of COVID-19. QIOs are also providing direct assistance to small and rural LTC Facilities and those serving vulnerable populations in areas where access to care is limited. The direct assistance is designed to increase the facilities' understanding of and compliance with CMS and CDC reporting requirements. In some cases, the QIOs will provide on-site support to assist LTC Facilities that have been identified as having the greatest needs in infection control. The QIOs will help these facilities to establish a strong infection control and surveillance program by creating an action plan and implementing specific steps.

LTC Facilities can expect states to quickly ramp up infection control survey activities given CMS's requirement that state survey agencies complete 100 percent of their focused infection control surveys by July 31, 2020 or risk losing a percentage of the state's CARES Act funding for survey and certification activities in FY 2021. CMS describes these surveys as "prioritized inspections to allow inspectors to focus on the most serious health and safety threats like infectious diseases and abuse." Under the term of the CARES Act, states are required to perform on-site surveys of LTC Facilities with previous COVID-19 outbreaks or with new COVID-19 suspected and confirmed cases (within three to five days of identification). Beginning in FY 2021, states will be required to perform annual focused infection control surveys of 20 percent of LTC Facilities based on state discretion or additional data that identifies facility and community risks. CMS also plans to post the results of inspections already completed by state surveyors this week, and on a monthly basis as they are completed.

Baker Donelson is assisting LTC Facilities in implementing the COVID-19 reporting rule correctly and in responding to state surveys and CMS enforcement actions as effectively as possible. For specific guidance or more information on this alert, please contact [Stefanie Doyle](#), [Amy Schrader](#), or any member of [Baker Donelson's Long Term Care Team](#). For more information and general advice 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.