*The Adelman Advantage*

Nursing Homes MUST Verify – OIG’s February 2019 Report

 This month, the Department of Health and Human Services (DHHS) Office of the Inspector General (OIG) issued its report “**CMS GUIDANCE TO STATE SURVEY AGENCIES ON VERIFYING CORRECTION OF DEFICIENCIES NEEDS TO BE IMPROVED TO HELP ENSURE THE HEALTH AND SAFETY OF NURSING HOME RESIDENTS**.”

 Under an agreement with the Centers for Medicare & Medicaid Services (CMS), State survey agencies (SAs) perform surveys to determine whether nursing and skilled nursing facilities (nursing homes) meet specified program requirements, known as Federal participation requirements. During a survey, a SA identifies certain deficiencies, such as a nursing home’s failure to provide necessary care and services. *The SA must verify that the nursing home corrected identified deficiencies before certifying whether the nursing home is in substantial compliance with Federal participation requirements.*

 Per the OIG report, in its previous reviews of nine SAs across the Nation, the OIG found that seven did not always verify or maintain sufficient evidence that they had verified nursing homes’ correction of deficiencies identified during surveys in accordance with Federal requirements. The stated objectives of the OIG are that the reviews are intended to (1) help CMS understand the need for improvements to SAs’ practices for verifying nursing homes’ correction of identified deficiencies and maintaining documentation supporting verification and (2) offer CMS recommendations to help ensure the health and safety of nursing home residents.

 After describing the process of the SA reporting of deficiencies and deficiency ratings (Severity and Scope Levels for Deficiency Ratings), the OIG then describes the process for correcting deficiencies and certifying substantial compliance (the Nursing Home’s Plan of Correction). Focusing on the verification process, the OIG report iterates that after a nursing home submits a correction plan, the SA must verify that the nursing home corrected the identified deficiencies to certify that the nursing home is in substantial compliance with Federal participation requirements. A nursing home is in substantial compliance when identified deficiencies have ratings that represent no greater risk than potential for minimal harm to resident health and safety (A, B, or C). Forms 2567, 2567BB and other related forms are identified by the OIG as the correction mechanism by CMS.

 The OIG then describes how it conducted its review as previously reviewing nine SAs to determine whether they verified nursing homes’ correction of deficiencies identified during surveys in accordance with Federal requirements. It summarized the results of those reviews for the report. In addition, the OIG assessed CMS’ Manual guidance to SAs on verifying nursing homes’ correction of deficiencies and its interim guidance to SAs on maintaining documentation to support verification of deficiency correction.

**The Findings**

Of the nine selected SAs in its previous reviews (Washington, Oregon, Arizona, Missouri, Kansas New York, North Carolina, Florida and Nebraska), two SAs verified nursing homes’ correction of deficiencies identified during surveys in accordance with Federal requirements. However, the remaining seven SAs did not always verify nursing homes’ correction of deficiencies as required. Specifically, for 326 of the 700 sampled deficiencies, these SAs did not obtain evidence of nursing homes’ correction of deficiencies or maintain sufficient evidence that they had verified correction of deficiencies.

For less serious deficiencies, the practice of six of the seven SAs was to accept a nursing home’s correction plan as confirmation of substantial compliance with Federal participation requirements without obtaining from the nursing home the evidence of correction of deficiencies. Further, three of the seven SAs had technical issues with maintaining supporting documentation in the Automated Survey Process Environment (ASPEN) system; as a result, they did not have sufficient evidence of correction of deficiencies.

According to the OIG, if SAs certify that nursing homes are in substantial compliance without properly verifying the correction of deficiencies and maintaining sufficient documentation to support the verification of deficiency correction, the health and safety of nursing home residents may be placed at risk.

In addition to summarizing the issues identified during the nine previous reviews, the OIG determined that CMS’ guidance to SAs on verifying nursing homes’ correction of deficiencies and maintaining documentation to support verification needed to be improved.

Several examples of failure to verify and other statistics are included in the report. Most notably under the heading in the report “The Health and Safety of Nursing Home Residents May Be Placed at Risk if Correction of Deficiencies Is Not Properly Verified,” the OIG cites the following examples:

*“A State agency did not have sufficient evidence that it had verified a nursing home’s correction of a G-rated (more serious) deficiency related to quality of care. A surveyor noted: “Based on observation, record review and interview, the facility staff failed to obtain treatment orders and failed to evaluate nutritional requirements for the development of a pressure ulcer for 1 resident.”*

*“A State agency did not obtain evidence of correction for an E-rated (less serious) deficiency related to quality of care. A surveyor noted: “Based on interviews and record reviews, it was determined that for one of five residents reviewed for unnecessary medications, the facility did not ensure that all of the residents were free of significant medication errors.”*

CMS officials provided information to the OIG essentially stating that CMS has little guidance on how SAs must verify and document verification of nursing homes’ correction of less serious deficiencies before the SAs certify nursing homes’ substantial compliance with Federal participation requirements. CMS’ defense then resulted in the ultimate finding by the OIG that without specifying how a SA should document the information or evidence it used to verify the correction of deficiencies, CMS cannot be assured that a SA verified that a nursing home corrected the deficiencies. The SA may have certified the nursing home’s substantial compliance with Federal participation requirements even though the nursing home did not correct the deficiencies.

Thus, recommendations were made. We can expect that these recommendations will be adopted and implemented, and the survey process will involve even greater scrutiny and documentation and investigations. Compliance and certification/re-certification will become even more challenging.

**Recommendations**

OIG makes the following recommendations to CMS:

1. Reconsider its position on permitting SA to certify nursing homes’ substantial compliance on the basis of correction plans without obtaining evidence of correction for less serious deficiencies (deficiencies with ratings D, E, and F without substandard quality of care);

2. Revise guidance to SA to provide specific information on how SAs should verify and document their verification of nursing homes’ correction of less serious deficiencies before certifying nursing homes’ substantial compliance with Federal participation requirements;

3. Revise guidance to SAs to clarify the type of supporting evidence of correction that should be provided by nursing homes with or in addition to correction plans;

4. Strengthen guidance to SAs to clarify who must attest that a correction plan will be implemented by a nursing home;

5. Consider improving its forms related to the survey and certification process, such as the Forms CMS-2567, CMS-2567B, and CMS-1539, so that surveyors can explicitly indicate how a SA verified correction of deficiencies and what evidence was reviewed; and

6. Work with SAs to address technical issues with the ASPEN system for maintaining supporting documentation.

**CMS Comments**

In written comments on OIG’s draft report, CMS concurred with the OIG’s recommendations and provided information on actions that it had taken or planned to take to address the recommendations.

Regarding the first recommendation, for less serious deficiencies in which no actual harm was identified, CMS stated that it will review current guidance regarding the requirement to provide evidence of correction of a deficiency and determine whether updates are needed to help verify correction.

Regarding the second recommendation, CMS stated that it will review the current guidance to SAs regarding the verification and documentation of correction of less serious deficiencies and discuss with SAs any areas needing additional clarification in determining the scope of changes needed.

Regarding the third recommendation, CMS stated that it will review guidance to SAs and continue to educate SAs on the types of supporting evidence of correction that should be provided with corrective action plans.

Regarding the fourth recommendation, CMS stated that it will review its existing policies and guidance to ensure that a nursing home official with authority and responsibility for operations of a facility is attesting to the plan of correction and its implementation.

Regarding the fifth recommendation, CMS stated that it will review forms related to the survey and certification process and evaluate whether updates are needed.

Regarding the sixth recommendation, CMS stated that it continually reviews its systems for technical issues and addresses those issues as they arise. CMS also stated that it will continue to provide education and technical support to SAs on its systems.

**The Future Impact**

The survey and certification process is, at present, extremely burdensome, and we can expect that with the OIG reports and recommendations as well as CMS’ comments, SAs will increase the levels of investigation, documentation and become increasingly punitive with citations and the verification of compliance. As a proactive measure, properly document and retain documentation and prepare detailed plans of correction with support to minimize the opportunity for the SAs to reject a Plan of Correction. Understanding the need for verification and the impact of failing to comply with care standards, these interests can be protected without the continued enhancements of regulations by CMS and its SAs. Without much choice but to cooperate with the SAs and provide the needed information if there are deficiencies cited at your community, do your best to thoroughly document the needed information we know the SAs will need to verify and Plan of Correction.

**JOIN US AND REGISTER TODAY!**

**The annual complimentary long-term care conference I host along with Horne Rota and Kaufman Borgeest & Ryan is in its 7th year and not to be missed! Please save the dates April 3-4, 2019 for The National Long-Term Care Defense Summit (love our new conference name!) in Memphis! Education, networking, blues and BBQ!** [**Click here to register.**](http://events.r20.constantcontact.com/register/event?oeidk=a07efr82p38d81fe992&llr=gxcxwb6ab.)



**About Rebecca Adelman:**

Rebecca Adelman is an entrepreneur, influencer, thought leader and founder of Adelman Law Firm, established in 2001. For nearly 30 years, Rebecca has concentrated her practice in insurance defense and business litigation. The firm’s practice extends through the Tri-States of Arkansas, Mississippi and Tennessee. Rebecca’s insurance defense practice includes representation of insurance companies and long‐term care providers and their insurers, both regionally and nationally. She also provides consulting services and educational programming to healthcare professionals and business associates. She has active practices in the areas of general liability, professional liability, premises, and employment law. She is a listed mediator serving all areas of business and healthcare litigation. Contact Rebecca at rebecca@adelmanfirm.com and visit [www.adelmanfirm.com](http://www.adelmanfirm.com) and [www.rebeccaadelman.com](http://www.rebeccaadelman.com).