

Center for Medicaid and State Operations/Survey & Certification Group

Ref: S&C-09-34

DATE: April 30, 2009

TO: State Survey Agency Directors

FROM: Director
Survey and Certification Group

SUBJECT: Release of Form CMS-2567 (Statement of Deficiencies) by State Survey Agencies (SAs)

Memorandum Summary

- This memorandum reiterates current law and regulations and also guidance contained in Chapters 3 and 7 of the Centers for Medicare & Medicaid Services (CMS) State Operations Manual (SOM) that involve the release of the survey findings as reflected in the Statements of Deficiencies, commonly referred to as the 2567.
- Procedures for release of the Form CMS-2567 have not changed with the publication of 73 FR 53148, dated September 15, 2008 that amended 45 CFR Part 2 entitled “Testimony by Employees and the Production of Documents in Proceedings Where the United States Is Not a Party.”
- More detailed information concerning the impact of this regulation will follow in the near future.

BACKGROUND

45 CFR Part 2 entitled “Testimony by Employees and the Production of Documents in Proceedings Where the United States Is Not a Party” was initially published in 52 FR 37146 on October 5, 1987. It establishes the rules to be followed when an employee or former employee of the Department of Health and Human Services (DHHS) is requested or subpoenaed to provide testimony in a deposition, trial or other similar proceeding concerning information acquired in the course of performing official duties or because of such person’s official capacity with DHHS. The regulation also sets forth procedures for the handling of subpoenas duces tecum (a specific form of subpoena requiring the production of documents) and other requests for any document in the possession of DHHS (other than the Food and Drug Administration), and for the processing of requests for certification of copies of documents.

73 FR 53148, dated September 15, 2008 amended 45 CFR Part 2 by including within the definition of “Employee of the Department of Health and Human Services” (DHHS) “*employees of a contractor, subcontractor, or state survey agency performing survey, certification, or enforcement functions under title XVIII of the Social Security Act or Section 353 of the Public Health Service Act but only to the extent that the requested information was acquired in the course of performing those functions and regardless of whether documents are also relevant to the state’s activities.*”

DISCUSSION

45 C.F.R. Part 2 provides DHHS policy regarding both subpoenas for testimony, and subpoenas duces tecum for the production of records.

There has been no change with respect to the release of form CMS-2567. This memorandum reiterates current law and regulations and the policies set forth in Chapters 3 and 7 of the SOM concerning the release of Federal survey findings as reflected in the Statements of Deficiencies, commonly referred to as the 2567.

RELEASE OF CMS-2567 AND FREEDOM OF INFORMATION ACT (FOIA)

In response to FOIA requests by members of the public, including the media, copies of 2567s are directly releasable by the SA or RO in paper or electronic format without further review by the CMS Freedom of Information Group. The request can be in writing or via e-mail or fax, and the RO or SA may release the document(s) in hardcopy or via e-mail as a PDF file. Any individual identifiers (other than standard patient/resident or staff alphanumeric identifiers, e.g. “Patient 1” “Physician 2,” etc.) must be deleted from the document prior to release.

Form CMS-2567 for Surveyed Providers and Suppliers (Other than Skilled Nursing Facilities (SNF) or Nursing Facilities (NFs)):

The SA may release the Form CMS-2567 consistent with the provisions contained within this paragraph. Disclosure of any Form CMS-2567 that the State generates on a provider or supplier must comply specifically with 42 CFR 401.126(b)(1), 42 CFR 401.130 (b)(17), 42 CFR 401.133(a), SOM § 3308A and SOM § 3314. This means that, when requested:

1. Prior to release, the provider must have had an opportunity to review the report (not exceeding 60 days) and offer comments within the overall time frames cited below.
2. Prior to release, the report must have been provided to CMS (via upload to the ASPEN system), and the disclosure made within 30 days of CMS’s receipt of the report. The disclosure must be made within 90 days following completion of the survey by the SA.
3. Pertinent written comments, if received from the surveyed provider within the time frames above, must be disclosed with the report.
4. Individual identifiers within the report (of patients, health care practitioners, or others) must be deleted (this does not include alphanumeric patient/resident or staff identifiers).

Releasable Information on SNFs and NFs:

Per 42 CFR 488.325 and SOM §§ 7900 and 7903A disclosure of SNF and NF results is made within 14 calendar days after such information is made available to those facilities. Plans of corrections are made available when approved (42 CFR 488.325(a)(3)). Additional releasable information/records are set forth at §7900.

More detailed information concerning the impact of this regulation will follow in the near future.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management