



CMS announces Interim Final Rule for nursing home COVID-19 reporting

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On April 30, 2020, the Centers for Medicare & Medicaid Services (CMS) pre-published an [Interim Final Rule](#) (IFR) requiring nursing homes and other long-term care facilities (LTCFs) to report COVID-19 cases to the Centers for Disease Control and Prevention (CDC). As we [reported](#) earlier, CMS announced its intention to issue this rule on April 19, 2020. Given the urgency of the COVID-19 crisis, CMS is waiving the normal notice-and-comment period. The IFR will become immediately effective upon publication in the *Federal Register*, which is expected on Friday, May 8, 2020.

Existing federal regulations require LTCFs to establish and maintain an infection prevention and control program designed to provide a safe and healthy environment for residents, staff, and guests, and to help prevent the development and transmission of communicable diseases and infections.¹ This program must include written standards, policies, and procedures, including a system of surveillance to identify possible communicable diseases or infections before they can spread to others in the facility, and when and to whom possible incidents of communicable disease or infection should be reported.² To support the surveillance of COVID-19 cases, CMS is revising its rules to establish several new reporting requirements at 42 C.F.R. § 483.80(g) for confirmed or suspected cases.

The new provisions of the IFR

42 C.F.R. § 483.80(g)(1)

Under the new § 483.80(g)(1), LTCFs must electronically report information about COVID-19 in a standardized format, which will help monitor trends in infection rates and inform public health policies. This report must include:

- Suspected and confirmed COVID-19 infections among residents and staff, including residents previously treated for COVID-19
- Total deaths and COVID-19 deaths among residents and staff
- Personal protective equipment and hand hygiene supplies in the facility
- Ventilator capacity and supplies in the facility

- Resident beds and census
- Access to COVID-19 testing while the resident is in the facility
- Staffing shortages
- Other information CMS may specify

42 C.F.R. § 483.80(g)(2)

LTCFs must report the above information **at least weekly** to the Center for Disease Control and Prevention’s (CDC) National Healthcare Safety Network (NHSN) using the NHSN’s [LTCF COVID-19 Module](#). This information will be shared with CMS, which will publicly post the information in an effort to protect the health and safety of residents, staff, and the public.³ These federal reporting requirements are in addition to, and do not supersede, COVID-19-related reporting obligations for LTCFs imposed by state governments and localities.

42 C.F.R. § 483.80(g)(3)

CMS is adding a new provision at § 483.80(g)(3) to require LTCFs to inform residents, and their representatives and families, of confirmed or suspected COVID-19 cases in the facility.

Under the new rule, LTCFs must inform residents, representatives, and families of confirmed or suspected COVID-19 cases in the facility among residents and staff. LTCFs must provide this notice by 5:00 p.m. the next calendar day after the occurrence of either: (1) a single confirmed COVID-19 infection, or (2) three or more residents or staff with new-onset of respiratory systems that occur within 72 hours of each other. Additionally, cumulative updates to residents, their representatives, and families must be provided at least weekly by 5:00 p.m. the next calendar day following any subsequent occurrences of these reportable events.

The required notice must be given in accordance with existing privacy statutes and regulations, and must not include personally identifiable information. The notifications must include information on the mitigating actions the LTCF has implemented to prevent or reduce the risk of transmission, including if normal operations of the facility will be altered, such as restrictions or limitations to visitation or group activities. LTCFs may provide notice by telephone, telephone messages, website postings, listservs, paper notifications, or other forms of communication that make the information easily accessible to residents, representatives, and family members—provided notice is given by 5:00 p.m. the next calendar day after a reportable event.

Next steps

CMS has left no doubt that a primary purpose of these new COVID-19 reporting requirements is “to monitor whether individual nursing homes are appropriately tracking, responding, and mitigating the spread and impact of COVID-19 on our most vulnerable citizens, personnel who care for them, and the general public.”⁴ To mitigate risk and ensure full compliance, LTCFs are advised to identify a single point of contact within their facilities who will have responsibility for making the COVID-19 report mandated in the IFR. Any LTCF not currently enrolled in the CDC’s NHSN should set up an account as soon as possible.⁵

Because state and local entities may likely require reporting of the same or similar information regarding infection rates and related COVID-19 data, often according to different timetables, these responsible employees should familiarize themselves with COVID-19 reporting obligations for LTCFs at all levels of government, and ensure timely reporting. We recommend that the

responsible employees be sufficiently empowered to gather information from various components and personnel on a daily basis in order to track and properly report metrics as required.

LTCFs are further advised to designate responsible employees charged with making timely and compliant notifications to residents, representatives, and families of confirmed or suspected COVID-19 cases in the facility among residents and staff. The content of all reports made to CMS and state and local agencies should be carefully recorded and preserved, as should notifications to residents and their representatives and family members. Of particular importance is recording the timing of a requisite COVID-19 notification—whether to the government, or to residents and their families and representatives—in relation to the event that triggered the reporting obligation.

Counsel is available to assist LTCFs in assessing the potential effects of the IFR and other mandated COVID-19 reporting requirements, developing written policies and protocols to ensure compliance, and drafting reports to constituencies. We will continue to monitor COVID-19 developments affecting LTCFs and will provide updated guidance.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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¹42 C.F.R. § 483.80.

²42 C.F.R. § 483.80(a)(2).

³The preamble to the IFR states that the reported information is publicly available under the Freedom of Information Act (FOIA). However, instead of providing the information in response to individual FOIA requests, the IFR indicates that CMS intends to publish the information proactively to the public at large. CMS states, for example, that “[w]e have received, and expect to continue to receive, COVID-19 related FOIA requests,” and notes that the new requirements will support the agency’s efforts “to **proactively inform** interested parties and ensure that the most complete information on COVID-19 cases is available.” IFR at 180 (emphasis added). Moreover, the newly added 42 C.F.R. § 483.80(g)(2) provides that the reported information “will be **posted publicly** by CMS.” (Emphasis added).

⁴ IFR at 181

⁵Enrollment information can be found [here](#). NHSN LTCF staff offers to conduct various virtual trainings and office hour sessions to assist LTCFs with enrollment and data submission.