

Hospice and Palliative Care  
Practice Group

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## Have You Modified Your Nursing Facility Agreements To Comply With The New CoPs?

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Hospices that provide routine home care to residents of nursing facilities are now subject to a new Medicare Condition of Participation (CoP). Effective December 2, 2008, all hospices must comply with the very comprehensive requirements in 42 C.F.R. § 418.112. According to the Centers for Medicare and Medicaid Services (CMS) commentary that accompanies the new Medicare Hospice Regulations, CMS adopted this CoP to ensure that quality hospice care is provided to eligible patients who are residents of a nursing facility. It is important to note that this CoP does not expressly apply to arrangements with assisted living facilities. However, these obligations serve as important risk management tools, and it is advisable for hospices to consider integrating them into their assisted living relationships. In addition, some states are requiring that hospices have written agreements with assisted living facilities and may use the nursing facility contracting requirements as a guide.

The new nursing facility CoP is extremely broad and addresses eligibility, professional management of hospice services, the hospice plan of care, coordination of services and orientation and training of staff. Each of these standards will require significant effort on the part of hospices. To ensure compliance, it is critically important that hospices review their current template agreements for routine home care in the nursing home, since virtually every hospice in the country will need to have new contracts signed and implemented no later than December 2, 2008.

Under 42 C.F.R. § 418.112(c), hospices must address at least the following terms in their written agreements with nursing facilities:

- The manner in which the facility and hospice will communicate with each other and document such communications to ensure that the needs of patients are addressed and met 24 hours a day
- A provision that the facility immediately notify the hospice if: (i) a significant change in the patient's physical, mental, social or emotional status occurs; (ii) clinical complications appear that suggest a need to alter the plan of care; (iii) a need to transfer the patient from the facility arises, and the hospice makes arrangements for and remains responsible for any necessary continuous care or inpatient care related to the terminal illness; or (iv) the patient dies
- A provision stating that the hospice assumes responsibility for determining the appropriate course of care, including to change the level of services provided
- An agreement in which it is the facility's responsibility to continue to furnish 24-hour room and board care, meeting the personal care and nursing needs that would have been provided by the primary caregiver at home at the same level of care provided before hospice care was elected

- An agreement in which it is the hospice's responsibility to provide services at the same level and to the same extent as those services would be provided if the facility resident were in his or her own home
- A delineation of the hospice's responsibilities, which include, but are not limited to, the following: providing medical direction and management of the patient; nursing; counseling (including spiritual, dietary and bereavement); social work; provision of medical supplies, durable medical equipment and drugs necessary for the palliation of pain and symptoms associated with the terminal illness and related conditions; and all other hospice services that are necessary for the care of the resident's illness and related conditions
- A provision that the hospice may use the facility's nursing personnel where permitted by law and as specified by the facility to assist in the administration of prescribed therapies included in the plan of care only to the extent that the hospice would routinely utilize the services of a hospice patient's family in implementing the plan of care
- A provision stating that the hospice must report all alleged violations involving mistreatment, neglect, or verbal, mental, sexual, and physical abuse, including injuries of unknown source, and misappropriation of patient property by anyone unrelated to the hospice to the facility's administrator within 24 hours of the hospice becoming aware of the alleged violation
- A delineation of the responsibilities of the hospice and the facility to provide bereavement services to facility staff

Since many of the provisions listed above are new, compliance will require either an amendment to existing contracts or an entirely new contract. Based on our review of hospice nursing home arrangements over the past several years, many hospices are using contracts that are very old and perhaps have been modified a number of times. These contracts are in many instances not compliant. Therefore, it is recommended that hospices consider redrafting their nursing home agreements to not only comply with the new nursing facility CoP, but also integrate the other obligations contained in the new Medicare Hospice Regulations. We understand the complexity in implementing new agreements, given the fact that hospices may have dozens of nursing home relationships or more. That makes it even more important to start the process immediately by informing your nursing home partners of the need to modify and implement new agreements.

Instead of entering into new agreements, some hospices are using letter amendments as a means of revising their existing nursing facility agreements to comply with the new facility CoP. This may be an adequate short-term approach for hospices whose underlying agreements are compliant, as it will show surveyors and regulators that the hospice and facility are making an effort to achieve compliance with the new nursing facility CoP during the transition time between the old regulations and the new regulations. If parties use this approach, these letter amendments should be sent out and returned to the hospice prior to December 2, 2008.

Ultimately, the better approach is for hospices to execute new agreements that are fully compliant with 42 C.F.R. § 418.112 **and** all of the other relevant provisions in the Medicare

Hospice Regulations. For example, in addition to the overarching requirements in 418.112, hospices are required to develop, implement and maintain an effective hospice-wide, data-driven Quality Assessment and Performance Improvement (QAPI) program. The QAPI program must involve "all hospice services (include those services furnished **under contract or arrangement**)" (emphasis added). To comply with these requirements, hospices will need to require all of their contractors (including nursing facilities who solely have routine home care contracts with the hospice) to cooperate with the hospice's QAPI program. It is advisable to include this obligation in the contract, as it will place the contractor (*e.g.*, nursing facility) on notice of the need to work with the hospice on QAPI-related matters.

## Conclusion

To avoid future survey citations related to a hospice's contractual arrangements with nursing facilities, hospices need to act quickly to ensure that their agreements are compliant with the new Medicare Hospice Regulations by December 2, 2008. New surveyor guidance from CMS is forthcoming, and surveyors will be trained on the new guidance prior to the effective date of the revised regulations.

To assist hospices in complying with the new regulations, the Hospice and Palliative Care Practice Group at Reinhart Boerner Van Deuren s.c. has developed the "**Hospice and Nursing Home/Assisted Living Contracting Toolkit**." This Toolkit contains template contracts for routine home care, general inpatient care and respite care as well as a sample letter agreement that may be used as an interim measure in lieu of an entirely new contract. These template agreements are designed to comply with the revised Medicare Hospice Regulations and to assist hospices and their local counsel in developing compliant contracts in light of the new requirements as well as their own state laws. For information on the Toolkit, please visit the NHPKO Marketplace: <http://iweb.nhpco.org/iweb/Purchase/SearchCatalog.aspx> or Reinhart's website: <http://reinhartlaw.com/webpages/2/Subtoolkits.aspx?id=807>.

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