

## CMS RELEASES NEW CIVIL MONEY PENALTY ANALYTIC TOOL FOR SURVEY DEFICIENCIES WHICH CAN RESULT IN CMPs EXCEEDING \$100,000<sup>1</sup>

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Early this summer we were surprised to hear from some of our clients that they had received civil money penalties (CMPs) in the six-figure range for deficiencies that allegedly started prior to the first day of the survey. Since 1995, federal regulations have allowed the Centers for Medicare and Medicaid Services (CMS) to impose CMPs that would start accruing as early as the date that the nursing facility was first out of compliance,<sup>3</sup> but we had not seen this applied in Pennsylvania. Although on the books for decades, these regulations had seldom been applied to Pennsylvania's nursing facilities. In conversations with CMS, we were told that they were using a new CMP analytic tool that was designed to normalize the enforcement process across the country but they were not able to share the model with us. Finally, on December 19, 2014, CMS issued the CMP Analytic Tool and Guidance (CMP Guidance) that they have been using since June 16, 2014.<sup>4</sup> The actual computer module is still not publicly available.

The CMP Guidance is illuminating and more clearly explains CMS' new approach to imposing per-day CMPs (PD CMPs). Until recently, in a typical survey enforcement action, the Department of Health (DOH) would recommend a PD CMP which would start as of the exit date of the survey. CMS would often accept this recommendation, and the CMP would run from date of exit until the date the facility was found to have regained substantial compliance. Under the traditional enforcement policy, PD CMPs would never accrue for more than 180 days because a facility that was out of compliance for six months would be terminated from the Medicare and Medicaid programs.

Unfortunately, because CMS has recently started to enforce the long-standing but seldom used regulations, facilities across the Commonwealth may be surprised to find themselves facing PD CMPs for a deficient practice, such as an avoidable pressure ulcer, that the surveyors identify

as having started long before the start of the survey in question. The new CMP Guidance clearly states:

A PD CMP should begin on the first day noncompliance at the cited s/s [scope and severity] level is documented, *even if that date precedes the first day of the current survey*, unless the facility can demonstrate that it corrected the noncompliance prior to the current survey (past noncompliance). If the team cannot document the first day of noncompliance, then the CMP should start on the day the noncompliance was observed and documented at the time of the current survey.

CMP Guidance at 6 (emphasis added). Facilities should be aware that surveyors will be looking for documentation of the beginning of a deficient practice. If the surveyors do not find specific documentation, the facility may still be at risk for PD CMP that starts prior to the exit date, if the surveyors identify the noncompliant practice before the day they exit.

This new enforcement policy applies not only to how CMS calculates the PD CMP, but also to state survey agencies. CMS has instructed its analysts to calculate the start date for the proposed CMP with the "first supportable date of non-compliance, as determined by the evidence documented by surveyors in the statement of deficiencies (CMS form 2567)." State surveyors are instructed that they must "determine the earliest date for which supportable evidence shows that the non-compliant practice began" when performing surveys and making recommendations for a PD CMP to CMS. Additionally, if there is ambiguity about the start date, or if the start date of the noncompliance is not clearly identified and supportable, the CMS analyst is instructed to contact the state survey agency to see if such a date can be determined. The analyst is also required to document their discussions and conclusion with the state agency. If the state date cannot be determined, then the PD CMP would start on the first day during the survey on which the survey team identified the noncompliant practice. *Id.* at 22.

Federal PD CMPs have been ranging from \$100,000 to over \$600,000 for deficient practices that have been cited as starting more than 100 days before the

survey exit date but that were not identified by the surveyors until the survey but for which the surveyors identified an earlier date connected with the deficient practice. Facilities have also been assessed CMPs for immediate jeopardy (IJ) situations that allegedly existed more than 23 days before the DOH officially declared the facility to be in immediate jeopardy. Simply stated, PD CMPs are now being assessed at the earliest documented evidence of a deficient practice, even though the facility may not be aware that DOH considered the practice deficient until the survey exit.

While most nursing facilities are familiar with the concept of being fined for past noncompliance, they do not expect to have PD CMPs starting to accrue before the date they were notified by the surveyors that they were out of compliance. Consider the following hypothetical survey situation at Skilled Nursing Facility (SNF). The survey begins on August 1 and ends on August 5. SNF receives a number of deficiencies, including one cited at isolated actual harm for failure to prevent and treat pressure ulcers (F tag 314, scope/severity G). The surveyors looked at 20 residents with pressure ulcers, including Resident R1. The Statement of Deficiencies CMS form 2567 (2567) references a nursing progress note dated February 5, that identified a reddened area on R1's sacrum. According to the 2567, the next documentation concerning R1's sacrum is a weekly wound report dated February 12, identifying a Stage 4 preventable pressure ulcer on R1's sacrum. The 2567 further states that interviews with the Director of Nursing and Wound Care Nurse on August 4 confirmed that the facility was unable to provide any documentation that R1's pressure ulcer was identified timely or that the physician was notified.

In the past, the SNF would have expected a PD CMP that started August 5 (the exit date) and ended the date it was found to have regained substantial compliance, in this case, September 5. The total number of days the PD CMP would have accrued under this hypothetical was 30 days. Now consider the same facts under the new enforcement policy. The first documented evidence of potential noncompliance was the nursing progress note of February 5. Assume that Resident R1's stage 4 ulcer was unresolved at the date

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of exit, August 5. Under the new enforcement policy, the CMP would be calculated as starting February 5 and ending September 5, a total of 212 days.

Assume that the PD CMP for this G-level deficiency is \$500 per day. Under the new enforcement protocol, the SNF would be facing a total CMP of \$106,000 instead of a total CMP of \$15,000.

This scenario is happening with greater frequency in Pennsylvania, and facilities need to examine their statements of deficiencies very carefully to look for potential factual inaccuracies. In many cases, the facility will not know that it is being assessed this extended PD CMP until it receives the official letter from CMS. Often, that is well after the time for filing an informal dispute resolution (IDR) has passed. Facilities do have an opportunity to file a federal independent IDR when they receive notice of the federal CMP, but the regulations require that the entire CMP be placed in escrow if the facility seeks to challenge the CMP.<sup>5</sup> Facilities are well advised to consult counsel as soon as possible if they find themselves in such a situation.

The new CMP Guidance also provides additional information about the “add-on” factors that CMS considers. The base amount for a PD CMP ranges from \$50 per day to \$5,050 per day. The base amounts for a per instance CMP ranges from \$1,200 per instance to \$5,500 per instance. Table 1 provides an overview of the range of add-ons which CMS is required to consider as well as total CMP limits.

The CMP Guidance also contains culpability ranges for two categories of culpability. The CMP Guidance provides that a base amount should be added if culpability is a factor. For purposes of the culpability base amount, culpability includes “neglect, indifference, or disregard for resident care, comfort or safety. A facility may be held responsible and culpable for the actions of its management and staff, and *contract staff*.” (Emphasis added.)

The second culpability add-on is called the “failure to act culpability amount.” The analyst is instructed to add an additional amount, up to \$500, *if it can be*

*documented that management officials, e.g., administrator, director of nursing, facility owners, and/or the facility’s governing body knew of problems but failed to act.*” (Emphasis added.) *Id.* at 12.

CMS has stated that it “is not CMS’s intent to impose CMPs that could, in and of themselves, put providers out of business.” Providers can file “compelling evidence of financial hardship,” which CMS “is willing, in the interest of the Medicare and Medicaid programs and their beneficiaries, to consider.” A successful request may result in the reduction of the CMP or in an extended payment plan that usually will not be longer than twelve months. While this may sound promising, the underlying instructions to CMS analysts provide that in determining whether a facility’s financial condition is a factor which would support lowering the CMP amount, the analyst is instructed to select one of only two alternatives. The CMS analyst must document whether the facility’s documentation proves that: (1) “the facility lacks sufficient assets to pay the CMP without having to go out of business,” or (2) “the facility does not lack sufficient assets to pay the CMP without having to go out of business.”

CMS does have some discretion when it imposes CMPs under the rubric of the CMP Guidance. Facilities may still obtain a 35% reduction if they notify CMS in writing of their intent to waive the right to appeal the survey findings within 60 days.

Given the potentially devastating impact of the new CMP enforcement protocols, facilities should reconsider their entire approach to surveys. At a minimum, Directors of Nursing should be more proactive when they receive statements of deficiencies. Citations should be reviewed for factual accuracy, as improperly identified dates or missing documentation that would prove correction of a deficient practice could result in high CMPs. We will be discussing the CMP Guidance at our session at PADONA’s 27<sup>th</sup> Annual Convention on March 24, 2014.

<sup>1</sup>This article does not offer specific legal advice, nor does it create an attorney-client relationship. You should not reach any legal conclusions based on the information contained in this article without first seeking the advice of counsel.

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<sup>3</sup>42 C.F.R. § 488.440 (a)(1).

<sup>4</sup>CMS Survey & Certification Memo, “Civil Money Penalty (CMP) Analytic Tool and Submission of CMP Tool Cases, S&C: 15-16-NH (Dec. 19, 2014).

<sup>5</sup>See, 42 CFR § 488.431(b).

**TABLE 1 - CALCULATING CMPs**

<b>Base CMP</b>	
Per CMP	\$50 - \$5,050
Per Instance	\$1,200 - \$5,500
<b>Add - Ons</b>	
History of Noncompliance	\$100 - \$500
Repeated Deficiencies	\$50 - \$150
Repeated Substandard Quality of Care (SQC)	\$50 - \$2,500
Total SQC Tags	\$0 - \$550
Facility Culpability (Base Amount)	\$100 - \$2,250
Facility Culpability (Failure to Act)	\$1 - \$500
<b>Total CMP Limits</b>	
Immediate Jeopardy (IJ)	≤ \$10,000 per day
Immediate Jeopardy (IJ)	≤ \$10,000 per instance
Non-IJ with no repeat deficiencies	≤ \$3,000 per day
Non-IJ with a repeat deficiency	> \$3,000 per day