

Response to Immediate Jeopardy Citations in Long-Term Care Facilities

Guidelines were revised by CMS on March 5, 2019, and released on April 12, 2019, and per QSO-19-09.

The guidance can be found in Appendix Q of the CMS State Operations Manual at 2019 Appendix Q 'Core Appendix Q' that applies not only to nursing homes but to all providers and suppliers that accept Medicare and/or Medicaid funding. This training focuses on nursing homes.

Regulatory Definition:

The regulatory definition of an immediate jeopardy (IJ) citation in nursing homes is 'a situation in which the provider's noncompliance with one or more Requirements of Participation (ROPs), formerly known as Conditions of Participation, has caused, or is likely to cause serious injury, harm, impairment, or death to a resident'.

Components of Immediate Jeopardy:

Meeting the requirements of Immediate Jeopardy consist of meeting three components:

1. **Noncompliance:** Surveyors must first establish that the nursing home failed to meet one or more requirements of participation and provide sufficient evidence to support the noncompliance. Previous guidance included a requirement that the facility's culpability first had to be determined in addition to the noncompliance. The updated guidance does not require culpability and this step alone makes it easier for the surveyors to cite an IJ.

At times, when there is noncompliance at the IJ level for one regulation, there may be noncompliance at the IJ level for other related regulations. The same set of facts could be applied by the surveyors to multiple IJs in the past. With the update, surveyors now must ensure that each IJ deficiency contains some facts that are unique to that specific deficiency.

Surveyors are also instructed to cite noncompliance, even if a nursing home claims a 'rogue' employee violated a regulation. CMS states that 'an entity cannot disown the acts of its employees, operators, consultants, contractors, or volunteers or disassociate itself from the consequences of their actions to avoid a finding of noncompliance.'

2. **Serious injury, serious harm, serious impairment, or death has occurred or is likely to occur:** Surveyors must determine the outcome or impact the noncompliance had or is likely to have on the resident. Use of the term 'likely' differs from previous use of the term 'potential'. This change brings the IJ requirement in line with the regulatory definition, which refers to 'likely'.

Serious injury, serious harm, serious impairment or death is defined as ‘adverse outcomes which result in, or are likely to result in: death; a significant decline in physical, mental, or psychosocial functioning (that is not solely due to the normal progression of a disease or aging process); loss of limb or disfigurement; avoidable pain that is excruciating and more than transient; or other serious harm that creates life-threatening complications.’ Only one resident needs to have suffered or be likely to suffer for an IJ to exist.

If harm is likely, surveyors do not need to prove when the serious harm will occur or that it will occur within a certain timeframe. Furthermore, surveyors do not have to show that the noncompliance is the sole factor contributing to the adverse outcome or making a serious adverse outcome likely. It is enough for the noncompliance to be a factor in causing or making such an outcome likely. Harm to residents is not limited to physical harm. Appendix Q now provides considerable guidance about determining psychosocial and/or mental harm. For instance, the guidance acknowledges that there are situations when psychosocial harm might be difficult to determine.

In those cases, surveyors are instructed to interview the resident’s family, legal representative, or other individuals involved in the resident’s life to understand how the resident reacted or would have reacted to the noncompliance. If these interviews are not possible or in situations in which the psychosocial outcome to the resident is incongruent with what would be expected, surveyors are to apply the ‘reasonable person’ concept (how a reasonable person in the resident’s position would be impacted by the noncompliance).

- 3. Immediate Action is Needed:** The surveyors must decide if corrective action must be taken right away so that the serious, adverse outcome will not occur or recur. CMS clarifies that action must be taken even if the resident is no longer in the facility or has died.

CALLING IMMEDIATE JEOPARDY

Surveyors are now required to use an ‘IJ Template’ to determine if immediate jeopardy exists and to communicate the immediate jeopardy finding to the nursing home (the IJ Template is in Section XII of Appendix Q). The IJ Template identifies the three key components of immediate jeopardy and requires surveyors to identify their substantiation of each as ‘yes/no’ and to provide a preliminary fact analysis to support the existence of a key component.

After determining the presence of immediate jeopardy, the survey team must consult with their state agency for confirmation that immediate jeopardy exists and seek direction. In some cases, the CMS regional office is also contacted for confirmation. Surveyors then must immediately notify the nursing home administrator and deliver the completed IJ Template.

REMOVING IMMEDIATE JEOPARDY

Development of a Removal Plan:

The facility must complete a 'removal plan' which:

- Identifies the residents who have suffered, or are likely to suffer, a serious adverse outcome because of the noncompliance;
- Specifies the action the entity will take to change the process or system failure to prevent a serious adverse outcome from occurring or recurring; and
- Indicates the date the action will be complete.

The removal plan differs from a plan of correction because the facility doesn't have to **correct** all noncompliance – just the noncompliance contributing to the serious harm.

Approval of the Removal Plan:

The state agency or the survey team in consultation with the State Agency determines whether, if implemented appropriately, the removal plan will remove the likelihood that serious harm will occur or recur.

To remove the IJ, surveyors must determine **onsite** that the nursing home took **immediate** action to remove the IJ. Surveyors must determine onsite that the nursing home took immediate action to prevent a serious adverse outcome from occurring or recurring and no resident is currently experiencing serious injury, serious harm, or serious impairment; and/or serious injury, serious harm, serious impairment, or death is not likely. If the plan is not fully implemented, the IJ will continue until the removal plan is fully implemented and the likelihood of serious injury, serious harm, serious impairment, or death no longer exists.

Note: if the harm cannot be remedied (death or serious harm has already occurred), the removal plan must address how additional serious harm will be prevented. Offsite desk/telephone review for removal of IJ is not permitted.

Nursing Home Subpart to Core Appendix Q

The new subpart to Appendix Q contains guidance about IJ specifically for nursing homes. Some key points include:

- **Duration** - IJ starts at the time noncompliance caused serious harm or made serious harm likely to occur and continues until it has been removed or corrected.
- **Past noncompliance (PNC)** - Surveyors can cite PNC at the IJ level when it occurred after the last standard survey and before the current survey and the facility has removed the IJ and completely corrected the noncompliance before the start of the survey. In this situation, surveyors must determine when the noncompliance was corrected. No plan of correction is required in cases of PNC.
- **Resident vulnerabilities** - The vulnerabilities, not just of residents in general, but of individual residents, must be considered in determining IJ. The vulnerabilities of a specific resident may make him/her more susceptible to serious harm than other residents.

- **Triggers for further investigation into a possible IJ** - The guidance identifies possible resident outcomes and/or staff/facility actions which trigger the need for further investigation.

Though Appendix Q does not include the requirement to notify the State Ombudsman of an IJ in the facility, it may be a step to consider.

Appendix Q IJ Template Section XII is available upon request. Please reach out to Marilyn Farran, QI Advisor, for Qsource at mfarran@qsource.org.