



Center for Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 17-37-NH

DATE: July 07, 2017

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Revision of Civil Money Penalty (CMP) Policies and CMP Analytic Tool

Memorandum Summary

- **Revisions to CMP Tool:** When noncompliance exists, enforcement remedies, such as civil money penalties (CMPs), are intended to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance. To increase national consistency in imposing CMPs, the Centers for Medicare & Medicaid Services (CMS) is revising the CMP analytic tool in the following areas which are further explained within this policy memorandum:
 - Past Noncompliance;
 - Per Instance CMP is the Default for Noncompliance Existed Before the Survey;
 - Per Day CMP is the Default for Noncompliance Existing During the Survey and Beyond;
 - Revisit Timing; and
 - Review of High CMPs.
- **This policy memo replaces S&C Memo 16-15-NH:** The prior versions of the CMP Tool are obsolete, as of the effective date of this memo, July 17, 2017.

Background

The Omnibus Budget Reconciliation Act of 1987 (OBRA '87) modernized the survey process for long term care facilities and provided a range of remedies that CMS could impose to encourage a swift return to substantial compliance and sustained compliance going forward, thus preventing harm to residents. Among the remedies authorized by OBRA '87 are civil money penalties (CMPs). CMS imposes two types of CMPs: Per Day and Per Instance. Per Day CMPs are divided into lower and upper level ranges. The upper level range CMPs must be used when facility noncompliance puts resident health and safety in immediate jeopardy. Lower level CMPs must be used for facility noncompliance that results in actual harm to residents or poses the potential for more than minimal harm to residents.

More information on CMP amounts and ranges can be found in 42 CFR 488.408, and on the CMS website at <https://www.cms.gov/Medicare/Provider-Enrollment-and-Certification/SurveyCertificationGenInfo/Civil-Monetary-Penalties-Annual-Adjustments.html>.

When selecting an enforcement remedy, CMS Regional Offices (ROs) review the survey findings to determine which remedy is most appropriate to address the noncompliance. The statute and regulations (488.406) outline a variety of federal remedies (CMP, directed plan of correction, directed in-service training, etc). We encourage use of the remedy that will best achieve swift and sustained compliance with federal health and safety requirements. If the RO determines that imposition of a CMP will best achieve the goal, the ROs use an analytic tool to calculate the amount imposed based on the type of noncompliance. Notwithstanding the type of noncompliance, CMP amounts can vary based on factors such as the date of the noncompliance and the timing of the revisit survey to certify compliance. To reduce this variation, CMS is making several changes to the CMP analytic tool.

Revised CMP Policies and Analytic Tool

The revised CMP Analytic Tool instructs ROs how to use Per Day and Per Instance CMPs depending on the timing of the noncompliance in relation to the survey, whether residents were harmed or abused, whether the facility has a good compliance history, and whether the noncompliance was an isolated event or persistent deficient practices were identified.

When noncompliance exists, enforcement remedies, such as civil money penalties (CMPs), are intended to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance. To increase national consistency in imposing CMPs, CMS is revising the CMP analytic tool in the following manner:

- **Past Noncompliance:** ROs will impose a per-instance CMP for past noncompliance – something occurred before the current survey, but has been fully addressed and the facility is back in compliance with that area.
- **Per Instance CMP is the Default for Noncompliance that Existed before the Survey:** CMS ROs will generally impose a Per Instance CMP retroactively for non-compliance that still exists at the time of the survey, but began earlier. However, a Per Day will be used to address noncompliance that occurred where: (1) a resident suffers actual serious harm at the immediate jeopardy level; (2) a resident was abused; (3) or the facility had persistent deficient practices violating federal regulations.
- **Per Day CMP is the Default for Noncompliance Existing during the Survey and Beyond:** In contrast, Per Day CMPs will be the default CMPs for noncompliance identified during the survey and beyond, because there is an urgent need to promote a swift return to substantial compliance for a sustained period of time, preventing future noncompliance. Exceptions allowing Per Instance CMPs will be made for facilities with good compliance histories, and where a single isolated incident causes harm to a resident, unless abuse has been cited.

- **Revisit Timing:** CMS ROs should consider the timing of the revisit survey to certify compliance when imposing the final CMP amount. CMS has added language specifying this consideration.
- **Review of High CMPs:** CMS Central Office will Review CMPs of \$250,000 or greater.

Contact: For questions or concerns, please contact DNH.TriageTeam@cms.hhs.gov.

Effective Date: July 17, 2017 for all enforcement cases where the CMS RO determines that a CMP is an appropriate enforcement remedy. This guidance should be communicated to all RO and State Survey Agency survey, certification and enforcement staff, their managers and the State/RO training coordinators.

/s/

David R. Wright

Attachment- CMP Analytic Tool User's Guide Version 1.3

cc: Survey and Certification Regional Office Management
State Medicaid Agency