Survey Boot Camp

Polsinelli Shughart

February 20, 2013

Polsinelli Shughart

Jason T. Lundy
Polsinelli Shughart PC
161 N. Clark St., Suite 4200
Chicago, IL 60601
312-873-3604
312-498-5630 (cell)
jlundy@polsinelli.com

Matthew J. Murer
Polsinelli Shughart PC
161 N. Clark St., Suite 4200
Chicago, IL 60601
312-873-3603
773-259-9381 (cell)
mmurer@polsinelli.com

© 2013 Polsinelli Shughart PC

Getting ready for a survey

- Are you in the window for your Annual survey?
- Have you recently submitted an incident report to IDPH?
- Have you recently had an incident or confrontation with a resident's family?
- Have you recently terminated or disciplined a problematic or disgruntled employee?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Getting ready for a survey

- Review compliance for at least the past year, if not the past three to five years.
- Identify problem areas and problem employees.
- Confirm all prior Plans of Correction were completed.
- Have routine jobs been done, and documented?
  - staffs' licenses and certifications up-to-date?
  - in-services accomplished?
  - fire drills and alarm checks in the maintenance binder?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Getting ready for a survey

- Conduct a dress rehearsal or mock survey, including interviews of staff.
  – Drill staff on policies and procedures. Can staff orally describe what they are supposed to do in certain situations?
- Gather important documents and have them ready.
  – You have the incident report handy, how about the Nurses' Notes, follow-up assessments, revised Care Plan, new Physicians' Orders, etc.?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Getting ready for a survey

- *Do you think surveyors will look at these issues?*
  - Abuse / Neglect
  - Elopements
  - Accident Hazards
  - Pressure Sores
  - Urinary Incontinence & Indwelling Catheters
  - Incident Investigations & Reporting

- (HINT: we do!)

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

During the survey

- Command Central
- Escorts (monitor the surveyors as closely as possible)
- Runners
- Give and take (and always copy)
- Did I really say that?
  - If possible, correct misunderstandings and provide documents
  - Document discussions and get statements from staff.
- Getting ready for day 2, day 3, …exit.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

During the survey

- Immediate Jeopardy
  - If an IJ is called, #1 priority is to get it abated/removed

    (save arguments of why it should not be an IJ for later)
  - Submit a Plan of Abatement/Removal to IDPH
  - Confirm that IJ has been removed
  - Even when IJ is removed, still remains a deficiency to address with a POC

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

During the survey

Surveyors' Golden Oldies:

- "Did you know that you are doing that wrong?"
- "What do you mean you don't know?"
- "X said that it was your responsibility [fault]."
- "How could this happen?"
- "Look, I know that this wasn't your fault. I'm sure that even you were surprised."

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

During the survey

Staff's Golden Oldies:

- "I think . . . "
- "I heard . . . "
- "They never trained me."
- "I didn't know . . . "
- "That's not my responsibility."
- "I shouldn't be telling you this, but…"

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

During the survey

- If necessary, get Springfield involved
- Address problems as they arise
- Daily review of status
- Start collecting documents
- What NOT to do:
  - the amazing, suddenly-appearing policy/document
  - “Here it is!” or “We could find one…”
  - Always, always, *always* a bad idea

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

During the survey

- The Exit Conference
  - Present documents
  - Seek clarification
  - This isn't Oprah

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

The Statement of Deficiencies

- IDPH's Initial Notice letter
  - Cover letter with 2567 attached
- Don't overlook the letter!
- Where do you stand?
  - Opportunity to correct/desk-review?
  - Imposed or recommended remedies?
  - Appeal rights?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

The Statement of Deficiencies

- Also called “2567”
- “F-tags” corresponding to federal regulations
- “K-tags” corresponding to Life Safety Code
- F9999 and 300 Sections? – preview of State licensure findings

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

The Statement of Deficiencies

	Isolated	Pattern	Widespread
Immediate Jeopardy	J	K	L
Actual Harm	G	H	I
The Potential for more than Minimal Harm	D	E	F
The potential for no more than minimal harm	A	B	C

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Plan of Correction

Required Elements:

1) Measures to address resident(s) specifically identified in the survey
2) Identify other resident(s) having the potential to be affected by the same alleged deficient practice
3) Measures the facility will take or systems the facility will alter to ensure that the alleged problem will not recur
4) Quality assurance plan to monitor facility performance and make sure that corrections are achieved and are permanent
5) Completion date

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Plan of Correction

Introduction/Disclaimer:

This Plan of Correction also represents the [Facility's] allegations of compliance. The following Combined Plan of Correction and Allegations of Compliance is submitted solely because it is required by law and is not an admission to any of the alleged deficiencies or violations. Furthermore, none of the actions taken in this Plan of Correction are an admission that additional steps should have or could have been taken by [Facility] to prevent the alleged deficiency. These steps are only included because a Plan of Correction is required by law. [Facility] was in compliance with all licensure and certification requirements at the time of the survey and disputes that any alleged deficiency or violation existed.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

1.) Measures to address resident(s) specifically identified in the survey

- re-evaluate or re-assess resident
- modify Care Plan
- hospitalize
- consult with Dr. regarding care
- change meds
- meet with staff responsible for resident to discuss issue
- Refer to therapy, dietitian, specialist

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

1.) Measures to address resident(s) specifically identified in the survey

- “R1 was re-assessed and determined to have no lasting negative outcome as a result of the alleged deficiency.”
- “R1 is no longer a resident of [Facility].”
- “No residents were identified as being affected by the alleged deficiency.”

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

2.) Identify other resident(s) having the potential to be affected by the same (alleged) deficient practice

- Other residents in similar situation or category as identified residents, or a broad issue potentially effecting everyone?
  - all residents with the same diagnosis?
  - all residents with the same behavior?
  - all residents with the same needs?
  - all residents of the facility?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

2.) Identify other resident(s) having the potential to be affected by the same (alleged) deficient practice

- "All residents have the potential to be affected by the alleged deficient practice."
- "All residents at high risk for skin breakdown have the potential to be affected by the alleged deficient practice."
- "All residents with swallowing precautions and therapeutic diets have the potential to be affected by the alleged deficient practice."

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

3.) Measures the facility will take or systems the facility will alter to ensure that the alleged problem will not recur

Toolbox of available actions:

- assess all residents with similar condition / issue
- in-service staff (return demonstrations)
- document in a new, better way
- physician or specialist referral/evaluation
- Care Plan updates
- enhanced precautions (falls, skin breakdown, aggressive behaviors, elopement/wandering)

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

3.) Measures the facility will take or systems the facility will alter to ensure that the alleged problem will not recur

Toolbox of available actions (continued):

- review and revise Policy & Procedure
  - (create a new Policy & Procedure?)
- repair, replace, or change equipment
- hire staff
- **employment discipline? fire staff?**

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

3.) Measures the facility will take or systems the facility will alter to ensure that the alleged problem will not recur

- proportional to deficiency cited

- one-and-done?
  - No! POC actions are expected of facility going forward.
  - Over-done POC may create traps for future tags. (How long will staff really keep up with that new, complicated procedure???)

© 2013 Polsinelli Shughart PC

4.) Quality assurance plan to monitor facility performance to make sure that corrections are achieved and are permanent

Toolbox of available actions:

- chart audit / employee file audit
- direct observation (random or scheduled)
- required return demonstration
- testing
- staff subject to discipline for failure to follow policy
- include in facility's internal QA review meetings

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

4.) Quality assurance plan to monitor facility performance to make sure that corrections are achieved and are permanent

- Who will be responsible? Clearly identify who is committed to this action . . . but give leeway for help.
  - "Director of Nursing or her designee will . . ."
  - "Maintenance Director or his designee will . . ."
  - **NOT** "Nursing staff will . . ."

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

4.) Quality assurance plan to monitor facility performance to make sure that corrections are achieved and are permanent

- Give monitoring a finite duration
  - “random observations of restraint use for the next three weeks”
  - “monitor staff response to call lights for the next 3 weeks by use of a call light monitoring log”
  - “review random telephone orders on a daily basis for the next 3 weeks”
- Again, make it proportional to the deficiency cited

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

5.) Completion dates

- revisit will not occur until *after* the completion date
- cannot be *before* the survey exit date
- STRATEGY:
  - as quickly as possible to close the cycle, end remedies, and avoid intervening incident/complaint surveys

    vs.
  - enough time to complete corrective action, get staff re-trained, and be confident you will pass the revisit

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

5.) Completion dates

- prepare and retain documentation of when corrective actions are complete

- argue for back-dating compliance to the actual completion date if the revisit survey is not timely

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Desk-Review

- Submission of evidence of correction in lieu of an on-site revisit survey
- When? Submit: a) along with POC, or b) by a separate letter within 30 days from IDPH initial notice
- Organize documents by tag

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR (and Comments)

- Refuting the survey – change to argue that the tag is wrong
  - Keep this out of the POC.
- "Revenge is a dish best served cold."
- Ask, "why is the surveyor wrong?"
- Review the *entire* chart – was the information somewhere else?
- Show staff and physicians the 2567 – are they accurately quoted?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR (and Comments)

- **ORGANIZATION** is key – for arguments and documents
- **Assume that the reviewer knows nothing about your facility or the survey context** (because she doesn't)
  - And your IDR is the *only* document she will review
- Frame argument as positive assertion of compliance with regulation, for example:
  - "[Facility] ensures that each resident receives adequate supervision and assistance devices to prevent accidents."

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR (and Comments)

<u>Organize arguments around **themes**:</u>

- 2567 is factually wrong.
  - Here are the correct facts.
- Surveyor missed important info.
  - Here it is (documented).
- Surveyor made an improper conclusion.
  - Here is what really happened or what those documents really mean.
- Surveyor thinks the regulation requires certain action.
  - The regulation requires this, but not that.
- The scope and severity of the tag is wrong.
  - This was not an IJ, or it did not cause actual harm.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR (and Comments)

Don’t bother with these arguments:

- “We’ve never been cited with this before.”
- “But the surveyor said . . .”
- “There is this other facility that had a far worse problem and the state didn’t do anything to them.”
- “We are a good facility with good staff.”
- “Look at how quickly we addressed it.”
- “It was the fault of a rogue staff.”

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR

- *For federal certification deficiencies only* (F-tags and K-tags) **choice** of IDR with IDPH or MPRO.
  - Written review by IDPH
  - Written review by MPRO
  - Telephone discussion (with written review) by MPRO

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR – IDPH written review

- Submit an IDR Request Form requesting written review by IDPH within 10 days of receiving the Statement of Deficiencies
- Submit the IDR arguments and all supporting documents within 10 days of receiving the Statement of Deficiencies
- Free

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR – MPRO written review

- Submit an IDR Request Form requesting written review by MPRO and an executed facility service agreement with MPRO within 10 days of receiving the Statement of Deficiencies
- Submit the IDR arguments and all supporting documents within 10 days of receiving the Statement of Deficiencies
- $210 per tag + $100/hour for reviewer

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

IDR – MPRO written review

- MPRO reviews a clean copy of the Statement of Deficiencies and the facility's IDR arguments and supporting documents
- MPRO's reviewer decides on a recommendation to uphold, amend, or overturn each alleged deficiency
- MPRO submits its recommendation to IDPH; IDPH reviews recommendation before making a final decision

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

IDR – MPRO telephone

- Submit an IDR Request Form requesting a telephone IDR with MPRO **within 6 days** of receiving the Statement of Deficiencies
- Submit **2 copies** of the IDR arguments and all supporting documents and an executed facility service agreement with MPRO **within 10 days** of receiving the Statement of Deficiencies
- $230 per tag + $100/hour for reviewer

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR – MPRO telephone

- MPRO calls the facility administrator with a few possible times for the telephone IDR
- MPRO reviews a clean copy of the Statement of Deficiencies and the facility's IDR arguments and supporting documents ***before the telephone IDR***
- MPRO's reviewer prepares for the telephone IDR and may have questions for the facility
- MPRO's reviewer decides on a recommendation to uphold, amend, or overturn each alleged deficiency
- MPRO submits its recommendation to IDPH; IDPH reviews recommendation before making a final decision

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

IDR (and Comments)

To IDR, or Not to IDR?

- Does not hurt – tags will not get *worse*
- Does not slow down a revisit
- Two-for-one: if you get licensure findings, Comments are usually a cut-and-paste of the IDR
- Excellent opportunity to evaluate what went wrong and prepare for the next survey
- Excellent opportunity for advanced preparation of an appeal.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Survey Cycles and Remedies

- "Cycles" apply to federal certification, Medicare & Medicaid
- Survey Cycle opens upon the finding of a deficiency.
- Remedies run with the cycle.
- The cycle remains open, and remedies continue to run, until the next time the facility is found to be in substantial compliance with ***all*** requirements.
- IDPH acts as CMS' State survey agency for federal certification surveys.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Survey Cycles and Remedies

CMS Remedies

- “Proposed” – probably still an opportunity to correct the deficiencies and avoid the remedies.
- “Recommended” – Suggested by IDPH, may only be imposed by CMS, and likely will be.
- “Imposed” – remedy is in effect and running.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Remedies

- Category 1
  - – Directed Plan of Correction
  - – Directed inservice
  - – State Monitor
- Category 2
  - – Civil Money Penalty ($50-$3,000 per day)
  - – Denial of Payments for New Admissions
  - – Denial of Payments for all admissions (Medicare/Medicaid)

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Remedies

- Category 3
  - – Temporary management
  - – Termination from Medicare/Medicaid
  - – Civil Money Penalty ($3,050 - $10,000 per day)
- Other
  - – Civil Money Penalty ($1,000-$10,000 per instance)
  - – Transfer of residents

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Remedies

- Per instance CMPs
  - Can be implied even if there is more than “one instance” of non compliance.
  - May be imposed for noncompliance that constitutes actual harm, or for noncompliance that has the potential for more than minimal harm.
  - In situations of past noncompliance can be used for serious non compliance.
- Loss of Nurse Aide Training
  - Extended survey
  - SQC
  - $5,000 or greater CMP

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Survey Cycles and Remedies

Mandatory Remedies

(non-Immediate Jeopardy)

- Denial of Payments for New Admissions = 90 days after start of survey cycle
- Termination = 180 days after start of survey cycle
  - Non-negotiable, cannot be extended

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Survey Cycles and Remedies

- Immediate Jeopardy
  - – Fast track termination = 23 days or less.
  - – Plan of abatement must be filed.
  - – Immediate imposition of CMPs usually at $3,050 level.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Survey Cycles and Remedies

- Opportunity to Correct – if you correct (and clear) all cited deficiencies before a date certain, remedies will not be imposed or go into effect
- Immediate imposition of remedies – CMS has discretion to impose almost any ready immediately or before the mandatory times, and the “Double G” scenario
- Fast-track – while an Immediate Jeopardy exists and is unabated

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Double G Survey

- Two "G"s (or above) within the same survey cycle do not trigger a double "G." Look at "G"s in two cycles.
- Look to last Standard Survey
- Stop at last Standard Survey
- Both surveys need not be Standard. Could be Standard with "G", compliance, then a complaint with "G."
- Having no "G"s at your Annual survey is important, as it re-starts the "Double G" count at zero.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Revisits

- Look at corrective actions from the POC
- New issues that are obvious to surveyors
- No more than two revisits per survey cycle are guaranteed. A third revisit may be authorized by CMS. (And will likely occur very close to the termination date.)
- Cannot get a fourth revisit by way of a complaint.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Revisits

- A survey to confirm the removal of IJ counts towards the total.
- Complaint investigations are not counted against the two revisits.
- Desk-review (paper revisits) are not counted against the two revisits.
- New owners do not get a break.

© 2013 Polsinelli Shughart PC

Revisits

Possible outcomes:

- 1) Finds the facility to be in substantial compliance, clears all tags.
  - IDPH will issue a 2567B (“Post-certification Revisit Report”); this is a good document.
  - Note the completion dates. Back-dated to the POC’s completion dates or date of the revisit survey?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

Possible outcomes (continued):

- 2) Re-citation of deficiencies
  - Cycle stays open
  - Remedies continue to run (and amplify)
  - Start over again with the process: get another 2567, submit a POC, need another revisit

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

Possible outcomes (continued):

- 3) Intervening surveys – a complaint or incident report investigation
  - Any deficiencies prolong the survey cycle, and remedies
  - All deficiencies must be corrected and cleared, in addition to preexisting surveys, in order to close the cycle

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

<u>Dates of completion/clearing deficiencies</u>

- Important because it dictates the end of remedies (ends the running of DPNA and per-day CMP)
  - How is it determined?
  - Can a facility influence it?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

First revisit

- On first revisit, compliance is certified as of the latest correction date on the POC unless there is evidence that correction occurred earlier or later.

© 2013 Polsinelli Shughart PC

Revisits

First Revisit – old deficiencies corrected but continuing noncompliance (S/S < F)

- A second revisit is discretionary if acceptable evidence of compliance is sent to IDPH. If the evidence is accepted, compliance is certified as of the date of the evidence.
- When a second revisit is conducted, acceptable evidence must be provided if the facility wants a date earlier than the revisit date.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

First Revisit – old deficiencies corrected but continuing noncompliance (S/S ≥ F)

- A second revisit is required.
- When a second revisit is conducted, acceptable evidence must be provided if the facility wants a date earlier than the revisit date.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

First Revisit – Continuing Noncompliance

- A second revisit is required.
- When a second revisit is conducted, acceptable evidence must be provided if the facility wants a date earlier than the revisit date.
- Remedy must be imposed.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

Second Revisit – Substantial Compliance

- Compliance is certified as of the date of the second revisit; or
- The date confirmed by acceptable evidence.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

Second Revisit – Any Noncompliance

- A remedy must be imposed if not already imposed.
- Either conduct third revisit or proceed to termination.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

Acceptable Evidence

- Invoice or receipts verifying work completed, equipment purchased.
- Sign-in sheets verifying attendance at in-service training.
- Interviews with more than one training participant about training.
- Contact with resident council (e.g., when dignity issues are involved).

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

- Q: If old deficiencies are corrected but new deficiencies are found at the time of the 2nd or 3rd revisit, does a new certification cycle begin with the new noncompliance?
- A: No. If noncompliance exists at the time of the 2nd or 3rd revisit, it is considered to be continuing noncompliance regardless of whether the previous deficiencies remain or new ones are cited, because it is the whole facility, not just the deficiencies, that factor into the decision about a nursing home's compliance status.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

- Q: If different tags are cited at the 2nd or 3rd revisit, would the new tags be considered continuing noncompliance or new noncompliance?
- A: Regardless of whether the new deficiencies are in the same or different tag(s) as previously cited, the fact that noncompliance exists at the time of the revisit constitutes continuing noncompliance.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

- Q: A complaint survey starts a certification cycle. One month later, IDPH conducts a standard/Annual survey but does not re-cite the deficiency found a month earlier. IDPH does not technically conduct a "revisit" to the complaint survey because its POC completion dates are later. If it is determined that no deficiencies exist at the time of the Annual survey, should a 2567B be prepared to clear the original deficiencies? Would the clearing of tags be considered a revisit and count toward the two revisit policy?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Revisits

- A: The fact that the Annual survey did not cite the deficiencies cited during the complaint survey establishes that those deficiencies have been corrected, so a 2567B should be prepared to clear the original deficiencies. The Annual survey is not considered a revisit and should not be included in the revisit count.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

After the Survey

- IDPH says that they will recommend to CMS that we are back in compliance on x date. Can we admit Medicare/Medicaid residents and expect to get paid?
  - What about the Medicare/Medicaid residents we admitted during the DPNA period? Will we get paid for them at all?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Appealing CMS remedies

- 60-day deadline from notice of imposition of any remedy.
- Often times have two different imposition notices, so need to file two separate appeals (that are later consolidated)
- May need to make an appeal to preserve hearing rights in case the survey cycle takes a turn for the worse.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Strategy about whether to appeal

- The 60-day deadline is approaching, but . . .
  - "We are still waiting for the revisit."
  - "The DPNA has not gone into effect yet."
- If the appeal is not filed by the 60-day deadline, you lose the appeal rights on the remedy—regardless of what happens later.
- **When faced with the 60-day deadline and the survey cycle is still open – appeal!**
  - It's okay to withdraw the appeal when the cycle closes.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Filing the Appeal

- 60 days from receipt of notice. *Must be filed timely!* One day late is cause for the appeal to be dismissed.
- Request for appeal must outline the issues to be considered at appeal, must be comprehensive.
  - All tags.
  - All remedies.
  - SQOC.
  - Reasonableness of CMP.
  - Basis for deficiencies.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Appealing the Survey

- Filing appeal wipes out "automatic" 35% reduction in CMP.
- Appeal does not stay most remedies (only stays payment of the CMP).
- If you appeal . . . do not pay the CMP.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Waiving Appeal

- 35% reduction of CMP
- Must affirmatively waive the right to appeal and elect the 35% reduction.
  - Also must be done within the 60-day deadline.
- Issues might arise under licensure.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Issues for Appeal

- Were any remedies imposed? No remedies, no appeal.
- Immediate Jeopardy
  - Level of non-compliance for justification of CMP
    - Immediate Jeopardy = $3,050 - $10,000 per day
    - Less than IJ = $50 - $3,000 per day
- Did the alleged deficiency exist?
- Date of Compliance.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Issues for Appeal

- "A facility has the right to appeal a certification of noncompliance leading to an enforcement remedy. However, the choice of remedies by CMS or the factors considered when choosing remedies are not subject to review."

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Issues for Appeal

- "A facility may only challenge the scope and severity level of noncompliance found by CMS that could be collected by CMS or impact upon the facility's nurse aide training program."

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Issues for Appeal

- "CMS's determination as to the level of noncompliance must be upheld unless it is clearly erroneous. This includes CMS's finding of Immediate Jeopardy."

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Issues for Appeal

- “To be clearly erroneous, a decision must strike us as more than just maybe or possibly wrong; it must …strike us as wrong with the force of a five-week-old unrefrigerated dead fish.” Vandalia Park *citing* Parts and Elec. Motors, Inc. v. Sterling Electric

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Issues for Appeal

- If not, must prove that there was no deficiency.
- There need be no actual injury for a finding of immediate jeopardy.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Appealing the Survey

- CMS's determination as to the level of noncompliance of a skilled nursing facility must be upheld unless it clearly erroneous. CMS Bears the burden of coming forward with sufficient evidence to establish a prima facie case that [facility] was not in substantial compliance with the participation requirements at issue.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Appealing the Survey

- [The facility] must prove by a preponderance of the evidence that <u>it was in substantial compliance with the participation requirement at issue.</u>
  - ALJ Anne E. Blair's Pre-hearing Order.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Immediate Jeopardy

- Only subject to appeal if winning the appeal would change the amount of the CMP.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Immediate Jeopardy

- Therefore, a facility may not appeal the finding of immediate jeopardy if a per instance CMP was imposed.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Reasonableness of CMP

- Was there a basis for imposing any CMP (i.e., did the provider in fact fail to comply substantially with program requirements)?
- What was the duration of the period of non-compliance?
- Was the amount of the CMP reasonable?

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Reasonableness of CMP

- Culpability
- Severity
  - Winning on many, but not all tags may help, but not much

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

Life Safety Code Surveys

- A different enforcement track starts when the Life Safety Code and Health Surveys occur more than seven days apart.
- If there is a seven day separation, each survey will have its own enforcement time frames

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

Life Safety Code Surveys

- Temporary waivers are critical.
- IDR is possible if you are correct.
- Issues tend to be straight forward.
- Always consider an equivalency, such as an FSES.
- Past compliance doesn't mean much.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

State Licensure Violations

- Didn't we do this already???
- The *same survey* can be the basis for federal certification remedies by CMS ***AND*** State licensure violations and sanctions by IDPH!
- Don't make the mistake that taking care of one automatically takes care of the other.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

State Licensure Violations

- Under Nursing Home Care Act amendments from 2010, IDPH can cite 4 types of violations and has new ranges of fines.

© 2013 Polsinelli Shughart PC

State Licensure Violations

- Type AA, a violation of this Act or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a facility that proximately caused a resident's death.

- Type A, a violation of this Act or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a facility that (i) creates a substantial probability that the risk of death or serious mental or physical harm to a resident will result therefrom or (ii) has resulted in actual physical or mental harm to a resident.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

State Licensure Violations

- Type B, a violation of this Act or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a facility that is more likely than not to cause more than minimal physical or mental harm to a resident.

- Type C, a violation of this Act or of the rules promulgated thereunder which creates a condition or occurrence relating to the operation and maintenance of a facility that creates a substantial probability that less than minimal physical or mental harm to a resident will result therefrom.

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

State Licensure Violations

Fines

- Type "AA" violation = fine up to $25,000 per violation.
- Type "A" violation = fine of up to $12,500 per violation.
- Type "B" violation = fine of up to $1,100 per violation.
- 10 or more Type "C" violations = fine of up to $250 per violation.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

State Licensure Violations

High risk designation for fines

- Certain provision of the Code (Section 300 regulations) have been given the “high risk designation”.
- If a facility commits a “high risk designation” violation, or violates the same Code section three or more times in the previous 12 months . . . then IDPH may assess a fine of *up to 2 times the maximum fine otherwise allowed.*

© 2013 Polsinelli Shughart PC

Polsinelli Shughart

State Licensure Violations

Elimination of multiple fines for a single incident

- If an occurrence results in more than one type of violation, the maximum fine that may be assessed for that occurrence is the maximum fine that may be assessed for the most serious type of violation charged.
  - "More than one type of violation"?

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

State Licensure Violations

Conditional licenses

- Automatic for Type AA and Type A violations
- For a Type B violation when the facility does not follow its POC

© 2013 Polsinelli Shughart PC

State Licensure Violations

"Repeat" violations

- A violation
  - which has been cited during one inspection of the facility for which an accepted plan of correction was not complied with or
  - a new citation of the same rule if the licensee is not substantially addressing the issue routinely throughout the facility
- **Triggers license revocation action**

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

State Licensure Violations

IDPH inducements to waive appeals

- Off-set of CMP paid to CMS against the fines.
  - Cannot eliminate State fine, reduce it up to 75%.
- Automatic 35% reduction of State fine for waiving appeal rights within 10 days of Notice
- **Waiver means the facility accepts all violations as alleged and is under a conditional license.**
  - May cause unforeseen problems with a subsequent survey, *i.e*, “Repeat” violations, enhanced fines.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC

State Licensure Violations

Appealing State licensure violations and sanctions

- Request for hearing letter to IDPH
- Case is assigned to an ALJ and an IDPH attorney prosecutes.
- Ability to negotiate settlement.
- Hearing may address a wide scope of issues.

Polsinelli Shughart

© 2013 Polsinelli Shughart PC