Center for Medicare and Medicaid Services Proposes Delay of Implementation of New Home Health Agency Rules

By Lee Levin, Counsel

On January 13, 2017, the Center for Medicare and Medicaid Services (CMS) issued a final rule relating to a series of changes for conditions to participation in Medicare and Medicaid by home health agencies (HHAs). At the time of issuance in January 2017, the final rule indicated that it would become effective July 13, 2017. However, CMS recently issued a new revision to the rule, which features a delay in implementation until January 13, 2018.

There has been speculation that the Trump administration would issue an executive order seeking to delay the implementation of this rule, as it has done with respect to other rules regarding overtime pay and the fiduciary responsibilities of financial advisors. However, CMS's revisions to the rule, if not ending the Trump administration's potential action in this area, have at least reduced the pressure on the Trump administration to act quickly in regards to this rule.

Key features of the rule include adopting patient's rights provisions relating to a required notice of rights, exercise of rights, transfer and discharge, accessibility, and also setting forth specific rights of the patient and a procedure to initiate the investigation of complaints.

The rule can be summarized as follows:

- **With respect to the notice of rights**, CMS will be requiring, through this new rule, that the mandated disclosures be provided to the patient and the patient's representative verbally, and also in writing. The written information must be provided in an alternative form, at no charge to patients with disabilities, so that the disabled person can understand the information provided. In addition, written notice must be understandable to patients with limited proficiency in English.

- **With regard to the exercise of rights**, CMS wants to provide the representative of an incompetent patient with the ability to exercise the rights of the patient in accordance with the patient's preference. In situations where the patient had been adjudged to lack legal capacity under State law by a court of proper jurisdiction, the patient will be able to exercise those rights to the extent allowed by the court order.

- **As to accessibility**, the root of the rule relates to requiring that the information provided to patients is set forth in plain language and in a manner that is both accessible and timely, which dovetails into their description of the rule regarding notice of rights.

- **With regard to transfer and discharge**, CMS added a new standard that would mandate all patients and representatives have the right to be informed of the HHA's policies governing admission, transfer, and discharge. Under this proposed standard, the HHA could only transfer, discharge. or terminate care for the following reasons: (i) if the physician responsible for the HHA plan of care and HHA agreed that the HHA could no longer meet patients' needs, based on the patient's acuity; (ii) when a patient or payer could no longer pay for the services provided by the HHA; (iii) if the physician responsible for the HHA plan of care and HHA agreed that the patient no longer needed the HHA

services due to the improvement and/or stabilization of the patient's health and safety; (iv) when the patient refuses HHA services or otherwise elects to be transferred or discharged; (v) when there is cause; (vi) when the patient dies; or (vii) when the HHA ceases to operate. In the event a patient's needs exceeds the ability of HHA to provide services, this rule would require the HHA to ensure that the patient receives a safe and appropriate transfer to another facility better suited to meeting the patient's needs. In addition, the reference to discharging a patient "for cause" would include the patient's (or other persons in the patient's home) behavior becoming so disruptive, abusive, or uncooperative that the delivery of care to the patient and the ability of HHA to operate safely and effectively becomes seriously impaired. However, before discharging a patient for cause, the HHA would be required to first attempt to work with the patient or their representative, the physician who was responsible for the home health plan of care, and the patient's primary care practitioner or other health care professional who would be responsible for providing care after discharge to make efforts to resolve the problems presented, document the problems and the efforts made to resolve the problems, and enter this documentation into the clinical records.

- **With respect to the rules regarding investigation of complaints**, CMS would require that the HHA investigate complaints made by patients, representatives, caregivers, and families regarding treatment or care that was (alleged failed to be closed) furnished, or was furnished inconsistently or inappropriately, which would include, but not be limited to, investigation of allegations in mistreatment, neglect, verbal, mental, psychosocial, sexual, and/or physical abuse. This includes injuries of an unknown source and/or misappropriation of patient property by anyone furnishing services on behalf of the HHA. Additionally, the new rule would require the HHA to take immediate action to prevent further abuse while the complaint was being investigated.

If you have any questions about this topic, please contact one of the listed Roetzel attorneys.

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