

Nursing Homes Are Taking Heat in 2023: Here's How to Avoid Getting Burned

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Nursing homes have come under fire recently for allegations of poor quality of service and patient safety concerns. So, it should come as no surprise that the Department of Health and Human Services (HHS) and state attorneys general are sending smoke signals for a future crackdown on nursing homes in 2023.

Not only will federal enforcement focus on improving quality of care, but also states will be incentivized to monitor their nursing homes more diligently to avoid federal penalties.

As nursing homes gear up for the coming enforcement firestorm, they should let recent federal and state enforcement actions and agency publications be their guide. Below we discuss how nursing homes can mitigate risk and stay out of hot water in 2023.

Heightened State-Level Enforcement

The 2023 Congressional Budget Justification (2023 Budget Justification) submitted by HHS' Office of the Inspector General (OIG) outlines key focal points for the OIG's enforcement efforts in 2023. The budget request includes significant funding for enforcement of individual state survey agency reporting on the basis that more than half of states failed to meet nursing home surveying requirements between 2015 and 2018. With fresh funding, the OIG intends to leverage state oversight to improve nursing home care. This includes following up after state surveying to verify whether facilities actually corrected identified deficiencies.

Given OIG's emphasis on state-level enforcement in 2023, nursing home facilities should anticipate deeper scrutiny and more frequent follow-up from state agencies this year. The federal government appears intent on involving state regulators in nursing home enforcement by sanctioning states that fail to properly audit facilities. This, more than anything, serves as a clear marker that state-level enforcement will be on the rise, both in quantity and depth of investigations. With this increased enforcement, facilities should focus not only on compliance with federal regulations, but also on individual state regulations, which the federal agencies will work to enforce. Facilities should also ensure that their premises, equipment, and staff are prepared for on-site regulatory inspections.

Emphasis on Emergency Preparedness

The OIG also continues to devote attention to addressing perceived deficiencies in nursing home emergency preparedness, as highlighted by the COVID-19 pandemic's impact on nursing homes. More broadly, the 2023 Budget Justification focuses on preparing nursing homes for future potential emergencies beyond pandemics, including natural disasters or environmental emergencies. The OIG emphasizes that facilities should plan with their communities on how to best respond to these types of emergencies. In 2023, nursing homes can expect enforcement activity that scrutinizes whether existing policies adequately plan for emergencies, including whether they consider situations that might require community assistance.

The OIG's budget requests related to emergency preparedness and the inclusion of local communities in addressing individual facility emergency plans also signal a more forward-looking enforcement attitude. Enforcement activity in 2023 will likely look beyond whether nursing homes anticipate situations like the COVID-19 pandemic, as well as examine how nursing homes anticipate involving community leaders, including fire and rescue agencies, in emergency planning. Revising and enhancing such emergency preparedness is now one way for nursing homes to potentially avoid enforcement actions that allege inadequate policy drafting.

Audit and Monitor Billing Practices

Individual enforcement actions by the Department of Justice (DOJ) also reveal trends in nursing home enforcement for 2023. For example [an \\$11.2M settlement](#) between the DOJ and one of the nation's largest nursing home chains recently resolved allegations related to Medicare billing for medically unnecessary or grossly substandard services for residents. The magnitude of this settlement highlights the DOJ's emphasis on nursing home billing and the importance of renewed diligence for billing policies and practices.

Large settlement payments relating to improper billing practices require each nursing home keep close watch over its financial operations. Billing Medicare or other government payors for any procedures possibly perceived as not being medically necessary or falling below the standard of care could open a facility to DOJ scrutiny. With the magnitude of recent settlements showing the DOJ's intent to crack down on these practices, nursing homes would be wise to revise and enhance their compliance operations and internal oversight mechanisms, so they can better identify and correct such issues before they ripen into enforcement actions.

Similarly, nursing homes should ensure they have appropriate diligent processes in place to document the quality and necessity of billable services. Through such documentation, nursing homes will be well positioned to disabuse any notions by the DOJ or other regulators that improper billing took place. When the DOJ alleges improper billing, the claims can add up to large penalties very quickly, particularly in large nursing home chains. All nursing homes should be diligent in reviewing and auditing billing practices at their individual facilities.

Adequate Staffing Is Essential

Staffing levels are another key area of DOJ enforcement. This issue has long been a key one for nursing homes, but it has been subject to particular scrutiny due to staff absences or leaves of absence during the COVID-19 pandemic. Given the prevalence of staffing-related enforcement actions, it is critical for any nursing home to ensure that it has adequate staffing policies in place and, perhaps more importantly, appropriate contingency plans that can be activated in the case of absences.

At the state level, key enforcement actions also reflect that staffing levels and quality of care issues are top priorities for state attorneys general. In a recent [New York state investigation](#), the attorney general found insufficient levels of staff and evidence of resident neglect. The resulting penalties were significant, including the removal of the medical director, a freeze on resident admissions, implementation of financial and health care monitors, and full reimbursement to the state for the cost of the investigation.

To avoid any penalties for noncompliance, facilities should ensure policies address all possible situations for staff absences. Facilities should be prepared to staff their nursing homes adequately, even in the face of staff shortages. Beyond implementing a policy, nursing homes also should ensure compliance with these policies when an absence or staffing shortage occurs. Individual and corporate oversight is key, and nursing homes should continually revise and update their policies to account for new staffing challenges.

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