

Resources

Nursing Home Compliance Under the COVID-19 Microscope

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Nursing homes have been on the front lines throughout the COVID-19 pandemic as they care for the persons most at risk. In an effort to improve safety and curb the spread of COVID-19, federal and state authorities are relaxing certain compliance obligations. Despite this regulatory latitude, nursing facilities should remain aware that federal and state agencies continue to closely monitor nursing home compliance.

On March 13, 2020, and March 23, 2020, the Centers for Medicare and Medicaid Services (“CMS”) issued guidance memoranda instructing state survey agencies to (1) postpone standard life safety code surveys not associated with immediate jeopardy, and (2) not cite nursing facilities for lack of personal protective equipment in some instances. *Guidance for Infection Control and Prevention of Coronavirus Disease 2019 (COVID-19) in Nursing Homes*, <https://www.cms.gov/files/document/qso-20-14-nh-revised.pdf>, (2020); *Prioritization of Survey Activities*, <https://www.cms.gov/files/document/qso-20-20-allpdf.pdf-0>, (2020). On a state level, Michigan’s Governor Gretchen Whitmer issued Executive Order 2020-30 relaxing health care practitioner scope-of-practice requirements. Mich. Exec. Order No. 2020-30 (March 29, 2020), https://www.michigan.gov/whitmer/0,9309,7-387-90499_90705-523481--,00.html. The collective purpose is to grant these entities the tools to fight COVID-19 by focusing on patient care.

Even though some compliance measures are less stringent, nursing homes are not insulated from CMS and the U.S. Department of Justice (“DOJ”) enforcement action. For example, CMS and state regulators inspected Life Care Center of Kirkland in mid-March—the Washington nursing home accounting for at least 37 COVID-19 deaths. CMS proposed a fine of \$611,000 for a multitude of failures, including failure to notify the state department of health, which contributed to the size of the fine and potential loss of Medicare and Medicaid participation. CMS is emphasizing that even in an environment of relaxed regulations, patient safety remains paramount and any nursing facility shortcomings that jeopardize that safety will not be tolerated.

In addition, nursing homes remain a federal enforcement priority. The DOJ recently announced on March 3, 2020, the National Nursing Home Initiative—an organized taskforce with criminal and civil enforcement capabilities. The DOJ emphasized it will target nursing homes that “consistently fail to provide adequate nursing staff to care for their residents.” *Department of Justice Launches a National Nursing Home Initiative*, (2020), <https://www.justice.gov/opa/pr/department-justice-launches-national-nursing-home-initiative>. Nursing facilities should remain vigilant about their compliance obligations, including those relaxed by federal or state authorities, review any financial arrangements with physicians and other referral sources, and have established procedures to address any whistleblower claims.

While COVID-19 protection must remain a priority overall, nursing facilities must not let their compliance guard down amidst increased federal and state enforcement efforts, especially as these efforts are expected to intensify as the crisis abates.

For more information about the National Nursing Home Initiative, please contact Jonathan Feld (312-627-5680 or jfeld@dykema.com), David Padalino (734-214-7616 or dpadalino@dykema.com), or your Dykema relationship attorney.

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