



Health Reform & Long-Term Care: Provisions Impacting Transparency, Enforcement and Staff Training

When the *Patient Protection and Affordable Care Act* (PPACA), was signed into law by President Obama on March 23, 2010, health reform became a reality. Among other considerations, long term care facilities and post-acute care providers must now position themselves to operate in an environment with an increased emphasis on transparency, enforcement and staff training. The legislation also includes a new focus on nursing facility chains.¹ While not intended to be exhaustive, the following discussion will provide basic information that will enable SNFs and NFs (“Facilities”) to begin strategically preparing for inevitable changes, including participation in the demonstration projects and grant opportunities that will soon be available.

I. Improving Transparency

A. Information Regarding Ownership and Management

PPACA requires Facilities to immediately make available to regulators, information regarding “each member of the governing body and each person or entity who is an officer, director, member, partner, trustee, or managing employee of the Facility, including the name, title, and period of service of each such person or entity.” “Managing employee” is very broadly defined to include

anyone who directly or indirectly advises on any element of the practices, finances or operations of the facility. Facilities are also required to disclose their organizational structure, including information that describes the legal interrelationships between the entity and the individuals that own or manage the Facility, and must be ready to identify any “additional disclosable party.”² When regulations are promulgated by 2012, Facilities will be required to report this same information in a standardized format as a condition of payment and certification.

B. Compliance and Ethics

By 2013, every Facility must have an operational compliance and ethics program to prevent and detect criminal, civil and administrative violations and to promote quality of care. CMS is required to publish implementing regulations by 2012 which will distinguish between single Facilities and chains. Small Facilities will face a reduced administrative burden.

C. Quality Assurance and Performance Improvement

The Secretary of Health and Human Services (“Secretary”) must establish and implement a quality assurance and performance improvement (QAPI) program for all Facilities including multi-facility chains, by

¹ The impact of the PPACA on other post acute care providers such as hospice, home health, assisted living and DME suppliers, and the development of additional insurance coverage mechanisms and payment policies are beyond the scope of this Advisory. These important issues will be addressed in future HDJN client advisories.

² An additional disclosable party includes anyone who exercises operational, financial or managerial control over the facility including those who provide policies and procedures; financial or cash management; those who lease property to the Facility; or provide management, clinical consulting or financial services to the Facility.



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December 31, 2011. The program will establish QA standards and provide assistance for the development of best practices to meet those standards. Facilities must submit a plan to implement the best practices and meet the standards, within one year of the promulgation of the QAPI guidelines.

D. Standardized Complaint Form

By 2011, CMS must establish and implement a standardized complaint form to be used by consumers in filing a complaint against a Facility with the state agency or long term care ombudsman.

E. Complaint Resolution Process

By 2011, all states must develop a complaint resolution process to assure that a Facility will not retaliate against a complainant and ensure that the complainant is not denied access to the resident. The process must include tracking of all complaints received, notification to the complainant of receipt, investigation procedures and deadlines.

F. Nursing Home Compare Website

By 2011, the following additional information must be posted on the CMS Nursing Home Compare website in a prominent, easily searchable, accessible and timely manner:

- Staffing data for each Facility, including the hours of care provided per resident per day, data on staff turnover and tenure, and discussion on how staffing levels affect residents and their needs;
- Links to state websites for survey and certification programs;
- Links to state-issued 2567 inspection reports, Facility-submitted plans of correction and information to guide consumers in interpreting these documents;

- Standardized complaint form;
- Instructions on how to file a complaint with a survey agency or long-term care ombudsman;
- Summaries describing the number, type, severity, and outcome of substantiated complaints against a Facility³; and
- The number of adjudicated instances of criminal violations by a Facility or the employees of a Facility to include instances of abuse or exploitation.

CMS must also have a process to review the accuracy, clarity of presentation and timeliness of the information reported on the website. In performing the website review, CMS must consult with state long-term care ombudsman programs, consumer advocacy groups, and provider stakeholder groups. The data on the website must be updated quarterly. To ensure the timeliness of the data, the state will be required to provide inspection reports to CMS at the same time that the information is provided to the affected Facility.⁴ The website must also include a consumer rights page that explains Facility-specific information available to consumers, tips on choosing a nursing home, and a description of services available through the long-term care ombudsman program.

G. State Websites

Under PPACA every state is required to develop and maintain a consumer-oriented website with useful information pertaining to each Facility in the state. 2567 inspection reports and each Facility's corresponding plan of correction "or other response to the survey" must also be posted to the website.⁵

H. Special Focus Facilities

The Special Focus Facility program

³ It is unclear whether any appeal process must be exhausted before the complaint is determined to be "substantiated".

⁴ Timely submission of POCs to CMS by the state agency is not as clearly addressed.

⁵ An unanswered question is whether an IDR appeal request or similar challenge constitutes an "other response to the survey".



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will continue for SNFs that the Secretary “has identified as having substantially failed to meet” certification requirements. Special Focus Facilities must be inspected at least once every six months.

I. Availability of Inspection Reports

By 2011, Facilities must have inspection reports from the previous three years available for review upon request, minus resident identifying information. Notice of availability must be posted in a prominent place within the Facility.

J. Reporting of Expenditures

By 2012, SNFs will be required to separately report expenditures for wages and benefits for direct care staff, breaking out registered nurses, licensed nurses, nurses aides, and other medical and therapy staff members as part of a redesigned cost report. All expenditure information shall be available to interested parties upon request.

Not later than 30 months after the enactment of PPACA, CMS will prepare and supply a modified cost report form including the following categories which must be reported on an annual basis:

- Spending on direct care services (including nursing, therapy, and medical services);
- Spending on indirect care services (including housekeeping and dietary services);
- Capital assets (including building and land costs); and
- Administrative services costs.

K. Staffing Accountability

By 2012, Facilities will be required to submit direct-care staffing information

(including contract and agency staff) electronically to CMS using data from the Facility’s payroll and other auditable data. CMS will develop the submission format. The reported staffing must specify the type of employee (e.g., registered nurse, licensed nurse, certified nurse aide, etc.). The information provided must be in context and include resident census data and information on resident care needs. The reported data must also include data on employee turnover and tenure, and on the hours of care provided by each category of certified employees. Information pertaining to temporary agency and contract employees will be reported separately. CMS is required to consult with state long-term care ombudsman programs, consumer advocacy groups, provider stakeholder groups, and employees and their unions in the development of these procedures.

L. Five Star Rating Program

By 2012, the GAO must submit a report to Congress containing an analysis of how the 5 star rating system is being implemented; any problems with its implementation and suggestions for legislation and administrative action for its improvement.

II. Enforcement

A. Civil Money Penalties

By 2011, CMS will be authorized to reduce civil monetary penalties imposed against Facilities up to 50% if the Facility self reports and then promptly corrects a deficiency within ten days of the imposition of a civil money penalty. No CMPs will be reduced if the same violation was similarly reduced within the preceding year, or if the penalty is imposed as the result of a deficiency that caused a pattern of harm or widespread harm, immediate jeopardy to a



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resident's health or safety, or caused a resident's death.⁶

B. Informal Dispute Resolution and Appeals

The Secretary must issue regulations that provide an independent informal dispute resolution (IDR) process conducted on the record no later than 30 days after a CMP is imposed and before it can be collected. If a per diem penalty is assessed, it will not begin to accrue until the IDR process has concluded. Under this new regulatory structure CMS will have the authority to require that CMPs be collected on the earlier of the date IDR is completed or 90 days after the CMP is imposed, and placed into an escrow account retained pending the resolution of any subsequent appeals. If the Facility prevails on appeal, the escrowed monies may be returned with interest. If subsequent appeals are not successful, some portion of the collected CMP amounts may be used to support activities for the benefit of residents.⁷

C. Oversight of Nursing Home Chains

By 2011, CMS and the HHS Inspector General will begin a two-year demonstration project to develop and test an Independent Quality Monitor designed to oversee interstate and large intrastate Facility chains, to be selected based on SFF status or repeated quality deficiency status. The independent monitor will conduct periodic reviews and root cause quality and deficiency analysis of the participating chain. The monitor will also analyze factors such as management structure, expenditures, staffing levels, staff turnover rates and employee tenure. The monitor will report all findings and recommendations to the chain, to the federal and state governments and will publish the results. Within ten days of

receiving the findings the chain must submit a report to the monitor that outlines how the chain will implement recommendations or alternatively, why the chain will not implement the recommendations. Chains will pay the cost of the monitor to CMS, which in turn will pay the monitor. CMS and the HHS Inspector General will evaluate the results of this project and submit a report to Congress within 180 days of its completion.

D. Facility Closures

By 2011, Facility administrators will be required to provide written notice of closure at least 60 days before a scheduled voluntary closure, or in the case of decertification, at the time specified by CMS. The notice must be provided to CMS, the state long-term care ombudsman, facility residents and their representatives. The notice must include a plan for the transfer and relocation of each resident. Any administrator that violates this requirement will be subject to civil monetary penalties up to \$100,000 and may be excluded from federal health care programs.

E. National Demonstration Projects

By 2011, CMS will implement two national demonstration projects. The first will focus on the development of best practices in Facilities involved in the culture change movement. The second will focus on the development of best practices for the use of information technology to improve resident care in the nursing facility setting. The projects must also consider the special needs of residents with dementia and conclude within 3 years of commencement. CMS will submit a report to Congress within nine months of completion, including recommendations for legislation or administrative action.

⁶ Therefore no CMPs may be reduced if imposed for deficiencies cited at levels H-L.

⁷ HDJN will provide further analysis on this significant change to the IDR and CMP collection process at a later time.



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III. Improving Staff Training

A. Dementia and Abuse Prevention

By 2011, Facilities will be required to include dementia care and abuse prevention in staff training. This minimum training requirement includes training of agency or contract staff.

B. Nationwide Background Checks

The Secretary is required by PPACA to establish a program for nationwide background checks of prospective direct-patient access employees. The program will be carried out through agreements made between CMS and a single state agency for each state. The background checks will apply to SNF/NFs, home health agencies, hospice agencies, long term acute care hospitals, adult day care providers, and assisted living Facilities. The background checks will require fingerprinting and must be capable of “rap back” so that subsequent criminal convictions are automatically reported to CMS, the states and the Facility. States will provide a process for appeals of disqualified persons which will consider the passage of time, extenuating circumstances, demonstration of rehabilitation, and the relevance of the disqualifying conviction.

C. National Nurse Aide Registry

CMS is required by PPACA to conduct a study on establishing a national nurse aide registry. The study will determine who should be included in the registry, how it would comply with privacy laws, how data would be collected and how it would be coordinated with nationwide background checks. CMS must submit a report on this study to Congress by September 2011.

D. Grant Opportunities

PPACA has authorized \$20 million for fiscal year 2011, and a slightly lesser amount for each of the following three years to provide incentives for direct-care services. For example:

- CMS will make grants eligible to entities to provide training and bonuses to employees who achieve certification with the overall goal of creating career ladders for direct-care employees.
- CMS will provide grants to promote management practices designed to retain direct-care employees, to include promotion of a culture that respects caregivers and policies that reward high performance.
- CMS will also provide grants to long-term care Facilities to implement electronic health records. CMS has also been directed to adopt electronic standards for the exchange of clinical data between Facilities.

E. Immediate Strategic Areas of Focus

Besides remaining aware as regulations begin to appear, Facilities should take the following immediate steps:

- Information Gathering
 - Gather 2567-survey reports for prior 3 years.
 - Gather and make readily accessible, in an easily-updatable format, the names, titles, and length of service of all owners, operators, managers and consultants. Prepare or update organizational charts.
 - Examine documentation of staffing and staff expenditures.
- Compliance Plans – Begin to evaluate existing compliance plans. If your Facility does not have one or if it has one that is not operational, immediately take steps to operationalize.
- Training – Examine staff training plans to ensure that they include dementia and abuse prevention for all staff.
- Facility chains should particularly prepare for increased scrutiny. If quality concerns have been prevalent consider participating in demonstration projects.



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- Prepare for increased complaints and resulting enforcement, including litigation, as complaints become easier to make, survey reports become easily accessible online, and information on ownership is disclosed.

If you have any questions, or for more information about the Act or for assistance in planning programs to

meet these new challenges, please contact Mary C. Malone, Jeannie A. Adams, or Emily W. G. Towey at (866) 967-9604 or by email at: mmalone@hdjin.com, jadams@hdjin.com or etowey@hdjin.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm's website at: www.hdjin.com.

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