

What's Next for Nursing Homes: COVID-19 and Outlook for Action

Key Points:

- Congress and government watchdogs have conducted considerable work to date investigating the COVID-19 response pertaining to nursing homes.
- Stakeholders should look to previously introduced legislation—especially on the part of Democrats, who now control Congress and the White House—for an indication of legislation that is likely to be considered.
- Stakeholders should expect additional hearings and reports from government watchdogs like the Government Accountability Office and HHS Office of Inspector General as the pandemic recedes.
- Congress will likely consider legislation enhancing enforcement in nursing homes and the Biden-Harris administration is likely to tighten government regulation of nursing homes, ramp up survey and enforcement activities, and strengthen sanctions like civil money penalties.

Over the last year, the nation's 15,500 Medicare- and Medicaid-certified nursing homes have been besieged by a deadly pandemic that has claimed more than 130,000 nursing home residents' lives and more than 1,600 staffs' lives **as of this writing**. While America's nursing homes are no outlier compared to the pandemic's effects on congregate living facilities **across the globe**, the pandemic has nevertheless reignited a longstanding debate about the American nursing home industry and the proper role of federal oversight, particularly by the U.S. Department of Health and Human Services (HHS), the Centers for Medicare & Medicaid Services (CMS) and state regulatory agencies.

As increasing numbers of American nursing home residents receive the COVID-19 vaccine, **cases are falling rapidly in these facilities**. CMS data indicates the lowest number of weekly cases and deaths for residents since the agency began tracking the information. In this context of a more positive outlook in America's nursing homes and, following enactment of the **\$1.9 trillion American Rescue Plan Act (ARP)**, the administration and Congress appear to be turning their attention away from emergency assistance and toward retrospective examinations.

On March 17, 2021, the Senate Finance Committee is convening another in a series of congressional hearings regarding safety and quality in America's nursing homes in the

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context of the COVID-19 pandemic. In that context, stakeholders should consider the nature and extent of congressional oversight and legislative actions, as well as regulatory actions that may be taken in response. This alert explores potential areas of interest for the Biden-Harris administration and Congress with respect to regulatory changes, legislation and oversight.

I. COVID-19 Legislative and Oversight Action in Congress to Date

HHS and CMS have taken several actions to combat the pandemic's effects in nursing homes, and a comprehensive timeline of such actions is located in [Appendix I](#).

Additionally, nursing homes themselves took action to protect residents, with, for example, a key nursing home industry group [providing resources](#) to its members regarding keeping residents safe from infection.

Despite these efforts, the agencies' and nursing home industry's responses to the pandemic have both come under fire from Congress, resulting in several hearings and legislative proposals. As Democrats now control the Senate, it is possible the legislation they introduced in the minority will now become blueprints for legislation they will pursue in the majority. A representative (but not exhaustive) selection of congressional activity is listed in [Appendix II](#).

Most of the legislation introduced to date has focused on addressing emergent issues in nursing homes. Proposals included funding additional technical assistance to facilities with cases (a policy that was ultimately passed in the American Rescue Plan (ARP)), facilitating additional personal protective equipment (PPE) and testing for nursing homes, and promoting tele-visitation for residents. Other legislation has sought to correct what some have identified as deficiencies in the current CMS Star Ratings program for nursing homes.

The Government Accountability Office (GAO) and HHS Office of Inspector General (OIG) have also been active in recent months with respect to nursing homes. The watchdogs have released reports, also listed in [Appendix II](#). These reports have examined the government's pandemic response during discrete time periods during the pandemic and have more deeply reviewed pre-pandemic quality of care concerns, and how they may have exacerbated the pandemic's effects in nursing homes. More reports from GAO and OIG are anticipated.

II. Looking Ahead: Potential Legislative, Oversight and Regulatory Activity

As the pandemic slowly recedes, Congress, the GAO and the OIG are likely to turn their attention to examining the pandemic response generally and nursing home policy is surely to be included. Congressional Democrats are likely to convene additional oversight hearings and attempt to legislate on this topic. In the Executive Branch, the Biden-Harris administration is likely to pursue an aggressive regulatory agenda focused on increasing resident safety through stricter requirements, enhanced survey and enforcement activity, including stronger penalties.

On March 15, in what may be an effort to anticipate legislative action, the American Health Care Association (AHCA) and LeadingAge—two leading nursing home industry groups—released a reform agenda called the [Care for Our Seniors Act](#). [According to the groups](#), it is intended “to address long-standing challenges affecting the quality of care provided in America’s nursing homes.” The project contains several white papers and background information. It is based on [four principles](#): 1) Clinical: enhancing

quality of care; 2) Workforce: strengthening and supporting our frontline caregivers; 3) Oversight: improving systems to be more resident-driven; and 4) Structural: modernizing for resident dignity and safety. Its specific policy proposals include enhanced infection control practices, new federal requirements for 24-hour staffing by registered nurses and moving away from a survey process that the groups characterize as “punitive.” Industry will likely look to this plan as a starting point for legislative negotiations.

Potential Oversight and Legislation

While some prior legislation has been reintroduced in the 117th Congress, the outlook for action remains unclear as of the writing of this alert. The GAO and the OIG are both anticipated to release reports in spring 2021 related to nursing home quality and safety during the pandemic. Congressional committees have already begun planning hearings to discuss the issue, and those reports may spark additional hearing activity. Several hearings have already been noticed that will be related to nursing homes, or which may include nursing home discussion, and those are listed below.

On March 17, 2021, the Senate Finance Committee is holding a full Committee hearing titled, “**A National Tragedy: COVID-19 in the Nation's Nursing Homes.**” The hearing will feature the Director for Health Care at GAO, John Dicken; R. Tamara Konetzka, an academic; Dr. David Gifford, the Chief Medical Officer of the American Health Care Association; Adelina Ramos, a Certified Nursing Assistant from Rhode Island; Denise Bottcher, the State Director of AARP Louisiana; and Quiteka Moten, the Tennessee Long-Term Care Ombudsman.

On March 17, 2021, the House Energy and Commerce Committee will hold a hearing titled, “**Leading the Way Forward: Biden Administration Actions to Increase COVID-19 Vaccinations.**” This hearing will feature Dr. Anthony Fauci, the Director of the National Institute of Allergy and Infectious Diseases at the National Institutes of Health; Dr. Peter Marks, Director of the Center for Biologics Evaluation and Research and the Food and Drug Administration; and Dr. Rochelle Walensky, Director of the Centers for Disease Control and Prevention.

On March 18, 2021, the Senate Health Education Labor & Pensions Committee will hold a hearing titled “**Examining Our COVID-19 Response: An Update from Federal Officials.**” The witnesses from the preceding entry will be joined by Dr. David Kessler, Chief Science Officer for the COVID-19 Response at HHS.

Potential Regulatory Activity

The Biden-Harris administration has already **begun a review of rules issued during the latter part of the prior administration**, with an eye toward revision of those policies to reflect a different view of the appropriate nature and scope of regulations. This may include areas explicitly linked to COVID-19, and some that are related, but not directly. The following are areas of likely rulemaking.

COVID-19 Response

The Biden-Harris administration has emphasized its commitment to a focused federal COVID-19 response. During the 2020 presidential campaign, the **Biden-Harris Campaign** promoted several pandemic-related policies in nursing homes, including: “effective point-of-care testing and contact tracing...updated public health

guidance...optimal PPE...in-person training on the proper use, donning and doffing of PPE,” as well as requiring nursing homes to “conduct regular open sessions with residents and family members” to discuss pandemic-related issues.

In its first major legislative victory, the Biden-Harris administration secured passage of the ARP through Congress. The ARP contained provisions related to testing, and contact tracing, as well as hundreds of millions of dollars to be used by states to stand up strike teams for nursing homes, as well as to fund Quality Improvement Organization activities in nursing homes.

Stakeholders can assume that the administration will continue to focus on the nursing home sector, and they should look to HHS and CMS for additional, agency-originated actions related to personal protective equipment (PPE) and PPE training. Some of the testing and contact tracing money provided by the ARP also is likely to be dedicated to nursing homes.

Infection Prevention and Control

In July 2019, CMS published a **proposed rule** that, among other things, sought to change requirements for nursing home infection preventionists. Specifically, the agency proposed to require them to work “sufficient time” rather than “part time.” The **agency’s rationale** was to allow nursing homes to tailor their infection preventionists’ work according to a facility’s needs. However, the proposal—nestled among a suite of deregulatory measures designed to reduce burden—was met with **fierce resistance**.

The pandemic hit only months after CMS made the proposal, and the prior administration ultimately did not finalize the rule. The Biden-Harris administration is likely to refrain from finalizing the rule, as well; in fact, it will likely pursue the opposite approach, given its **campaign proposal** to “require an infectious disease specialist in every regulated setting.” Stakeholders will be interested to learn how this proposal differs from current law and regulation, which generally already require infection prevention.

Surveys and Enforcement

CMS and its network of federally funded, state-based surveyors periodically inspect facilities to ensure they comply with Medicare’s essential health and safety standards, the Conditions of Participation (CoPs). Nursing homes are surveyed more frequently than any other setting of care – approximately annually. Facilities are also surveyed in response to complaints. During the Public Health Emergency, CMS took several steps to reduce burden for facilities dealing with the pandemic, including temporarily pausing the typical survey cadence and temporarily suspending imposition of civil money penalties (CMPs) levied on facilities with violations of the CoPs to incentivize a return to compliance. These actions fell against the backdrop of **changes to the CMP structure CMS made in 2017**, which the agency characterized as an effort to “increase national consistency” in CMP application.

The Biden-Harris administration is likely to reverse the prior administration’s actions and already **has proposed** to “increase the frequency and scope of surveys and data collection” and “conduct adequate numbers of surveys and restore levels of penalties needed to obtain compliance with quality standards.” Likewise, Xavier Becerra, HHS Secretary-Designate and former California Attorney General, has been active with respect to nursing home enforcement. In 2019, he led a group of 17 attorneys general

in a letter to then-HHS Secretary Alex Azar and, then-CMS Administrator Seema Verma, which accused the agency of a “regulatory roll-back” and registered opposition to the 2017 CMP changes.

As nursing homes are already the most frequently surveyed setting of care, it is yet unclear how or if the survey cadence will increase under the Biden-Harris administration. **According to CMS’s Fiscal Year 2021 budget**, long-term care facilities account for 33.2 percent of all Medicare and Medicaid-participating facilities, the largest facility type. Because of this, stakeholders will likely be concerned about an increased survey burden on state survey agencies (SSAs). SSAs are stressed in many ways, including personnel and funding, due to their obligation to conduct increasing numbers of complaint-triggered surveys.

State survey activities are funded by the CMS Survey and Certification Budget. The Biden-Harris proposal for more surveys would likely require new funding. States will likely be interested not only in a one-time infusion of funds (like the \$100 million included in the Coronavirus Aid, Relief and Economic Security (CARES) Act), but rather stable, long-term funding that would allow them to make personnel investments. Indeed, under the Trump-Pence administration, CMS requested an increase in funding to CMS’s Survey and Certification budget to fund current survey obligations, suggesting additional surveys would require even more funding:

- **Fiscal Year (FY) 2021:** Request: \$442.2 million (\$44.9 million above FY 2020 enacted)
- **FY 2020:** Request: \$442.2 million (\$44.9 million above FY 2019 enacted)
- **FY 2019:** Request: \$421.1 million (\$26.5 million above FY 2018 annualized Continuing Resolution [CR])
- **FY 2018:** Request: \$406 million (\$9 million above FY 2017 annualized CR)

Responses to a proposal to increase in the frequency and intensity of surveys will be mixed. Many industry stakeholders, for example, already consider surveys intrusive, punitive, and in some cases, arbitrary. Some may even doubt the benefit of increased surveys—as opposed, for example, to increasing availability and intensity of technical assistance from Quality Improvement Organizations (QIOs). By contrast, resident advocates will likely welcome additional surveys—and would also probably support increased QIO support.

Many stakeholders would be concerned if a marked increase in survey activity is not accompanied by increased funding to states. States, already struggling to meet current needs, could be forced to lengthen response times for revisit surveys. Facilities are often assessed a CMP each day a deficiency has not been remedied and if the state survey agency is unable to revisit the facility in a timely manner to confirm the deficiency is remedied, facilities could be forced to wait longer—and pay more—through no fault of their own. Likewise, advocates would likely be concerned that states would be unable to investigate allegations of abuse in a timely manner.

Ban on Pre-Dispute Arbitration Agreements

In October 2016, CMS **finalized a rule** that effectively banned the use of pre-dispute binding arbitration agreements as a condition for admission into nursing homes. Following a legal challenge from the nursing home industry, a court prevented CMS from enforcing the rule. Then, in June 2017, CMS **published a proposed rule** to

remove the prohibition of pre-dispute binding arbitration agreements and instead focused on ensuring transparency for residents about the agreements. CMS **finalized this proposal** in July 2019.

Though the 2019 rule comported with the court's injunction, it **drew fire from advocacy groups**. The Biden-Harris Campaign stated it would "reinstate the Obama-Biden Administration's ban on forced arbitration agreements," yet it is likely such an action would face legal challenges similar to those the Obama administration encountered in 2016.

III. Conclusion

The COVID-19 pandemic presented a nightmare scenario for America's nursing homes and other congregate living facilities for elderly individuals. Regardless of political party or policy preference, the pandemic's tragic effects on these facilities and their residents are clear. As the nation reels from more than 130,000 dead nursing home residents, scrutiny of the pandemic response—on the part of government and industry alike—is all but certain. Stakeholders should anticipate enhanced oversight from Congress, GAO and OIG, as well as HHS and CMS. They should prepare for Congress to legislate with respect to quality of care and reporting, and they should prepare for stricter regulation and guidance, more frequent surveys, and higher and more frequent CMPs and other enforcement remedies.

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