

PUBLICATION

Final Regulations Governing Closure of Long Term Care Facilities [Ober|Kaler]

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The federal Centers for Medicare and Medicaid Services (CMS) published a final regulation to further implement section 6113 of the federal health reform law, the Patient Protection and Affordable Care Act. The March 19, 2013, final rule updates CMS's interim, final regulation published on February 18, 2011. Section 6113 is unusual, in that the law imposes a personal obligation on the administrator of a Medicare skilled nursing facility or Medicaid nursing facility (collectively Long Term Care facility or LTC facility) to provide 60 days' advance notice of a closure of the LTC facility, as well as to have a closure plan. The only exception is if the Secretary of the U.S. Department of Health and Human Services identifies an earlier termination date.

The federal Requirements of Participation for Long Term Care Facilities (the Requirements) historically have included provisions concerning the discharge or transfer of residents, such as when the facility ceases to operate. However, the 30-day notice that is typically given is "trumped" by the 60-day-notice requirement in the instance of a facility closure. Interestingly, CMS identified that in the 12 years between 1999 and 2011, the number of LTC facilities in the nation declined by more than 10 percent, from 17,508 to 15,720. In 2010, 141 LTC facilities closed and in 2011 90 LTC facilities closed.

CMS provided various clarifying statements, including:

- Stricter or longer notice requirements imposed by state law are not superseded by this federal notice. While one notice might be given the stricter time frame would apply.
- The final regulation requires that notice be given to the Secretary of HHS, the state survey agency, the state long term care ombudsman, facility residents and their legal representatives or responsible parties.
- Clinicians need to be involved and made aware through the documentation process, although they are not identified in the regulation's "notice" provision.
- Closure means an LTC facility ceases to operate under section 483.12(a)(2)(vi) of the Requirements so that it is no longer providing care and services to residents. This does not include an emergency situation where the residents will return to the facility, such as in the case of a temporary transfer ordered by the state agency due to a failure of air conditioning in a heat wave.
- The facility's closure plan must be approved by the State, and include assurances of transfer to the most appropriate facility or setting in terms of quality, services and location and taking into consideration needs, choice and best interests of residents. (Some states require each LTC facility to have, prepared and ready, a closure plan even if there is no anticipated closure at hand.) The relocation plan is not required to be shared with residents. More detail on the elements of a required plan, such as how staff will be retained and paid during closure, will be forthcoming. The notice to residents and others must comply with the requirements in the regulation as adopted in 2011.
- Other facilities are not mandated to accept residents from a closing facility. The closing facility facilitates the selection process for departing residents.

CMS confirmed that the particular sanctions under this provision apply to the administrator, although a survey deficiency against the facility could result as well, such as due to a governing body's failure to ensure compliance.

In the event an owner of a facility fails to provide sufficient notice of the closure to the administrator to ensure timely compliance, the administrator must provide the notice as soon the administrator becomes aware of the closure. This can include an administrator who is brought into the closure process after it has commenced without prior, timely notice under this regulation by the former administrator. A sanctioned administrator has appeal rights under this regulation. Also, CMS included language indicating that, while harm to others, such as family members and visitors should be avoided, CMS did not intend to establish a “standard of care” by administrators to third parties.

The final regulation maintains a process to ensure continued payment to LTC facilities until residents are transferred in accordance with an approved plan.