IADC COMMITTEE NEWSLETTER

MEDICAL DEFENSE AND HEALTH LAW

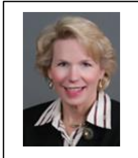
NOVEMBER 2017

IN THIS ISSUE

CMS' Final Rule for Emergency Preparedness, which affects all Medicare and Medicaid providers and suppliers, must be implemented by November 15, 2017.

The CMS Final Rule for Emergency Preparedness Implementation Deadline is Here: Is Your Facility Prepared?

ABOUT THE AUTHORS



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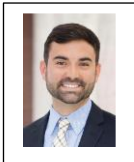

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ABOUT THE COMMITTEE

The Medical Defense and Health Law Committee serves all members who represent physicians, hospitals and other healthcare providers and entities in medical malpractice actions. The Committee recently added a subcommittee for nursing home defense. Committee members publish monthly newsletters and *Journal* articles and present educational seminars for the IADC membership at large. Members also regularly present committee meeting seminars on matters of current interest, which includes open discussion and input from members at the meeting. Committee members share and exchange information regarding experts, new plaintiff theories, discovery issues and strategy at meetings and via newsletters and e-mail. Learn more about the Committee at www.iadclaw.org. To contribute a newsletter article contact:

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Case Summary:

In response to recent natural and man-made disasters, CMS issued a Final Rule for Emergency Preparedness. As a Condition of Participation and/or Condition for Coverage, the Final Rule requires all seventeen facility types to ensure full compliance by November 15, 2017 to maintain participation in and reimbursement from the Medicare and Medicaid programs.

In response to recent catastrophic flooding, active-shooters, and other scenarios of catastrophe, the Centers for Medicare and Medicaid Services (CMS) published a Final Rule to help providers and suppliers plan for natural and man-made disasters. Those regulations became effective on November 15, 2016 and must be implemented by November 15, 2017. The Final Rule establishes emergency preparedness standards for all seventeen types of Medicare and/or Medicaid providers and suppliers, including hospitals, long-term care facilities, and critical access hospitals. Compliance with the Final Rule is a Condition of Participation (CoP) and/or Condition for Coverage (CfC)—providers and suppliers must comply for continued participation in the Medicare and Medicaid programs.

In the Final Rule, CMS identified four core elements central to an effective and comprehensive emergency preparedness framework: (1) risk assessment and emergency planning; (2) creation of necessary policies and procedures; (3) implementation of an effective communication plan to coordinate patient care; and (4) conducting emergency preparedness training and testing. Maintaining compliance with the core elements best enables facilities to provide quality healthcare services during catastrophic events and mitigates the risks associated with those emergencies.

Risk Assessment and Emergency Planning

First, the Final Rule requires facilities to perform a risk assessment using an "all-hazards" approach prior to establishing an emergency plan. The all hazards approach is specific to the facility's location and considers the types of hazards most likely to occur. These risks may include equipment and power failures, interruptions in communications, including cyber-attacks, and interruptions in the normal supply of essentials, such as food and water. The assessment also requires facilities to consider which business functions are essential and must be continued during an emergency. Similarly, facilities must assess whether arrangements with other providers are necessary to ensure patients receive continuity of care during emergencies.

Upon completing the risk assessment, the Final Rule requires facilities to develop an emergency plan. The plan must include strategies to address events identified in the risk assessment. For example, plans for evacuating and sheltering in place during various emergencies should be included. Additionally, the plan must provide a communication process for cooperation and collaboration with local, tribal, regional, state and/or federal providers to ensure continuity of patient care and an integrated response to emergencies. Notably, the Final

Rule allows a provider that is part of a healthcare system consisting of multiple, separately certified facilities to have one unified and integrated emergency preparedness program. However, each facility must conduct its own risk assessment and be able to independently demonstrate how it complies with the Final Rule.

Policies and Procedures

Next, the Final Rule requires facilities to implement policies and procedures supporting the successful execution of the emergency plan and risks identified during the assessment process. The policies and procedures must address a range of issues including alternate energy sources, sewage and waste disposal, tracking of patients and staff, HIPAA-compliant preservation and sharing of medical documentation, use of volunteers, and arrangements with other providers to transfer and receive patients. The Final Rule requires facilities to review these policies and procedures at least annually. As discussed below, not all facilities are required to address the same contingencies in their respective policies and procedures.

Communication Plan

Third, facilities must develop an emergency preparedness communication plan to coordinate patient care and safety within the facility, across healthcare providers, and with state and local health departments and emergency management agencies in the event of a disaster. The plan must include the names and contact information for facility staff, other facilities, volunteers, and relevant public officials and agencies. The communication plan must provide for a HIPAA-compliant method for sharing patient information and medical documentation between facilities. If the facility provides continuous care for patients, it must be capable of generating timely, accurate information, including information about a patient's general condition and location, which can be disseminated to family and other necessary individuals.

Training and Testing Program

Last, the Final Rule requires facilities to develop and maintain an emergency preparedness training and testing program. A well-organized, effective training program must include initial training for new and existing staff members in the facility's emergency preparedness policies and procedures as well as annual refresher trainings. The facility must also conduct drills and exercises to test the emergency plan and identify areas for improvement. Specifically, providers must conduct two testing exercises annually—one community based full-scale exercise and one additional exercise of their choice. The full-scale exercise requires a facility to create an individualized emergency scenario to assess its emergency plan and engage providers to promote a more coordinated response, while the additional exercise affords facilities flexibility to determine the testing most beneficial to their specific needs.

Specific Requirements Vary by Facility Type

The Final Rule primarily reflects the hospital CoPs for emergency preparedness, but there are substantial variations between facility types. For example, while hospitals are

required to have policies and procedures for the provision of subsistence needs, outpatient providers are not. Similarly, some facilities are only required to have policies and procedures to ensure subsistence needs and back-up temperature controls, whereas hospitals, critical access hospitals, and long-term care facilities must also have policies and procedures concerning the maintenance of emergency and stand-by power systems. Thus, it is critical that providers and suppliers look at the specific requirements listed under their facility type to ensure compliance.

Non-compliance will continue to be assessed by surveyors, and the same general process of enforcement will occur as when other CoPs and CfCs are found to be non-compliant. Here, both CMS and its Survey and Certification Group (SCG) have developed interpretative guidelines and other resources to assist facilities in implementing the Final Rule.

Conclusion

The Final Rule for Emergency Preparedness requires all seventeen types of Medicare and Medicaid providers and suppliers to implement the necessary requirements by November 15, 2017. The Final Rule creates a framework, requiring facilities to conduct a risk assessment, implement an emergency plan, adopt policies and procedures, create a communication plan, and conduct training and testing. As a CoP and/or CfC, the Final Rule requires compliance for continued participation in Medicare and Medicaid. Because the requirements vary by facility type, providers and suppliers must consult the correct section of the Final Rule to ensure full compliance.

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