



CMS's COVID-19 Long-Term Care Facility Guidance is an Invaluable Tool for Resident Care and Risk Mitigation

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The COVID-19 pandemic has placed long-term care facilities at the forefront of an unprecedented battle to maintain heightened infection control standards while also managing limited resources. To help facilities manage these challenges, the Centers for Medicare & Medicaid Services (CMS) published [comprehensive guidance](#) on infection control procedures, personal protective equipment (PPE), symptom screening and facility staffing.^[i] In addition, to helping facilities prioritize their daily operations, these guidelines provide valuable insight into potential government enforcement initiatives and future sources of civil litigation.

Summary of April 2, 2020 COVID-19 Long-Term Care Facility Guidance

CMS's latest guidance emphasizes the importance of complying with both CMS and CDC infection control protocols.^[ii] Specifically, providers are instructed to follow the CDC's guidance on hand hygiene, conservation of PPE and infection control in long-term care facilities.^[iii] Providers are also directed to utilize CMS's recently developed COVID-19 Focused Survey for Nursing Homes as a self-assessment tool.^[iv]

Next, long-term care facilities are directed to immediately implement symptom screening for all residents, staff and visitors. Residents must be assessed for symptoms and have their temperatures taken every day. In addition, every person that enters a facility should be asked about COVID-19 symptoms, and they must also have their temperature checked. The only exception to the screening requirement is when an Emergency Medical Service (EMS) worker is responding to an urgent medical need. To facilitate 100% screening, access points should be limited, and all entrances should have a screening station. If available, CMS also requires that patients and residents who enter facilities be screened for COVID-19 through testing. CMS requests that facilities and local health departments work together to help address any shortages in PPE or COVID-19 tests that may arise.

Importantly, all long-term care facility residents, whether they have COVID-19 symptoms or not, are advised to cover their noses and mouths with a tissue when staff are in their room. Cloth and other non-medical masks may be used if tissues are unavailable; however, residents should not use medical facemasks unless they are COVID-19-positive or assumed to be COVID-19-positive. Full PPE should be worn, in accordance with CDC guidelines, when caring for any resident with known or suspected COVID-19. In addition, if a COVID-19 transmission occurs in the facility, CMS directs all health care personnel to wear full PPE for the care of all residents irrespective of COVID-19 diagnosis or symptoms. Because PPE availability varies greatly among facilities and localities, providers are to coordinate with

state and local health departments regarding available resources and precautions to take if sufficient PPE is not available. Providers need to maintain a detailed record of their interactions with state and local agencies, including any recommendations they may receive from an agency regarding insufficient or substitute PPE.

Lastly, CMS advises facilities to use separate staffing teams for COVID-19-positive residents and to work with state and local leaders to designate separate facilities or units to keep COVID-19-positive residents separate from other residents. Facilities are instructed to keep residents and their families informed of the above limitations, as well as any requirements and procedures for placement in alternative facilities.

Implications for Government Enforcement Actions and Civil Lawsuits

Facilities should always prioritize the health and safety of their residents and employees; however, careful review and implementation of the above guidance will pay dividends in subsequent government enforcement actions and civil lawsuits. The Life Care Center of Kirkland, a Seattle-based nursing home that has lost more than 40 of its residents to coronavirus and faces civil money penalties (CMPs) in excess of \$611,000, has emerged as a prominent cautionary tale for long-term care providers. The CMPs were levied by CMS in response to a finding of Immediate Jeopardy during a complaint [survey](#) conducted at the facility on March 16, 2020.^[v] Unfortunately, the CMPs are only the beginning for the Life Care Center of Kirkland; families of deceased residents have already started filing [wrongful death lawsuits](#) against the facility.

The legal struggles at Kirkland demonstrate how a comprehensive compliance plan is essential to protect providers from liability on multiple fronts. Devoting appropriate resources to mitigation can limit exposure from state and federal agencies, such as CMS, HHS-OIG, the Department of Justice, the Federal Bureau of Investigation and local Medicaid Fraud Control Units (MFCU)^[vi] These same compliance strategies will help insulate providers from private actors pursuing civil claims, seeking millions of dollars in compensation for allegedly deficient care and wrongful death. Taking proactive steps before an outbreak and developing a plan to respond to an outbreak when it occurs could ultimately determine which facilities are able to recover and which facilities face criminal and civil penalties.

Once an outbreak has occurred, facilities can further mitigate risk by conducting a thorough internal investigation to determine when the outbreak occurred and to evaluate the reasonableness of the facility's response. Conducting an internal investigation and presenting the findings to regulators or law enforcement are essential to establishing credibility and building rapport with state and federal agencies.

Conclusion

Adhering closely to these guidelines will not only help facilities provide better care to their residents but will also help reduce exposure in subsequent government enforcement actions and civil lawsuits. It is apparent that nursing homes are going to be defending the decisions that they are making today for years to come in both government and private legal proceedings. Carefully managing resources, monitoring CMS and CDC guidance, updating compliance plans regularly and conducting thorough internal investigations have never been more critical.

State and federal agencies are expected to continually update and revise relevant guidance documents. Health care providers are encouraged to monitor the CDC, CMS and state agency websites for the most current requirements and to carefully evaluate compliance.

[i] Department of Health & Human Services, Centers for Medicare & Medicaid Services, *COVID-19 Long-Term Care Facility Guidance*, April 2, 2020, available at: <https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf>; see also Department of Health & Human Services, Centers for Medicare and Medicaid Services, Center for Clinical Standards and Quality/Quality, Safety & Oversight Group, Memorandum: QSO-10-14-NH, March 13, 2020, available at: <https://www.cms.gov/files/document/3-13-2020-nursing-home-guidance-covid-19.pdf>.

[ii] Department of Health & Human Services, Centers for Medicare & Medicaid Services, *COVID-19 Long-Term Care Facility Guidance*, April 2, 2020, available at: <https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf>.

[iii] Department of Health & Human Services, Centers for Medicare & Medicaid Services, *COVID-19 Long-Term Care Facility Guidance*, April 2, 2020, available at: <https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf>; Centers for Disease Control and Prevention, Hand Hygiene in Healthcare Settings, available at: <https://www.cdc.gov/handhygiene/providers/guideline.html>; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), Preparing for COVID-19: Long-term Care Facilities, Nursing Homes, available at: https://www.cdc.gov/coronavirus/2019-ncov/hcp/long-term-care.html?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fhealthcare-facilities%2Fprevent-spread-in-long-term-care-facilities.html; Centers for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19) Preparedness Checklist for Nursing Homes and other Long-Term Care Settings, available at: https://www.cdc.gov/coronavirus/2019-ncov/downloads/novel-coronavirus-2019-Nursing-Homes-Preparedness-Checklist_3_13.pdf.

[iv] Department of Health & Human Services, Centers for Medicare & Medicaid Services, *COVID-19 Long-Term Care Facility Guidance*, April 2, 2020, available at: <https://www.cms.gov/files/document/4220-covid-19-long-term-care-facility-guidance.pdf>; Department of Health and Human Services, Centers for Medicare and Medicaid Services, Center for Clinical Standards and Quality/Quality, Safety & Oversight Group, Memorandum: QSO-20-20-All, March 23, 2020, available at: <https://www.cms.gov/files/document/qso-20-20-all.pdf>.

[v] Centers for Medicare & Medicaid Services, Notice to Involuntarily Terminate Medicare Provider Agreement for Life Care Center of Kirkland, dated April 1, 2020, available at: <https://www.documentcloud.org/documents/6824370-CMS-Final-LCC-of-Kirkland-Extention-of-23-to-180.html>

[vi] The Department of Justice also recently announced its [National Nursing Home Initiative](#). The announcement does signal what will likely be the use of existing relationships and the DOJ's Elder Justice Initiative to investigate and pursue enhanced civil and criminal penalties across the country.

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