After Almost 25 YearsNew Long-Term Care Regs: An Impressive and Costly Undertaking

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On July 16, 2015, CMS released its long-awaited proposed changes for Medicare/Medicaid participation by long-term care ("LTC") facilities. The new regulations represent the first comprehensive change to the requirements since 1991. CMS projects that the cost of implementation will exceed $700MM in the first year alone, with the highest costs in the areas of resident care planning, quality assurance, infection control and compliance.

The proposed regulations incorporate the most recent research and innovations in resident care. They also incorporate changes mandated by the Affordable Care Act ("ACA") and the Improving Post-Acute Care Transformation Act ("IMPACT") aimed at increasing the role of LTC facilities in improving post-acute care and reducing unnecessary rehospitalizations.

Here are the highlights:

Facility Responsibilities:

CMS has added "Facility Responsibilities" as a new section to the regulations. This section incorporates many of the existing resident rights, and adds new resident protections. One new requirement that has the potential to result in legal disputes, involves resident representatives. The new regulations require that the facility not extend greater decision-making authority to the representative than granted by a court or delegated by the resident. The facility must now report instances when the representative oversteps his/her court-appointed or delegated authority. CMS also expressed its expectation that facilities will take on an increased role in identifying and reporting concerns about representatives that rise to the level of abuse or neglect.

At the same time, and perhaps adding to the potential for conflicts, this same section expands resident visitation rights, requiring increased access to residents by representatives and family members. However, CMS expects that open access actually will promote better communication and trust between facility staff and the resident's family and support system. CMS also proposes to increase resident access to medical records and surveys, as well as improve the form and manner in which residents receive information.

The proposed regulation also requires the facility to post a notice providing information on how residents or their representatives can contact various advocacy groups, state agencies and the Medicaid fraud control units. Much of this information is already required as part of the resident's written information, but would now be posted and available to representatives and others visiting the facility. The proposed rule also requires the facility to appoint a Grievance Officer and to have a policy to ensure prompt resolution of resident grievances.

Freedom From Abuse, Neglect and Exploitation:

CMS has re-organized and re-named this section, which now specifically prohibits facilities from employing individuals who have been convicted of resident abuse or neglect, or who have had professional disciplinary action taken against them. Facilities must develop comprehensive policies and procedures that prevent abuse, neglect, and mistreatment of residents, or misappropriation of their personal property. CMS also added enhanced requirements for identifying, investigating and reporting incidents of abuse, stating that it is holding the facility fully responsible and accountable for protecting residents from abuse.

Comprehensive Person-Centered Care Planning:

CMS has proposed a new section entitled "Comprehensive Person-Centered Care Planning" which significantly expands the administrative requirements for the resident's care planning process.

CMS proposes a new requirement that facilities develop a "baseline interim care plan" within 48 hours of a resident's admission, pending the completion of a comprehensive care plan. Current regulations allow up to 21 days for development of a comprehensive care plan, following completion of the new resident assessment. The new regulations would require development of a baseline plan that includes the basic information necessary for immediate care of the resident if required. Alternatively, a facility can complete the comprehensive care plan within 48 hours of the resident's admission if all of the necessary plan components are available.

CMS also proposes to expand the interdisciplinary team ("IDT") involved in the care planning process to include the nurse aide, a member of the food and nutrition services staff, and a social worker. CMS also will require facilities to clearly document why IDT participation by the resident and/or representative is not practicable. CMS stated that in a recent study, 99% of all records reviewed failed to meet Medicare requirements for resident assessments and care plans, including failure to document why resident/representative participation was not possible. Again, CMS stated its intention to hold facilities fully accountable for not protecting resident rights in this regard. Also, as proposed, the comprehensive care plan must ensure that the resident services are culturally competent, meaning that the plan addresses the resident's culture preferences and other language or special concerns of the resident.

Finally, with ACA/IMPACT initiatives to reduce hospital readmissions as a driving force, CMS proposes to enhance the role of LTC facilities in the discharge planning process. CMS referenced a study which found that one in five Medicare beneficiaries are re-hospitalized within 30 days. Therefore, CMS is requiring that the post-acute care providers, including LTC facilities, do a better job of transitioning care between providers by utilizing standardized patient data, quality and performance measures, and assuring that the patient's treatment goals and medications are appropriately coordinated.

Quality Assurance and Performance Improvement:

This new section requires facilities to develop, implement and maintain an effective, comprehensive, data-driven QAPI program that focuses on better outcomes, as well as incorporating objective measures of care and quality of life. CMS explained that the QAPI program would not replace the facility's quality assessment and assurance ("QAA") committee requirements, but rather are intended to enhance these requirements. The facility will be required to present the QAPI plan at the first annual recertification survey.

Infection Control:

CMS proposes that facilities have an effective system for preventing, identifying, reporting and controlling infections and communicable diseases for residents, staff, and other individuals. The facility's plan must be reviewed and

updated annually. CMS also proposes that facilities must designate an Infection Protection and Control Officer ("IPCO") who oversees the facility's infection control plan, and who would serve as a member of the facility's QAA committee to ensure that infection control is given the highest priority.

Compliance and Ethics Program:

As CMS emphasizes throughout the proposed regulations, it is taking compliance seriously, and now is mandating that each facility have a written compliance and ethics program that is capable of reducing the federal program violations. This is consistent with the ACA requirement that healthcare entities have a documented compliance program that is effective in preventing and detecting criminal, civil and administrative violations. CMS referenced the DHHS Office of Inspector General ("OIG") compliance guidelines, and supplementary guidance for nursing facilities, as good templates for implementing core program requirements. Under the proposed regulations, facilities are required to have this compliance and ethics program in place one year after the effective date of the regulations.

Training Requirements:

This new section imposes significant training requirements on facilities, emphasizing the need to educate staff concerning all aspects of the new regulations, including resident rights and communication, facility responsibilities, prevention of abuse and neglect, compliance, quality assurance and infection control. The need for dementia training is also included, given the increased recognition of this growing problem.

In addition to the above requirements, CMS has proposed numerous other new regulations pertaining to resident services and facility administration. Indeed, CMS will require that the facility conducts an annual facility-wide assessment to ensure that it meets the new requirements, including a full assessment of staff competencies, equipment and resources, cultural environment, resident services, health information technology (e.g. data sharing capabilities), contracts/documentation, compliance and other legal requirements.Comments on the proposed regulations are being accepted by CMS until September 14, 2015, to be followed by the final proposed regs. However, given the extent and cost of these new proposed requirements, it is best to begin planning for these changes now.

If you have questions concerning the proposed Long-Term Care Regulations, please call Chris Churchill, Partner and Chair of Barley Snyder's Health Law Subgroup, at 717-399-1571 or contact him at cchurchill@barley.com .

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