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CMS announces new transparency rules for nursing facilities with coronavirus (COVID-19) cases

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On April 19, 2020, the Centers for Medicare & Medicaid Services (CMS) [announced](#) its plan to issue new rules requiring nursing homes and other long-term care facilities (LTCFs) to report COVID-19 cases to the Centers for Disease Control and Prevention (CDC). These new regulatory requirements will also obligate LTCFs to inform residents and their families or representatives of COVID-19 cases in their facilities. CMS warns that failure to adhere to these new requirements may lead to enforcement action by the agency.

CMS' upcoming requirements for COVID-19 reporting

Current regulations require LTCFs to adopt and maintain an infection prevention and control program to help limit the transmission of communicable diseases and infections within their facilities.¹ This program must include a system of surveillance to identify possible communicable diseases or infections before they can spread to others in the facility, and identify when and to whom possible incidents of communicable disease or infection should be reported.²

As noted in CMS' announcement, existing regulations and guidance require nursing facilities to notify state or local health departments about residents or staff with suspected or confirmed COVID-19, residents with severe respiratory infections resulting in hospitalization or death, or three or more residents or staff members with new onset of respiratory symptoms within 72 hours of each other. CMS' new rule will expand LTCFs' reporting obligations by requiring them to disclose this information to CDC's National Health Safety Network. CDC will provide a reporting tool to nursing facilities to support federal efforts to collect data for the surveillance of COVID-19, monitor trends in infection rates, and inform public health policies. CMS has [stated](#) that it intends to make this data publicly available.

Under the new rules, LTCFs will also need to inform residents and their representatives about conditions in their facilities. Nursing facilities will have to notify residents and representatives

¹ 42 C.F.R. § 483.80.

² 42 C.F.R. § 483.80(a)(2).

within 12 hours of the occurrence of a single confirmed case of COVID-19, or if three or more residents or staff have a new onset of respiratory symptoms within 72 hours. The information that LTCFs report must include any mitigating actions the LTCF has taken to prevent or reduce the risk of transmission, including if normal operations within the facility will be altered.

CMS' announcement comes at a time when federal and state officials are seeking greater public transparency about nursing homes with confirmed COVID-19 cases. Earlier this month, U.S. Senators Bob Casey and Ron Wyden [wrote](#) to the heads of CMS and CDC urging them to release a list of facilities known to have had one or more cases of COVID-19, and requesting information on what CMS and CDC are doing to keep nursing home residents and their families informed.

CMS' new rules will not just add to LTCFs' existing reporting obligations at a time when resources are already stretched to the limit, but could also expose nursing facilities to heightened scrutiny from the government. Under CMS' proposed rulemaking, a failure to report instances of COVID-19 or other communicable diseases or infections among residents or staff, or to notify residents and family members of that information in a timely fashion, could lead to an enforcement action against the nursing facility by CMS.

At the same time, enforcement agencies could potentially use the reported information that CMS makes public under the new rule to identify facilities that appear to have a disproportionate number of coronavirus cases and to investigate whether those facilities failed to take appropriate steps in responding to suspected or confirmed infections. Further, this information will likely result in media reports about LTCFs with seemingly high numbers of COVID-19 cases, which could also lead to government scrutiny of those facilities. Indeed, within days of the California Department of Public Health posting a partial list of skilled nursing facilities in the state with at least one COVID-19 case, a flurry of news reports followed identifying specific facilities with high numbers of infections.³

As we discussed in an earlier [client alert](#), LTCFs are likely to face increased government enforcement activity in the wake of the COVID-19 crisis. To protect patients, contain the spread of the virus, and mitigate the risk of future government investigations, LTCFs should closely monitor the ongoing guidance from CMS, CDC, and state and local health officials; maintain robust infection prevention and control programs; and use the tools that CMS, CDC, and industry associations have developed for addressing key risk areas. As part of that effort, LTCFs should keep contemporaneous documentation of the steps they are taking to limit the transmission of COVID-19 and protect the health and safety of their patients and employees. This should include documentation of efforts made to obtain items in short supply, such as PPE and testing supplies.

We will continue to monitor events surrounding the COVID-19 crisis and will provide updated information, including an overview of the rules that CMS ultimately issues on the reporting of COVID-19 cases to CDC and nursing home residents, as it becomes available.

³ See [Hundreds of nursing homes with positive COVID-19 cases on list published by California health department](#). Sciacca, A. and Peele, T. (Apr. 18, 2020). *The Mercury News*; [State health officials release list of COVID-19 cases in nursing homes](#). Linder, M. (Apr. 18, 2020). *NBC Bay Area*; [California names nursing homes with COVID-19 infections and over half are in LA County](#). Powell, A. (Apr. 20, 2020). *KABC-TV*.

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