



COVID-19 Risk Management for SNFs – Survey & Regulatory Enforcement

This Article is Part 2 of 5 in EVOLVE's series on COVID-19 risk management for SNFs. In this Article of the series, we discuss changes in the regulatory environment stemming from COVID-19 and identify steps that your organization should be taking now to prepare for additional survey scrutiny.

SNFs are battling to keep up with regulatory changes due to COVID-19.

The global COVID-19 pandemic has upended SNF operations. Our country, and the world, is learning about COVID-19 and best practices for responding to the disease in real time. This means that SNFs are having to keep up with information coming out on a daily basis from a myriad of sources, including the Centers for Medicare & Medicaid Services (CMS), the Centers for Disease Control and Prevention (CDC), state departments of health, and local governments. Reviewing and responding to this guidance is more than a full-time job for clinical and operational personnel. We recognize the heroic efforts of the teams who are working day, night, and weekends just to keep up with guidance, update policies in response, and disseminate and train staff on the constantly changing protocols.

Although the SNF struggle is real, surveyors are not likely to provide SNFs much room for error.

We have seen a few indications that SNFs will receive some deference in enforcement in recognition of the herculean task they are facing. For example, CMS did say that they would exercise “enforcement discretion” with respect to implementation of their testing rules, presumably recognizing that the resources and availability of testing simply do not match up with the requirements being put in place.

Nonetheless, the majority of evidence points to the more likely scenario being that CMS and surveyors are going to penalize SNFs and make an example of them for mistakes made during the pandemic. Indeed, CMS has touted that it will be taking “aggressive enforcement action” against SNFs as part of its “commitment to safeguarding nursing home residents from the ongoing threat of COVID-19.” In June, CMS announced that it would be increasing civil monetary penalties (CMPs) for facilities with persistent infection control violations, as well as imposing enforcement actions on lower level infection control deficiencies to better incentivize correction. And in August, CMS trumpeted that it had *already* imposed over \$15 million in fines on SNFs for failure to report COVID-19 data and noncompliance with infection control requirements in just the first six months of the pandemic.

In addition, CMS has increased SNF oversight and enforcement efforts during the pandemic through the creation of two new mechanisms related to mandatory electronic reporting to the CDC and infection

ABOUT EVOLVE

Evolve Legal Solutions LLC (EVOLVE) harnesses the power of technology to provide self-service, subscription-based legal solutions to SNFs. Subscribers to EVOLVE have access to manuals, policies and procedures, training modules, protocols, and other tools. EVOLVE has currently suspended charges for its COVID-19 SNF Legal Hub, containing practical resources on COVID-19 legal and risk management issues.

control noncompliance. First, in May, CMS published an interim final rule requiring SNFs to report certain COVID-19-related information electronically directly to the CDC on a weekly basis and to residents, their representatives, and families.¹ In June, recognizing the “unique challenge” that COVID-19 presents for SNFs, CMS introduced enhanced penalties for noncompliance with COVID-19 infection control requirements under F884.² CMS further directed state survey agencies to engage in a number of additional COVID-19 survey activities, including on-site surveys for facilities with COVID-19 outbreaks and annual focused infection control surveys starting in 2021. And CMS has publicly disagreed with industry leaders who have argued that the spread of COVID-19 in SNFs has more to do with community infection rates than quality of care, citing a CDC study linking SNF infection rates with their quality ratings.

Thus, we anticipate that some of the finger-pointing and blame game for the spread of COVID-19 in SNFs is going to bear out in the survey process. SNFs should anticipate increased scrutiny and the potential for significant penalties, particularly if they are unfortunate enough to experience COVID-19 in their buildings. While we recognize that controlling the spread of COVID-19 in a SNF is nearly impossible, to the extent spread does occur and there have been errors or lapses in the policies we note below, surveyors are likely to reason that those errors are the reason for the spread.

Proactive Risk Management Strategies – Survey

All SNFs, and particularly those that experience COVID-19 cases in their building, should be prepared for surveys and for increased penalties in the face of any non-compliance. In order to prepare for this additional scrutiny, we have provided a list of priority survey and regulatory items that SNFs will want to successfully address to attempt to avoid survey deficiencies.³

In addition, you will see that we have underscored throughout this list the importance of documenting the actions taken. We cannot emphasize enough the necessity of maintaining written documentation for risk management, including documentation of any conversations with and any advice or orders received from the local health department. It is *this* documentation that is going to be requested and necessary to support the SNF’s actions. Documentation should be clear, concise, and updated as needed. Consider also that dates may be needed to validate that a policy was appropriate in light of the guidance that existed at a particular point in time.

Focused Survey Tool

- ☐ **Self-assess and document compliance with infection control requirements using available guidance.** Given the changes to the survey process, even greater focus on infection control, and enhanced enforcement penalties for noncompliance, SNFs should pay particular attention to infection control

¹ [QSO 20-29-NH](#) (May 6, 2020). Noncompliance under F885 results in an “F” level deficiency and daily Civil Monetary Penalty (CMP) fine, imposed for each week of noncompliance. The fine starts at \$1,000 and increases by \$500 for each additional week of noncompliance.

² [QSO-20-31-ALL](#) (June 1, 2020). Level 1 and 2 penalties for SNFs with a history of infection control deficiencies are even steeper while penalties are generally increased for any facility receiving deficiencies determined to be at the level of Actual Harm (Level 3) or Immediate Jeopardy (Level 4).

³ Please keep in mind that this list is not exhaustive, but is intended to be a review of key compliance items that may receive intense surveyor scrutiny.

practices in the immediate future. In March, CMS released a new COVID-19 Infection Control Focused Survey Tool (IC Focused Survey Tool) designed to assess a SNF's infection control preparedness using CDC and CMS guidance.⁴ If a SNF has not already done so, it should complete each of the identified IC Focused Survey Tool's self-assessments, potentially under legal privilege, to confirm that it has taken the necessary precautions. Surveyors and/or the local health department may inquire as to whether a SNF has completed each of the identified self-assessments and may request to see the results, so it is essential that this process be documented.

Testing Plan & Policy

- ❑ **Implement and document a COVID-19 testing plan and policy.** Requirements for COVID-19 testing in SNFs have been implemented by state and federal governments. The federal government requires SNFs to test residents and staff for COVID-19 on a routine basis, when a resident or staff member becomes symptomatic, and during an outbreak.⁵ Routine testing schedules vary depending upon the COVID-19 positivity rate in the SNF's county, as determined by CMS. Note also that requirements of individual states vary and may conflict with and/or be difficult to reconcile with the federal requirements.

Surveillance System

- ❑ **Create and document a COVID-19 surveillance system to identify infections and limit spread within the facility.** Obviously, one of the most powerful methods to limit scrutiny is to prevent the spread of COVID-19 in the facility. While all infection control protocols will contribute to stopping spread, SNFs should pay particular attention to implementing an effective screening and tracking system for symptomatic staff, contractors, visitors, and residents. Screening should include actively monitoring for fever and the presence of symptoms in accordance with CDC guidelines and documenting all monitoring. The tracking system should document not just screening, but diagnoses of COVID-19, who has been tested, and whether a resident diagnosed with COVID-19 has died, along with applicable dates. The SNF should also record the individuals, equipment, and locations that a symptomatic staff member came into contact with.

Again, SNFs should anticipate surveyors asking for surveillance documentation and maintain this information in an accessible and easy-to-understand format.

Visitation Plan

- ❑ **Create and document a visitation plan that adheres to applicable guidelines.** Rules on visitation continue to change as regulators attempt to balance the risk of COVID-19 spread against the detrimental effects of isolation on residents' mental health and well-being. As visitation continues to open up, SNFs need to have a visitation plan that facilitates visitation between residents and their families, while also protecting vulnerable residents and staff and complies with state law and CMS requirements for visitation.

⁴ [QSO-20-20-ALL](#) – March 23, 2020. The IC Focused Survey Tool was subsequently updated on May 8, 2020 in [QSO-20-29-NH](#) (May 6, 2020).

⁵ [QSO-20-38-NH](#) (August 26, 2020).

SNFs should establish protocols to communicate visitation procedures to families, schedule visits, and consistently document that visitors have been appropriately screened for COVID-19 symptoms, educated on infection control, and acknowledged the rules applicable to their visits. In addition, SNFs may want to obtain contact information for visitors, something not common before the pandemic, as the information could be helpful to share with health departments for contact tracing purposes.⁶

PPE

- **Implement and document appropriate PPE protocols and stockpiles.** SNFs should follow current CDC guidance regarding PPE (gloves, gowns, facemasks, and N95 respirators) and implement appropriate policies and procedures, routinely check the CDC website for updates, and have a system for communicating appropriate PPE use to clinical staff. Also, whenever possible, request that residents wear facemasks when in close contact with staff members, in common areas, and when they enter or leave the facility.

Consider performing observational audits of staff using PPE to ensure that the current guidelines are understood by caregivers and are being followed.

SNFs need to have an N95 fit-testing program so that staff are safely using N95 respirators in instances that require the use of a respirator or are able to do so when they are available.

Finally, SNFs are expected to take actions to mitigate PPE shortages and show that they are taking all appropriate steps to obtain the necessary PPE. If you are facing a shortage, or anticipate a shortage, be sure to document proactive steps taken, such as communicating with your local health department or contacting suppliers other than your primary vendor(s).

Cohorting & Isolating Residents

- **Create and document plans for cohorting and isolating residents.** SNFs should have, and implement, a plan for cohorting and isolating residents with COVID-19 in a dedicated space with dedicated staff. SNFs must also have, and implement, a plan for separately cohorting and isolating potentially exposed residents, such as new admissions and readmissions from the hospital or community and residents who may have been exposed by infected staff members or other residents in a dedicated space with dedicated staff.⁷ A SNF that is not able to separately cohort COVID-19 positive residents and potentially exposed residents should contact the local health department for assistance and guidance on how to safely cohort the residents or consider transfer.

Contingency Staffing

- **Create and document an effective plan for contingency staffing.** SNFs must have, and implement when necessary, a staffing policy that ensures the facility can meet the needs of residents during an emergency. Facilities must expect potentially serious staffing shortages if they experience an

⁶ One option for SNFs to consider to assist with visitation is [eConfirm](#), which enables self-schedule for visitors using an online platform, as well as electronic screening and acknowledgement of COVID-19 protocols.

⁷ *Note:* These two groups should not be cohorted together.

outbreak. Those without effective contingency plans risk multiple potentially serious survey deficiencies for staffing, quality of care, and administration.

Equipment Sharing & Sanitization

- ❑ **Audit and document equipment sharing and sanitization.** SNFs should designate shared equipment to either individual residents or to specific cohorted wings or units, and clean and disinfect appropriately according to the equipment and disinfectant manufacturers' instructions, using an EPA-registered hospital-grade disinfectant.⁸ Consider performing observational auditing to ensure that equipment is not being improperly shared and that shared equipment is being sanitized between uses.

Social Distancing

- ❑ **Practice social distancing and limit activities in accordance with guidance.** Residents and staff should be practicing at least six foot social distancing, to the extent possible. This includes staff in break rooms. Resident group activities, communal dining, and resident outings should be implemented in accordance with applicable federal and state guidelines and orders, when permitted, including the use of masks and social distancing for residents.

Notifications

- ❑ **Notify residents and family members of COVID-19 cases.** SNFs are obligated by both new federal and state requirements to notify residents and their family members when there are COVID-19 cases in the facility. In addition to satisfying mandatory reporting requirements, maintaining open lines of communication with residents and families should help SNFs to avoid resident and family complaints to their state agency.

Remember to maintain a copy of this correspondence for surveyors.

Reports

- ❑ **Report COVID-19 data in accordance with applicable requirements.** There are special SNF COVID-19 reporting requirements for local, state, and federal agencies. To avoid survey deficiencies, SNFs will need to follow any state-specific rules for reporting COVID-19 data and comply with federal regulations requiring COVID-related information be reported electronically to the CDC on a weekly basis.

SNFs should note that there has been considerable confusion since federal reporting became mandatory in early June. We have seen many citations for noncompliance under federal regulatory tag F884 issued to SNFs that believed they were in compliance and others that made good faith efforts to comply but were unable to access the CDC-NHSN reporting system. If you receive a survey deficiency under F884 and believe that you were in compliance, consider working with legal counsel to challenge it using the IIDR process described in the letter accompanying the Statement of Deficiencies.

⁸ [QSO-20-28-NH](#) (April 24, 2020) (Q&A #19).

Education

- **Increase education and document education and related staff communications.** Staff must be educated, and re-educated, on COVID-19 and the importance of understanding and adhering to all infection prevention requirements, especially the correct use of and donning/doffing PPE. Staff need timely updates when CMS or CDC revises guidance. Maintain records of trainings, attendance, and competency evaluation documentation to verify training activities during survey.

Don't forget that residents should also be educated about infection prevention techniques such as hand hygiene, wearing a facemask when outside of their room, and activity/dining/visitor restrictions. This education should also be clearly and consistently documented.

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