

## CMS Guidance/Waivers to Nursing Facilities During COVID-19 Outbreak

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### Social Distancing

The Centers for Medicare & Medicaid Services (CMS) has prohibited communal meals and other communal activities in nursing facilities.

Access to a facility is allowed only to essential health care workers and government surveyors. “Essential” may be interpreted narrowly, particularly given the risk posed by health care providers who may see residents in multiple facilities. This type of worker was cited as one of the problems in the nursing facility outbreak that occurred in Kirkland, Washington, as COVID-19 first impacted the United States. Physician visits can be conducted via telehealth, rather than being done in person.

Visitation is allowed only for “compassionate situations.” These “compassionate situations” include but are not limited to end of life visitation. When visits take place, they are limited to the resident’s room or another designated room – for example, a “clean” room near the front of the facility. The visitor must wear Personal Protective Equipment (e.g., face masks) and practice “hand hygiene,” and is discouraged from hugging or any other physical contact.

The persons limited to “compassionate situation” visitations include family, friends, ombudsman program representatives, and other “non-essential” persons. Also, there is no access whatsoever for anyone with a symptom of a respiratory infection.

In the absence of in-person visitation, a family member or friend might want to connect via telephone or video chat, or see the resident through a window. CMS encourages a facility to facilitate phone calls and other methods of remote communication, with a stronger mandate to facilitate communication with the resident’s representative or physician, or with a representative of the ombudsman program or a protection and advocacy organization.

### Other Changes in Facility Operations

Nurse aide training requirements have effectively been waived, aside from a requirement that nurse aides be competent. Facilities may convert dining rooms or other available rooms in to resident rooms; likewise, a facility may have immediate permission to begin operating out of a temporary location.

During the emergency, a facility does not have to comply with deadlines for submitting its staffing levels or resident assessment data to the Centers for Medicare & Medicaid Services (CMS).

## Admissions from Hospitals

The standards for Medicare payment have been loosened – a three-night hospital stay is not being required as a prerequisite for Medicare coverage of nursing facility care. What is still required, however, is a finding that the resident needs either 1) focused nursing care on a daily basis (not including routine nursing oversight or medication administration) or 2) skilled therapy services at least five days a week.

CMS says that a facility is free to admit a resident with COVID-19, “as long as the facility can follow CDC guidance for Transmission-Based Precautions.” Admissions should be business as usual, according to CMS: “Nursing homes should admit any individuals that they would normally admit to their facility, including individuals from hospitals where a case of COVID-19 was/is present.”

Notably, this has become a contentious issue in many states. For example, New York issued a memorandum prohibiting nursing facilities from excluding residents with COVID-19, whereas Louisiana went in the opposite direction, prohibiting facilities from accepting COVID-positive residents from the hospital.

To this point, CMS has not taken a position on these state policies. CMS officials have stated informally that they are inclined to defer to states on these issues, given the states’ presumably superior knowledge of their health care systems’ competence and capacity.

## Moving Residents Based on Diagnosis

CMS allows residents to be moved without advance notice to a different facility, in three situations:

- A resident **with COVID-19 or respiratory infection symptoms** is being transferred to a facility dedicated to care of such residents;
- A resident **without diagnosis or symptoms of a respiratory infection** is being transferred to a facility dedicated to care of such residents; or
- A resident without symptoms of a respiratory infection is being transferred to another facility for a 14-day observation.

The “new” facility must agree in advance to accept the resident. CMS also points out that the written notice of transfer must be provided “as soon as practicable” but, since this is taking place **after** the transfer, it is far from clear that the notice serves much purpose. Indeed, under the CMS waiver, the notice does not include any reason for the transfer, or any appeal rights. This looks to be the practical equivalent of eliminating appeal rights, even though CMS has not formally waived the appeal-specific provisions.

National advocates will be urging CMS to issue more meaningful guidance regarding these transfers/discharges. Likewise, state advocates should speak to relevant state agencies to urge that these transfer/discharge waivers be exercised judiciously, if at all.

CMS also has waived regulations in a way that reduces residents’ control over transfers *within* the facility. For the sole purpose of separating COVID-positive and COVID-negative residents, CMS has waived regulatory rights to 1) share a room by consent of both persons, 2) receive notice before transfer within facility, and 3) refuse certain transfers within a facility.

## Survey Activities

Under CMS’s survey prioritization, survey activities are limited to,

- Surveys for “immediate jeopardy” situations;
- Targeted infection control surveys, conducted along with the Centers for Disease Control and Prevention (CDC); and
- Initial certification surveys.

In addition, facilities have an infection control checklist for self-assessments.

Surveyors face additional limitations, due to CMS guidance and practical realities. If a surveyor cannot obtain Personal Protective Equipment, an on-site survey cannot be performed. Also, enforcement remedies will not be imposed during the emergency period, except for remedies arising from “immediate jeopardy” situations.

Unless a complaint is triaged as “immediate jeopardy,” it will be logged into the system, but no other action will be taken for the time being. It is unclear what will happen to these complaints in the long term; CMS has said that it will be issuing further guidance.

## Tips for Representing Residents

Almost all of the regulations that were in place prior to the COVID-19 pandemic are still effective. For example, except in three limited situations, transfer/discharge protections are still in place. If a resident does not want to leave, the principal rules are Don’t Panic! And Don’t Move Out!

Facilities’ internal grievance procedures remain available; a facility must issue a written response to any submitted grievance. The resident or advocate can also still file a complaint with the survey agency, even if the resolution will be murky. Also, for some disputes, court resolution may be appropriate.

Finally, as always, communicating and advocating with the facility is essential, whether that be through discussions and/or formal written grievances. The resident will need to acknowledge the real-life changes caused by the current outbreak, but without allowing the crisis to completely override individual residents’ lives.

## Tips for Administrative Advocacy

The advocate must push CMS and the states to not lose sight of individual resident needs. It is better to think of modification of regulations, rather than pure waiver, so the appropriate resident protections can be maintained. If a waiver is issued, federal or state guidance should fill the holes where waiver has left a vacuum.

## Additional Resources

- [CMS Memo QSO 20-14-NH](#) (3/13/20) (visitation restrictions, etc.).
- [CMS Memo QSO 20-20-NH](#) (3/23/20) (prioritization of survey activities, including infection control self-assessment).
- [CMS Findings](#) re: Waiving of 3-Night Hospitalization Requirement for Medicare Coverage of Nursing Facility Care (3/13/20)
- CMS, COVID-19 Emergency Declaration [Blanket Waivers](#) for Health Care Providers.