Health Industry Alert

September 10, 2014

Fire Safety Requirements for Hospitals and Other Health Care Facilities: How CMS Is Interpreting Occupancy Classifications and What This Might Mean for Many Health Facilities Across the Country

On April 16, 2014, the Centers for Medicare & Medicaid Services (CMS) published a proposed rule amending the fire safety standards for hospitals and other types of health care facilities. Compliance with the fire safety standards outlined in the 2000 edition of the *Life Safety Code* (LSC) has been a condition of participation for these facilities since 2003. In its proposal, CMS is now updating its regulations to comply with the latest edition (2012) of the LSC. The comment period on the proposed rule closed on June 16, 2014, and a final rule is expected as early as this fall.

CMS is advancing some controversial policies in terms of how it plans to implement the LSC. In one part of the proposed rule, integrated health care systems that treat patients in a variety of different settings could be forced to duplicate resources or undertake expensive renovations. Specifically, CMS is proposing to disregard patient census numbers when classifying a facility as a "health care occupancy" versus an "ambulatory health care occupancy" or "business occupancy." Under this proposal, any facility—such as an outpatient clinic or medical office building—that sees even one hospital inpatient would be classified as a "health care occupancy" and would need to meet the most stringent set of fire safety standards. CMS's policy, if implemented, could mean that these providers would need to either undertake expensive renovations or purchase duplicative equipment to stay in compliance.

In its comments to CMS, the American Society for Healthcare Engineering (ASHE) has estimated that CMS's policy could affect nearly 400,000 health care facilities and force them to change services, upgrade buildings to a higher occupancy type or close their doors completely. This, ASHE estimates, could collectively cost health care providers up to $32 billion and displace hundreds of thousands of patient services. CMS does not appear to have assessed the financial impact of its decision in the proposed rulemaking.

Background

CMS has historically incorporated by reference the fire safety requirements outlined in the LSC as regulatory conditions of participation for various types of health care facilities, including hospitals, long-term care facilities, critical access hospitals (CAHs), hospice facilities and ambulatory surgical centers. The LSC, a compilation of fire safety requirements for new and existing buildings, is published and updated every three years by the National Fire Protection Association (NFPA), a private, nonprofit organization of experts dedicated to reducing loss of life from fire. CMS adopted the 2000 edition of the LSC in a January 10, 2003, final rule and has been enforcing it as a condition of participation for facilities through the state survey and certification process.

Facilities are required to meet the fire safety standards that correspond to their occupancy types. The LSC breaks down occupancy standards that a facility must meet based on the types of services the facility offers, the types of patients the facility serves and the number of patients served. For instance, the LSC defines a health care occupancy as an "occupancy used to provide medical or other treatment or care simultaneously to four or more patients on an inpatient basis, where such patients are mostly incapable of self-preservation due to age, physical or mental disability, or because of security measures not under the occupants' control."[1] The fire safety standards for health care occupancies—which would include most inpatient hospitals—are the most stringent and are designed to allow facility staff to "defend-in-place" since evacuation of inpatients would be a slow process. The NFPA deliberately included the "four or more" standard because it believes that facilities can safely evacuate a small number of patients needing assistance and therefore do not need to construct the same defend-in-place features applicable to health care occupancies.

Prior Interpretations Inconsistent with NFPA

On December 17, 2010, CMS released a memorandum to state survey agency directors that provided guidance on occupancy requirements for hospitals and CAHs.[2] In the memorandum, CMS stated that it would not consider the number of patients in determining whether a facility is a hospital, and, therefore, a hospital facility or unit does not need to treat four or more inpatients at a time to be classified as a health care occupancy. The memo generated a substantial amount of confusion among state surveyors and providers, and, as a result, CMS did not incorporate the memo into the *Medicare State Operations Manual* as originally intended. Some state surveyors, however, continue to enforce CMS's policy of disregarding the "four or more" standard and are issuing citations based on this interpretation, which is arguably inconsistent with the plain language of the LSC.

Proposed Rulemaking Would Officially Implement Prior, Inconsistent Interpretations of the LSC

In the latest proposed rule, CMS acknowledges that both the 2000 and 2012 editions of the LSC classify health care occupancies as facilities "having 4 or more patients on an inpatient basis."[3] CMS continues to state, "However, CMS does not apply this LSC standard with respect to patient census numbers,"[4] and proposes to amend the regulations to require that hospitals meet the 2012 edition of the LSC "regardless of the number of patients served."[5] CMS seems to suggest that it has always disregarded the "4 or more" standard, despite having never incorporated such a policy into the regulations or any guidance document (save the December 17, 2010, memorandum proposing updates to the Medicare State Operations Manual, which was never finalized).

CMS, of course, is free to accept or reject provisions of the LSC as it sees fit, provided it gives providers adequate notice and opportunity to comment, and provided its actions are not arbitrary or capricious. In

[1] National Fire Protection Association, *Life Safety Code* § 6.1.5.1 (2012).

[2] Memorandum to State Survey Agency Directors (Dec. 17, 2010; rev. Feb. 18, 2011) (S&C-11-05-LSC)

[3] 79 Fed. Reg. 21,552, 21,554 (April 16, 2014).

[4] *Id*.

[5] *Id*. at 21,574.

this instance, CMS is using the notice—and—comment rulemaking process to attempt to formalize its interpretation, and it cites patient safety rationale in its discussion of the LSC "four or more" standard. It states, "We believe that patients in small facilities should be assured the same level of fire safety as those in larger facilities. Therefore, the LSC exception for health care occupancy facilities with fewer than four occupants/patients would be inapplicable to the Medicare and Medicaid facilities affected by this proposed rule."

The NFPA, however, has clearly spoken out against CMS's disregard of the "four or more" standard and, in a comment submitted in connection with the April 16 proposed rule, stated that the interpretation "is in direct conflict with long established thresholds used in NFPA codes dating back to 1961."[6] So, the experts at the NFPA have, for years, agreed that a facility that treats only a small number of inpatients, or "patients incapable of self-preservation," can safely evacuate those patients and therefore does not need the defend-in-place features applicable to health care occupancies.

What this Might Mean for Health Care Facilities

Hospitals and other health care facilities across the country have planned their physical environments and constructed their facilities in accordance with the plain language of the LSC. Most inpatient hospitals are likely built to comply with the fire safety "defend-in-place" standards required of health care occupancies. Other sites, such as outpatient departments or clinics may not be built to meet health care occupancy requirements, since they are not intended to be used to treat four or inpatients at a time or keep patients overnight.

Many hospital campuses, particularly in the case of integrated health care systems, operate both inpatient and outpatient facilities, some of which are immediately adjacent to or completely contiguous to one another. In these systems, hospital inpatients may occasionally be brought into an outpatient unit to receive certain diagnostic or treatment services, such as imaging services or cancer treatments. This allows hospitals to consolidate equipment and personnel in one location instead of having to duplicate resources at multiple sites of service.

Conclusion

CMS has not given any indication as to if and when it will finalize the various policies outlined in the April 16, 2014, proposed rule. To be sure, if CMS continues to apply stringent health care occupancy standards to non-inpatient facilities regardless of the number of inpatients served, hospitals and health systems could be placed in a difficult position with respect to compliance. As CMS deliberates its next steps, hospitals and health systems should consider how the "four or more" policy might impact their current service offerings. Providers should also investigate whether they may have already been cited for violations related to treating an inpatient in an outpatient setting.

On behalf of several health system clients, Akin Gump Strauss Hauer & Feld LLP is developing a strategy to educate CMS leadership and relevant members of Congress regarding the practical problems with the

[6] Comment letter from the National Fire Protection Association (June 13, 2014) (on file at www.regulations.gov).

proposed rule. If your system is concerned, please contact us below to learn how you might participate in this effort.

Contact Information

If you have any questions regarding this alert, please contact:

Ladd Wiley
lwiley@akingump.com
202.887.4083
Washington, D.C.

Kelly Cleary
kcleary@akingump.com
202.887.4329
Washington, D.C.

