

WHAT DOES A WATERMELON HAVE TO DO WITH A NURSING HOME? HOW TO USE THE FEDERAL REGULATIONS TO WIN YOUR CLIENT'S CASE

M. Chad Trammell
Nix, Patterson & Roach, LLP
2900 St. Michael Dr.
Suite 500
Texarkana, TX 75503
(903) 223-3999
chadtrammell@nixlawfirm.com

I. Introduction

In 1987, the Omnibus Budget Reconciliation Act of 1987, or OBRA '87, was signed into law. This bill contained the Federal Nursing Home Reform Act, which created a national set of minimum standards of care and rights for people living in certified nursing facilities. Since its implementation, this landmark legislation has paved the way for a series of nursing home reform initiatives over the last 20 years aimed at improving the quality of care and quality of life for nursing home residents. Facilities are expected to provide services to help residents "attain and maintain his/her highest practicable physical, mental, and psychosocial, well-being." In addition to the way in which nursing homes provided care to their residents, there were also changes made to ensure facility compliance with the new regulations. Facilities that do not meet the minimum requirements are subject to a range of sanctions such as civil money penalties (CMPs), denial of payment for new admissions, directed plans of corrections, in-services, and temporary management.

II. Sound Complicated? It Is, but There's Hope . . . You Just Need a Watermelon

The infamous "Watermelon" book, so named for its color, is the Bible for certified nursing homes across the nation. Within these pages, you will find the federal regulations set forth in 42 C.F.R. Part 483, Subpart B as well as details about the survey process and procedures that State Inspectors follow from pre-survey visits to post-survey revisits. There is also a section of the Watermelon book, "Guidance to Surveyors," that lists the F Tag number(s) for each part of federal regulations § 483.5 through § 483.75. F Tags are a designation used to identify a specific portion of each requirement. In addition to the F Tag, there are detailed interpretive guidelines for each regulation/F Tag. This information serves as the guide that Surveyors use to measure a facility's compliance and helps to promote consistency in the survey process. For the most part, the Watermelon book is your road map to better understanding the federal regulations and survey process so that you will be able to use the information from a nursing facility's surveys to impact your cases.

In order for a nursing facility to participate in the Medicare or Medicaid program, it must be in compliance with the federal regulations. Compliance with these requirements is determined through the survey process. Once a nursing facility is certified, subsequent routine surveys are done for recertification. Standard Surveys are done every 12 to 15 months followed by a Post-Survey Revisit if deficiencies were cited in the Standard Survey. There are other types of surveys as well, but one that I would like to call attention to is an Abbreviated Survey, which is usually conducted as a result of a complaint. During the survey process, the State Surveyors determine whether or not the nursing facility is in compliance with the federal regulations. If non-compliance is determined, the facility is issued a Statement of Deficiencies outlining each F Tag being cited.

As Surveyors prepare for Standard Survey of a nursing facility, various sources of information about the facility are available for review before Surveyors ever reach the facility. One important piece of information is the facility's performance on the previous survey (Statement of Deficiencies) and compliance history (OSCAR Reports). Surveyors will be able to see specific information about deficiencies cited during the last survey and determine if there is a pattern of deficiencies or repeat F Tags over the previous four surveys. Another key source of information is the Facility Quality Measure/Indicator Report. This report reveals the nursing facility's status for each Quality Indicator as compared to State and National averages. Some of the Quality Indicators included on the report are accidents, nutrition, physical functioning, quality of life, and skin. This information comes directly from the Minimum Data Set (MDS). For those not familiar with "MDS," this is a comprehensive assessment that is periodically completed on each resident in the facility. With all of the information available in the preparation phase, Surveyors are able to preselect residents and identify potential concerns to focus on during the survey. Standard Surveys can be done any day of the week, including weekends, and at any time of day. Surveys are not announced to the facilities, meaning the facilities do not have advance notice of when Surveyors will arrive. Once on-site, the Surveyors complete various tasks during each phase of the survey process in order to make a determination of compliance or noncompliance. A few of these tasks include general and direct observation, interviews with facility staff, family members, and facility residents, and record review. At the conclusion of the survey, the survey team analyzes all of the information to determine compliance. If deficiencies exist, Surveyors must determine the scope and severity for each deficiency and complete a Statement of Deficiencies, or "CMS-2567." There are four levels of severity:

1. "Level 1 No actual harm with potential for harm";
2. "Level 2 No actual harm with potential for more than minimal harm that is not immediate jeopardy";
3. "Level 3 Actual harm that is not immediate jeopardy";
4. "Level 4 Immediate jeopardy to resident health or safety."

There are three scope levels:

1. "Isolated" when one or a very limited number of residents are affected, one or a very

- limited number of staff are involved, and/or the situation has occurred only occasionally or in a very limited number of locations;
2. "Pattern" when more than a very limited number of residents are affected, more than a very limited number of staff are involved, the situation has occurred in several locations, and/or the same resident(s) have been affected by repeated occurrences of the same deficient practice;
 3. "Widespread" when the problems causing the deficiencies are pervasive in the facility and/or represent systemic failure that affected or has the potential to affect a large portion or all of the facility's residents. Widespread refers to the entire facility population, not a subset of residents or one unit of a facility.

The Statement of Deficiencies is prepared by the Surveyors and sent to the facility. This form specifies the F Tag and level of scope and severity for each requirement that was not met. Additionally, the Surveyor provides a summary of the evidence and supporting observations for each deficiency. The summary specifies what part of each requirement was not met, identifies the deficient practice and the objective evidence concerning the practice, identifies the extent of the deficient practice, and identifies the source of the evidence, such as observation, interview, or record review.

Upon receipt of the Statement of Deficiencies, the nursing facility must provide the State Agency with a written Plan of Correction for each deficiency. The Plan of Correction is what the nursing facility plans to do to correct the deficiencies identified during the survey. The nursing facility's Plan of Correction must contain the following elements:

1. What corrective action(s) will be taken for those residents found to be affected by the deficient practice;
2. How the facility will identify other residents who have the potential to be affected by the same deficient practice and what corrective action will be taken;
3. What measures will be put into place and/or what systemic changes the facility will make to ensure the deficient practice does not recur; and
4. How the corrective action(s) will be monitored to ensure the deficient practice will not recur, i.e., what quality assurance program will be put into place.

Once the nursing facility submits an acceptable Plan of Correction to the State, the Surveyors then perform a Post-Survey Visit. The purpose of this visit is to reevaluate the specific care and services that were determined to be noncompliant during the original survey. The Surveyors are looking to see if the facility is in compliance, as represented by the Plan of Correction, and has the ability to remain in compliance.

Next, I would like to look at some specific F Tags that might be applicable to nursing home negligence cases. We do not have enough time to cover all of them, so I want to focus on the F Tags that might be cited as a result of the more common care quality of life and quality of care

concerns seen in nursing home cases including pressure sores, weight loss, dehydration, and falls/accidents.

III. Pressure Sores

Section 483.25(c) requires that a resident who enters the facility without pressure sores does not develop pressure sores unless it was clinically unavoidable, and that residents who do enter the facility with a pressure sore receives care and services to promote healing and to prevent new sores from developing. F 314 is cited when this requirement is not met. However, I should point out that in some instances, one deficient practice can result in multiple F Tags. If Surveyors determine the facility was not compliant with F 314, some of the other F Tags they may investigate and/or cite include the following:

1. F 272: Comprehensive Assessments. The Surveyor will determine if the facility comprehensively assessed the resident's skin condition, risk factors for developing pressure ulcers, and non-healing of an existing ulcer.
2. F 279: Comprehensive Care Plans. Surveyors will look to see if the facility developed a care plan that was consistent with the resident's needs and specific interventions/services to prevent ulcers from forming or treat existing ulcers.
3. F 280: Comprehensive Care Plan Revision. Surveyors will determine if the care plan was periodically reviewed and revised as necessary.
4. F 282: Provision of care in accordance with the care plan. Surveyors will determine if the facility has qualified staff and if staff is implementing the care plan.
5. F 353: Sufficient Staff. The Surveyors will determine if the facility had qualified staff in sufficient numbers to assure the resident received the necessary care and services based on the care plan.

IV. Nutrition/Weight Loss

Section 483.25(i) requires that a facility ensures a resident maintains acceptable parameters of nutritional status unless the resident's clinical condition demonstrates it is not possible. F Tag 325 is cited when this requirement is not met. Surveyors will determine if the facility identified risk factors for malnutrition, provided an adequate diet with supplements as ordered, and modified the care plan if goals were not being met.

V. Hydration

Section 483.25(j) requires that a facility provides each resident with sufficient fluid intake to maintain proper hydration and health. F 327 is cited when this requirement is not met. As

above, there are other potential Tags that could be cited including F 272 Comprehensive Assessment, F 279 Comprehensive Care Plan, and F 282 Provision of care in accordance with the care plan.

VI. Falls/Accidents

Section 483.25(h)(2) requires that each resident receives adequate supervision and assistance devices to prevent accidents. F 324 is cited when this requirement is not met. Other F Tags that may be cited as a result of this deficiency are F 272 Comprehensive Assessments, F 279 Comprehensive Care Plans, F 280 Comprehensive Care Plan Revision, or F 520 Quality Assessment and Assurance.

The F Tags that we've discussed are not all inclusive. Other F Tags could also be cited for noncompliance with the above care issues depending on the findings of the Surveyor during the survey process.

The Statement of Deficiencies is a valuable source of information regarding a nursing facility's performance. You will be able to see exactly what areas the nursing facility was deficient in, the specific evidence that led to the determination of noncompliance, and what things the nursing facility said it would do in order to correct the deficient practice. This is why it is so important that you examine a facility's survey results over a several year period. The Statement of Deficiencies can be a key piece of evidence in some cases. Where can you get the Statement of Deficiencies? Each individual State Agency maintains all of the documents that are obtained from the nursing facility, such as medical records or policies and procedures, or forms/documents generated by the State Surveyors during each survey they perform. A copy of this information can be requested directly from the State Agency. Another source of information regarding a nursing facility's performance is on the Medicare Web site at www.cms.org/NHCompare. This Web site allows you to search for nursing facilities by name, state, county, city, or zip code. The inspection results will not be as detailed as the Statement of Deficiencies, but it does show what Surveyors determined the facility failed to do along with the scope and severity of each failure. In addition, the Web site also provides information about the nursing facility's Quality Measures and Staffing.