

## **CMS Proposes New Regulations Impacting Hospice**

In a Proposed Rulemaking issued on July 10, 2023, the Centers for Medicare & Medicaid Services (“CMS”) has outlined new regulations impacting hospice service providers. First, CMS has proposed adding informal dispute resolution procedures following surveys, as well as instituting the “Special Focus” program for hospice agencies. This change will align survey and certification procedures with those presently used for home health agencies and skilled nursing facilities. Second, to address fraud and abuse concerns, CMS is proposing to implement several provider enrollment changes for hospice agencies that are similar to those used for home health agencies.

### **New IDR Process and Special Focus Program Being Implemented for Hospice**

The Proposed Rule adds regulatory provisions to implement a new hospice informal dispute resolution (IDR) process to address disputes related to condition-level survey findings following a hospice agency’s receipt of the official survey statement of deficiencies.

The IDR process will provide hospice agencies an informal opportunity to resolve survey findings disputes when seeking recertification from a State Survey Agency (SA) or reaccreditation from an accrediting organization (AO) for continued participation in Medicare. IDR would also be offered to hospice agencies after a complaint or validation survey and for hospice agencies in the Special Focus Program (SFP). In New Jersey, this process is presently available for state deficiencies, but under this rulemaking will be expanded to include accreditation surveys.

The Proposed Rulemaking would add four new definitions to 42 C.F.R. §488.1105 to implement the Special Focus program, which in long-term care typically affects only a few providers with chronic quality of care issues in each state. Under the new Hospice Special Focus program, CMS will utilize data from hospice surveys and the Medicare hospice quality reporting program to determine which agencies require increased oversight to ensure that they meet the Conditions of Participation. Once selected, hospices will be terminated if they cannot successfully graduate from the Special Focus program within 18 months.

### **New Medicare Provider Enrollment Provisions Impacting Hospice Agencies**

CMS explained its growing concerns about improper behavior and the potential for fraud and abuse within the hospice community, specifically referring to reports that hospices were being sold quickly after enrollment or purchase. To address its concerns, CMS added the following provisions to strengthen the provider enrollment process for hospice agencies:

1. Enhancing background checks during enrollment, including subjecting all 5% or greater owners of hospices to criminal background checks, including fingerprinting;
2. Incorporating the “36-month rule” to sales of a majority ownership interest of the hospice; and
3. Reducing the period of time before deactivation of a Medicare provider number due to non-billing of claims from 12 months to 6 months.

The “36-month” rule, upon implementation of these proposed rules, prevents the transfer of the hospice’s Medicare provider number to a buyer if the sale occurs within 36 months after the date of the most recent change in majority ownership, or within 36 months of the hospice’s initial enrollment in Medicare. A buyer, during this period, would be required to submit an initial enrollment application and undergo a new certification survey.

CMS will propose only the following limited exceptions to this “36-month rule”:

- If the hospice submitted 2 consecutive years of full cost reports since initial enrollment or the last change in majority ownership, whichever is later.
- If the hospice’s parent company is undergoing an internal corporate restructuring, such as a merger or consolidation.
- If the owners of an existing hospice are changing the existing business structure, but the owners remain the same.
- If an individual owner of a hospice dies.

CMS will accept comments on this Proposed Rulemaking until August 29, 2023. For questions and guidance related to Hospice services, regulatory matters, or IDR/Special Focus Program, please contact Greg Palakow at 609-580-3748 or [gpalakow@archerlaw.com](mailto:gpalakow@archerlaw.com), or Shloka Joshi at 267-817-9248 or [sjoshi@archerlaw.com](mailto:sjoshi@archerlaw.com).

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