



Office of Clinical Standards and Quality/Survey & Certification Group

Ref: S&C: 12-34-NH

**DATE:** June 1, 2012

**TO:** State Survey Agency Directors

**FROM:** Director  
Survey and Certification Group

**SUBJECT:** Clarification and revisions to Interpretive Guidance at F Tag 492, as Part of Appendix PP, State Operations Manual (SOM) for Long Term Care (LTC) Facilities

**Memorandum Summary**

**Revised Guidance for Tag F492:** Current guidance in Appendix PP of the SOM for Tag F 492, 42 CFR §483.75(b) and (c) States that this tag should be cited only when the authority having jurisdiction has **both** made a determination of noncompliance and has taken a final adverse action as a result. There has been confusion as to whether this requirement may be cited when a facility simply does not meet a State regulation. This memorandum clarifies and revises the Centers for Medicare & Medicaid Services (CMS) guidance to Surveyors in Appendix PP of the SOM regarding citations under Tag F492.

**A. Background**

Currently, the requirements for Skilled Nursing Facilities (SNFs) and Nursing Facilities (NFs) at 42 CFR §483.75(b) Compliance With Federal, State, and Local Laws and Professional Standards provide that “The facility must operate and provide services in compliance with all applicable Federal, State, and local laws, regulations, codes, and with accepted professional standards and principles that apply to professionals providing services in such a facility.”

Also, 42 CFR §483.75(c) Relationship to Other Health & Human Services (HHS) Regulations requires that – “In addition to compliance with the regulations set forth in this subpart, facilities are obliged to meet the applicable provisions of other HHS regulations, including but not limited to those pertaining to nondiscrimination on the basis of race, color, or national origin (45 CFR part 80); nondiscrimination on the basis of handicap (45 CFR part 84); nondiscrimination on the basis of age (45 CFR part 91); protection of human subjects of research (45 CFR part 46); and fraud and abuse (42 CFR part 455).” Although these regulations are not in themselves considered requirements under this part, their violation may result in the termination or suspension of, or the refusal to grant or continue payment with Federal funds.

**B. Interpretive Guidelines 42 CFR §§483.75(b) and (c)**

The intent of these requirements is to ensure that a facility is in compliance with Federal, State, and local laws, regulations, codes, and with accepted professional standards and principles that apply to professionals providing services in LTC facilities. However, we believe that a facility is not “in compliance with Federal, State, and local laws, regulations [and] codes” only when a final adverse action has been taken by the authority having jurisdiction regarding noncompliance with its applicable laws, regulations, codes and/or standards.

“Accepted professional standards and principles” means the individual State professional licensure practice acts and scope of practice regulations and/or standards. This may include various licensed professionals (i.e., Physicians, Nurses, Therapists, etc.) as specifically defined under individual State law and regulations.

An authority having jurisdiction is a Federal, State, local, or other regional department or individual, such as a fire chief; fire marshal; chief of a fire prevention bureau, labor department, or health department; building official; electrical inspector; professional licensure boards or others having statutory authority.

A “final adverse action” means an adverse action imposed by the authority having jurisdiction that is more than a corrective action plan or the imposition of a civil money penalty, such as a ban on admissions, suspension or loss of a facility or professional license, etc., and is NOT under appeal or litigation by the facility or the professional providing services in the facility. The authority having jurisdiction is the public agency or official(s) having the authority to make a determination of noncompliance, and is responsible for providing and signing official correspondence notifying the facility or professional of the final adverse action.

A Federal, State or the local authority having jurisdiction is responsible for making decisions about whether there are violations of the applicable Federal, State or local laws, regulations, codes and/or standards for which they have statutory and oversight authority.

Failure of the LTC facility to meet a Federal, State or local law, regulation, code, or accepted professional standards and principles that apply to professionals providing services in LTC facilities **may only be cited:**

- When the Federal, State or local authority having jurisdiction has both made a determination of non-compliance AND has taken a final adverse action.

Do not cite Tag F492 when a determination is made by the authority having jurisdiction that a facility is not in compliance with Federal, State or local requirements, regulations, codes and/or standards and a final adverse action has NOT been taken by the authority having jurisdiction.

State Survey Agencies (SA) should not use this F Tag to simply cite non-compliance with State or local licensure requirements.

Refer to Tag F281, 42 CFR §483.20(k)(3), for possible deficiencies related to professional standards of quality.

Do not cite Tag F492 as past non-compliance if at the time of the standard, complaint or follow-up survey, the facility or professional within the facility is in compliance with the Federal, State or local law, regulation, code and/or standard but was found not to be in compliance with those requirements during a time before the on-site survey. If there is a question, the SA may confirm the facility's current compliance status with the authority having jurisdiction for State and local authorities or the Regional Office (RO) for other Federal agencies.

### **C. Procedures 42 CFR §§483.75(b) and (c)**

Some State or local laws and regulations are more stringent than the Federal requirement on the same issue. If you believe you have identified a situation indicating that the facility or professional providing services in the facility may not be in compliance with a State or local law, regulation, code and/or standard, refer that information to the authority having jurisdiction for their follow-up action. If you have determined **and** received written confirmation from the authority having jurisdiction that a final adverse action has been taken, then the facility could be found to not meet the requirements at 42 CFR §§483.75(b) and (c) and a deficiency may be cited at Tag F492.

If during the survey you identify and suspect that you have observed noncompliance with a law, regulation, code and/or standard which is under the purview of another Federal agency other than CMS, notify the RO. The RO may assist you to contact the appropriate Federal agency to refer your observation and/or concern.

Do not prolong or delay a survey waiting for confirmation from an authority having jurisdiction to determine compliance with this requirement.

For issues related to Medicare Liability Notices and Beneficiary Appeal Rights in Nursing Homes<sup>1</sup>, Tag F492 may be cited in the following situations:

1. During the entrance conference, obtain a list of Medicare beneficiaries who requested demand bills in the past six months. From the list, randomly select one resident's file to determine if the facility submitted the bill to the Fiscal Intermediary (FI) or Medicare Administrative Contractor (MAC) within the required timeframe. In general, Medicare claims must be filed within one full calendar year following the year in which the services were provided. If the facility failed to submit the bill to the FI or MAC within the required timeframe or charged the resident while the decision was pending, the facility is in violation of the provider agreement with respect to resident billing

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<sup>1</sup> For more information, refer to 42 C.F.R. §424.44 and section 70.1 of the Medicare Claims Processing Manual, Chapter 1 - General Billing Requirements.

requirements. Cite tag F492, and refer to 42 C.F.R § 489.21, specific limitations on charges. If no Medicare beneficiaries requested a demand bill in the past six months, this portion of the review is complete and the surveyor should continue with the closed record review.

2. During closed record review, review three charts of discharged Medicare beneficiaries from the SNF. If the current closed record review sample does not include three Medicare beneficiaries discharged from the SNF, expand the sample. Look for a copy of appropriate liability and appeal notice(s). If the facility failed to provide the resident the appropriate liability and/or appeal notice(s), the facility is in violation of the notice requirements and tag F156, 42 C.F.R. 483.10, Resident Rights must be cited.

If you have additional questions or concerns regarding citations at F Tag 492 in LTC facilities please contact Jay Weinstein at (410) 786-0506 or via electronic mail at [Jay.Weinstein@cms.hhs.gov](mailto:Jay.Weinstein@cms.hhs.gov).

**Effective Date:** This clarification is effective immediately and CMS will incorporate these changes in our next revision of Appendix PP of the SOM. Please ensure that all appropriate staff members are fully informed within 30 days of the date of this memorandum.

**Training:** This clarification should be shared with all survey & certification staff, surveyors, managers and the State and Regional Training Coordinators.

/s/

Thomas E. Hamilton

cc: Survey and Certification Regional Office Management