

ANOTHER BALL IN THE JUGGLING ACT: CMS UPDATES ITS VISITATION GUIDELINES FOR NURSING HOMES

September 24, 2020

On September 17, 2020, CMS issued [QSO-20-39-NH, Nursing Home Visitation – COVID-19](#), the latest update in a series of guidance issued since March 2020 in response to the COVID-19 Public Health Emergency. This update includes important revisions to CMS guidance on visitation in nursing homes and impacts prior guidance in this area, including CMS's March 4, 2020, memorandum ([QSO-20-14-NH](#)) on restricting nursing home visitors and non-essential personnel (with the exception of compassionate care circumstances), CMS's May 18, 2020, memorandum ([QSO-20-30-NH](#)) on reopening for nursing homes, and CMS's June 23, 2020, [Frequently Asked Questions document](#). Most significantly, and as is detailed below, the updated guidance includes a general directive requiring facilities to permit visitation absent a "reasonable clinical or safety cause." More specific directives are set forth regarding access by Long-Term Care Ombudsmen, Federal Disability Rights Law and Protection & Advocacy (P&A) Programs, and non-employed health care workers. Concerning health care workers specifically, CMS directs that they "must be permitted to come into the facility as long as they are not subject to a work exclusion due to an exposure to COVID-19 or show signs or symptoms of COVID-19 after being screened." Further details regarding this update, as well as the steps providers should take in response, are set forth below.

SUMMARY OF UPDATED GUIDANCE

The updated guidance sets forth a number of "core principles" related to screening visitors and facilitating indoor and outdoor visitation in a manner that reduces risk of infection and aligns with applicable guidance from the Centers for Disease Control and Prevention. Concerning outdoor visitation specifically, facilities are encouraged to "create accessible and safe outdoor spaces for visitation, such as in courtyards, patios, or parking lots, including the use of tents, if available," while ensuring "a process to limit the number and size of visits occurring simultaneously to support safe infection prevention actions." With respect to indoor visitation, facilities are encouraged to ensure that there has been "no new onset of COVID-19 cases in the last 14 days" in the facility, and that visitors adhere to the "core principles" referenced above, including limiting movement within the facility. As a general matter regarding all visitation, facilities are encouraged to monitor their COVID-19 county positivity rate and to restrict visitation accordingly, and also to consider implementing procedures to test visitors for COVID-19 in counties with medium or high positivity rates. In addition to resuming visitation, facilities are also directed that they may resume communal activities and dining, again while ensuring adherence to the "core principles" referenced above.

Beyond setting forth guidelines for how facilities should conduct visitation and resuming communal activities/dining, the updated guidance provides a general directive that “facilities may not restrict visitation without a reasonable clinical or safety cause” (emphasis added). As CMS elaborates:

“For example, if a facility has had no COVID-19 cases in the last 14 days and its county positivity rate is low or medium, a nursing home **must** facilitate in-person visitation consistent with the regulations, which can be done by applying the guidance stated above. Failure to facilitate visitation, without adequate reason related to clinical necessity or resident safety, would constitute a potential violation of 42 CFR 483.10(f)(4), and the facility would be subject to citation and enforcement actions.”

The guidance then outlines specific requirements directing facilities to permit visitation or, if applicable, reasonable alternative accommodations (e.g., phone, video conferencing, etc.). Additional directives are included with respect to health care workers and resident advocates. Concerning “health care workers who are not employees of the facility but provide direct care to the facility’s residents, such as hospice workers, Emergency Medical Services (EMS) personnel, dialysis technicians, laboratory technicians, radiology technicians, social workers, clergy etc.,” such personnel “must be permitted to come into the facility as long as they are not subject to a work exclusion due to an exposure to COVID-19 or show signs or symptoms of COVID-19 after being screened.” Facilities are also directed to permit visitation by the applicable Long-Term Care Ombudsman and personnel associated with protection of disability rights and P&A Programs. Where such visitation cannot be safely accommodated, facilities are directed to “facilitate alternative resident communication... such as by phone or through use of other technology.”

WHAT THIS MEANS FOR PROVIDERS

Providers are strongly encouraged to review QSO-20-39-NH thoroughly to ensure responsive updates in facility policies & procedures are being implemented with respect to each category of visitation referenced (e.g., visitation by family, visitation by ombudsmen and other resident advocates, access by health care personnel, etc.). It is critical that facilities ensure meticulous documentation which supports any restrictions on resident visitation and access, and that, where such restrictions must be implemented for safety reasons, reasonable alternatives have been considered and implemented to ensure a “least restrictive” approach. There is a high likelihood, given this updated guidance, that surveyors will seek documentation of both the reasons for any restrictions on resident visitation and the reasonable alternatives which have been considered and implemented or declined. Additionally, surveyors may be unwilling to accept “blanket restrictions” applicable to multiple residents without clear support for the restriction as to each resident affected. Facilities may consult the following resources with respect to ensuring compliance and taking advantage of available resources:

1. **State long-term care trade associations** may provide insight on the efforts being made by other providers in the region, as well as the resources available to them. Many such trade associations have been hosting weekly constituent conference calls to review important updates. Such calls will likely include CMS’s updated guidance as a central talking point in the coming weeks.
2. **State and local departments of health** may be consulted for information regarding regional infection rates and any applicable local guidance on re-implementing visitation and resident access in long-term care facilities.

3. **CMP funds** may be available to assist providers in purchasing equipment to facilitate safe visitation (e.g., tents, clear dividers, etc.). CMS's guidance discusses such funds, indicating that up to \$3,000 may be available per facility. Providers are directed to contact the applicable [state agency CMP contact](#).

If you have any questions or need further guidance regarding CMS's new visitation guidance, please contact a member of Hancock Daniel's [Long-Term Care & Post-Acute Care](#) team.

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