


Abuse, Enforcement and Appeals



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Overview of 42 CFR 483.12

- F606 – Prohibit Employment for Individuals with Adverse Actions
- F607 – Policies and Procedures
- F608 – Reporting of Suspected Crimes
- F609 – Reporting of Alleged Violations
- F610 – Response to Alleged Violations

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Overview of 42 CFR 483.12

- F600 – Abuse and Neglect
- F602 – Misappropriation of Resident Property and Exploitation
- F603 – Involuntary Seclusion
- F604 – Physical Restraints
- F605 – Chemical Restraints

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F600-Abuse and Neglect

The resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation as defined in this subpart. This includes but is not limited to freedom from corporal punishment, involuntary seclusion and any physical or chemical restraint not required to treat the resident's medical symptoms.

(a) The facility must—
Not use verbal, mental, sexual, or physical abuse, corporal punishment, or involuntary seclusion;

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F600-Definition of Abuse

Abuse also includes:

- The deprivation of goods or services that are necessary to attain or maintain physical, mental, and psychosocial well-being.
- Instances of abuse of all residents, irrespective of any mental or physical condition, cause physical harm, pain or mental anguish.
- It includes verbal abuse, sexual abuse, physical abuse, and mental abuse including abuse facilitated or enabled through the use of technology.

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Definition of Sexual Abuse

- **“Sexual abuse,”** is defined at §483.5 as “non-consensual sexual contact of any type with a resident.”

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F600-Definition of Abuse

The willful infliction of injury, unreasonable confinement, intimidation, or punishment with resulting physical harm, pain or mental anguish.

“Willful” means the individual must have acted deliberately, not that the individual must have intended to inflict injury or harm.

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Some Examples of Sexual Abuse:

- Unwanted intimate touching of any kind especially of breasts or perineal area; all types of sexual assault or battery, such as rape, sodomy, and coerced nudity;
- Forced observation of masturbation and/or pornography; and
- Taking sexually explicit photographs and/or audio/video recordings of a resident(s) and maintaining and/or distributing them (e.g. posting on social media). This would include, but is not limited to, nudity, fondling, and/or intercourse involving a resident.

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Resident to Resident Sexual Abuse: Prevalence Of The Problem

- Dementia-driven resident-to-resident sexual abuse is the most common form of sexual abuse in nursing homes.
- As the nursing home population grows older, more feeble, and with more cognitive impairments, the opportunities for sexual abuse by residents with dementia.

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F602-Definitions

- **“Exploitation,”** as defined at §483.5, means “taking advantage of a resident for personal gain, through the use of manipulation, intimidation, threats, or coercion.”
- **“Misappropriation of resident property,”** as defined at §483.5, means “the deliberate misplacement, exploitation, or wrongful, temporary, or permanent use of a resident’s belongings or money without the resident’s consent.”

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F600-Definition of Neglect

“Neglect” means the failure of the facility, its employees or service providers to provide goods and services to a resident that are necessary to avoid physical harm, pain, mental anguish or emotional distress.

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F603-Involuntary Seclusion

Separation of a resident from other residents or from her/his room or confinement to her/his room (with or without roommates) against the resident’s will, or the will of the resident representative.

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F604/F605-Restraints

§483.10(e) Respect and dignity. The resident has a right to be treated with respect and dignity, including:

§483.10(e)(1) The right to be free from any physical or chemical restraints imposed for purposes of discipline or convenience, and not required to treat the resident's medical symptoms, consistent with §483.12(a)(2).

§483.12 The resident has the right to be free from abuse, neglect, misappropriation of resident property, and exploitation as defined in this subpart. This includes but is not limited to freedom from corporal punishment, involuntary seclusion and any physical or chemical restraint not required to treat the resident's medical symptoms.

§483.12(a) The facility must-

(2) Ensure that the resident is free from physical or chemical restraints imposed for purposes of discipline or convenience and that are not required to treat the resident's medical symptoms.

When the use of restraints is indicated, the facility must use the least restrictive alternative for the least amount of time and document ongoing re-evaluation of the need for restraints.

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F607– Policies & Procedures

§483.12(b) The facility must develop and implement written policies and procedures that:

- (1) Prohibit **and prevent** abuse, neglect, and exploitation of residents and misappropriation of resident property,
- (2) Establish policies and procedures to **investigate any such allegations**, and
- (3) Include **training** as required at paragraph § 483.95.

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F606 – Prohibitions on Employment

§ 483.12(a) The facility must—

(3) Not employ **or otherwise engage** individuals who—

(i) Have been found guilty of abuse, neglect, exploitation, misappropriation of property, or mistreatment by a court of law;

(ii) Have had a finding entered into the State nurse aide registry concerning abuse, neglect, exploitation, mistreatment of residents or misappropriation of their property; or

(iii) Have a disciplinary action in effect against his or her professional license by a state licensure body as a result of a finding of abuse, neglect, exploitation, mistreatment of residents or misappropriation of resident property.

(4) Report to the State nurse aide registry or licensing authorities any knowledge it has of actions by a court of law against an employee, which would indicate unfitness for service as a nurse aide or other facility staff.

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F608 Reporting Suspected Crimes

§483.12(b) The facility must develop and implement written policies and procedures that:

- (5) Ensure reporting of crimes occurring in federally-funded long-term care facilities in accordance with section 1150B of the Act.

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F608-Definition-Serious Bodily Injury

“Serious bodily injury” means an injury involving extreme physical pain; involving substantial risk of death; involving protracted loss or impairment of the function of a bodily member, organ, or mental faculty; requiring medical intervention such as surgery, hospitalization, or physical rehabilitation; or an injury resulting from criminal sexual abuse (See section 2011(19)(A) of the Act).

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F608-Policies and Procedures

- Annual notification of the covered individuals’ reporting obligations
- Retaliation
- Posting a notification of employee rights

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F608-Policies and Procedures

- Who is a covered individual
- Timeframe for reporting
- Examples of crimes
- Serious bodily injury
- Which entities must receive reports

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F609 - Reporting of Alleged Violations

§483.12(c) In response to allegations of abuse, neglect, **exploitation**, or mistreatment, the facility must:

(1) Ensure that all alleged violations involving abuse, neglect, **exploitation** or mistreatment, including injuries of unknown source and misappropriation of resident property, are reported immediately, **but not later than 2 hours after the allegation is made, if the events that cause the allegation involve abuse or result in serious bodily injury, or not later than 24 hours if the events that cause the allegation do not involve abuse and do not result in serious bodily injury**, to the administrator of the facility and to other officials (including to the State Survey Agency and **adult protective services where state law provides for jurisdiction in long-term care facilities**) in accordance with State law through established procedures.

(4) Report the results of all investigations to the administrator or his or her designated representative and to other officials in accordance with State law, including to the State Survey Agency, within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.

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F609-Reporting Timeframes

- Immediately (or as soon as possible)
 - Abuse or result in serious bodily injury-Not later than 2 hours, or
 - Do not involve abuse and do not result in serious bodily injury-Not later than 24 hours
- Investigation reports
 - Within 5 working days of the incident

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F610 - Response to Alleged violations

§483.12(c) In response to allegations of abuse, neglect, exploitation, or mistreatment, the facility must:

- (2) Have evidence that all alleged violations are thoroughly investigated.
- (3) Prevent further potential abuse, neglect, exploitation, or mistreatment while the investigation is in progress.
- (4) Report the results of all investigations to the administrator or his or her designated representative and to other officials in accordance with State law, including to the State Survey Agency, within 5 working days of the incident, and if the alleged violation is verified appropriate corrective action must be taken.

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Reporting of Suspected Crimes v. Alleged Violations

	Suspected Crimes	Alleged Violations
What	Any reasonable suspicion of a crime against a resident	1) All alleged violations of abuse, neglect, exploitation or mistreatment, including injuries of unknown source and misappropriation of resident property 2) The results of all investigations of alleged violations
Who is required to report	Any covered individual, including the owner, operator, employee, manager, agent or contractor of the facility	The facility
To whom	SA and one or more law enforcement entities for the political subdivision in which the facility is located (i.e., police, sheriffs, detectives, public safety officers; corrections personnel; prosecutors; medical examiners; investigators; and coroners)	The facility administrator and to other officials in accordance with State law, including to the SA and the adult protective services where state law provides for jurisdiction in long-term care facilities
When	Serious bodily injury- Immediately but not later than 2 hours after forming the suspicion No serious bodily injury- not later than 24 hours	All alleged violations-Immediately but not later than 1) 2 hours- if the alleged violation involves abuse or results in serious bodily injury 2) 24 hours- if the alleged violation does not involve abuse and does not result in serious bodily injury. Results of all investigations of alleged violations- within 5 working days of the incident

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Abuse Citation Examples

Paramount Nursing Home Oak Park

Facts of the case:

- Resident returned from pass late
- Was told he had “chosen” to be voluntarily discharged by being late
- Resident was put out on the street with all belongs
- It was December in Chicago, the temperature was in the teens
- The resident was not given any notice or appeal rights

Citations issued by the state:

F622—G **Transfer and Discharge**
 F623—D **Notice Before Transfer and Discharge**
 F600—G **Abuse**

Enforcement remedies imposed:

Civil Money Penalty of \$49,000
 Directed In-Service Training for staff on resident Rights
 Directed Plan of Correction to inform residents of their rights
 Denial of Payment for New Admission

Facility appealed the remedies but withdrew their hearing request before the case was heard.

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2017 DAB Abuse Case

Kindred Transitional--Greenfield
Docket No. A-16-138
Decision No. 2792
May 18, 2017

<https://www.hhs.gov/about/agencies/dab/decisions/index.html>

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Kindred Transitional—Greenfield Decision #2792

The facility argued four points:

- Foreseeability/Scope of employment
- Acts of the staff member alone
- Strict liability
- Inconsistent CMS application of abuse when abuse involves staff rather than another resident

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Kindred Transitional—Greenfield Decision #2792

Basic facts of the case:

- Facility appropriately screened and trained staff member before hire
- Staff member made sexual advances towards a resident
- Facility appropriately reported, investigated and protected residents during the investigation and terminated the staff person
- Cited with an IJ related to the sexual abuse

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Kindred Transitional—Greenfield Decision #2792

The DAB found:

- A facility is responsible for any abuse committed by its staff
- Since the abuse occurred while the staff member was on duty, they were the acts of Kindred
- Facilities cannot disavow the actions of the staff as the facility uses its staff to demonstrate compliance with program requirements
- Arguments of Strict Liability are inappropriate for Administrative compliance hearings
- Distinguishes “Foreseeability” when staff involved

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Enforcement and Appeals for LTC Facilities

1. Provide an overview of the Enforcement Process
2. Develop a better understanding of the Federal Appeals process
3. Develop a better understanding of the different levels of appeal and how they interact
4. Review case examples

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Remedies available to CMS

- Directed Plan of Correction
- State Monitoring
- Directed In-service Training
- Denial of Payment for New Admissions
- Denial of Payment for ALL Individuals
- Civil Money Penalty
- IJ Per Day
- Non IJ Per day
- Per Instance
- Temporary Management
- Termination
- Transfer of residents with closure
- Alternative State Remedies

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Enforcement Remedies

- Federal Enforcement for Nursing Homes is unique and unlike that of other providers.
- SNF/NFs must meet ALL requirements.
- Enforcement actions are called “remedies.”
- Providers may be subject to an array of remedies leading up to and including termination.

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SNF/NF Mandatory Remedies

Facilities are subject to the following remedies if not in compliance within:

- 3 months: Denial of Payment for new Admissions
- 6 months: Termination from the Medicare/Medicaid programs

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Scope and Severity

Deficiencies are evaluated against an enforcement “grid.” First, consider the severity of each deficiency:

- Potential for minimal harm
- Potential for more than minimal harm
- Actual harm or
- Immediate Jeopardy

Then consider the scope of each deficiency:

- Isolated
- A Pattern
- Widespread

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Factors considered for Enforcement

- The Scope and Severity of the noncompliance.
- The facility’s history.
- The relationship between and among deficiencies.
- What is most likely to help the provider achieve compliance.

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Enforcement basics:

- The deficiency with the highest severity drives the enforcement action.
- Once the scope and severity is known for each cited deficiency, the category of remedy will be known.
- Deficiencies at S/S of A, B, or C require no enforcement, since they are in substantial compliance.
- However, a Plan of Correction is required for B or C Level Deficiencies.

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How Does NATCEP fit in?

NATCEP isn’t a remedy imposed by the state or CMS but is a function of law if the conditions for NATCEP loss are met.

When does NATCEP Prohibition apply?:

- extended survey as a result of a finding of substandard quality of care
- assessed a total civil money penalty not less than \$11,242
- been subject to a denial of payment, the appointment of a temporary manager or termination; or, in the case of an emergency, been closed and/or had its residents transferred to other facilities
- within the previous two years, operated under a waiver of the full-time registered, professional nurse requirement

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How a CMP is calculated

The CMP Analytic Tool is used to calculate the initial Assessment

- The tool is available to the general public & can be found at: https://qcor.cms.gov/cmp_cal.jsp
- The tool is the mechanism CMS uses to determine the CMP type (Per-Day or Per-Instance) and amount.
- The tool ensures consistency in the CMP imposition by considering all the factors needed in the CMP calculation.

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CMP Tool Process

1. Start with Selecting the Base Amount:
2. Select the amount for the HIGHEST S/S level
3. Is There a History of Facility Noncompliance?
4. Are there repeated deficiencies?
5. Are there multiple deficiencies?
6. Facility Culpability?
7. CMP tool additional flexibilities

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Civil Money Penalty Selection

Per Instance (PI)? or Per Day (PD)?

- The PD CMP and the PI CMP cannot be used simultaneously during a specific survey (i.e., standard, revisit, complaint).
- Both types of CMPs may be used during a enforcement cycle if more than one survey takes place and a PD CMP was not the CMP initially imposed.
- However, when a PD CMP is the CMP sanction initially imposed, a PI CMP cannot be imposed on a subsequent survey within the same noncompliance cycle.
- Per Instance is used for noncompliance identified as a “singular event.”

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CMP Application Example

Health Complaint Survey 10-15-21 to 10-16-21

F600G (Abuse): On 09-01-21, a staff member took a photo of a cognitively impaired resident (with a BIMS of 1). The resident was naked and incontinent of bowel. The photo was posted on Instagram with the caption “Hot Mama” Another staff member saw the post and immediately reported it to the Administrator. The Administrator ensured that the post was removed from social media, terminated the perpetrator and notified the residents’ family and physician. The police was also notified.

F609G (Reporting of Alleged Violations): the facility did not report this incident of abuse to the State Agency.

The surveyors did not identify any other residents that were affected. No other deficiencies were cited at this survey.

The facility does not have a history of abuse citations and no history of G+ deficiencies in the last 3 years.

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CMP Application Example

Which type of CMP would be imposed:

Per Day or Per Instance?

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CMP Application Example

- History of non-compliance?
- Repeated deficiencies?
- Multiple deficiencies?
- Culpability?
- Financial Condition?

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CMP Application Example

Per Day CMP

Even though this was a singular event cited at a “G”, a PD CMP must be imposed since the deficiency cited ABUSE at the level of actual harm.

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CMP Application Example

- The only other factor that may be applied to add to the PD CMP for this case would be:

Culpability

- The determination of culpability can be challenging. The DAB has provided guidance, which is included in the instructions of the Analytic Tool. For culpability, one may consider basic management practices: employee appraisal, supervision, delegation, and staffing.

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Overview of the Appeals Process

1. Identification of non-compliance
2. Enforcement action is imposed
3. Facility files an appeal before an ALJ (DAB Civil Remedies Division) within 60 days
4. ALJ issues a decision
5. Either party may appeal the ALJ findings to the DAB Appellate Division
6. The DAB issues a final decision (mostly) for CMS
7. The facility may appeal the DAB decision to Federal Court

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Step Two: Enforcement action is imposed

CMS or the States can impose enforcement action when non-compliance is identified.

- For most NLTC providers, the only remedy is termination
- HHA enforcement remedies include termination and alternative sanctions like CMPs, directed plans of correction and denial of payment
- LTC providers have numerous remedies available.

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Step One: Noncompliance is identified

CMS or the States can impose enforcement action when non-compliance is identified.

- The enforcement action drives the appeal process, not the citation
- Generations at Regency Center, (DAB No. 2950)
 - Past Noncompliance cited
 - No Remedy imposed
 - Five star rating effected

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Step Three: Facility files an appeal before an ALJ

- A facility may file an appeal before an ALJ when CMS has made an *Initial Determination*. (See 42 CFR 498.3(b))
- Not all enforcement actions are Initial Determinations however.
- A preliminary notice of termination is not an Initial Determination. 42 CFR 498.3(d) lists specific things that are NOT Initial Determinations
- A finding of non-compliance is not an initial determination (meaning a provider cannot appeal a finding on a 2567 to an ALJ absent an enforcement action)

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Step Four: The ALJ Hearing

A de novo (meaning new) review of the facts of the case will be conducted to determine if enforcement action was justified.

CMS has the burden of proof to demonstrate a Prima Facie (on its face) showing of non-compliance to support the enforcement action taken.

Once CMS has made a prima facie showing of non-compliance, the burden shifts to the provider to show by a preponderance (greater than 50%) of the evidence that CMS's determination was in error.

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CMPs, Scope and Severity and Hearings

A facility has the right to receive a 35% reduction in the CMP amount if they waive their right to a hearing within 60 days.

A facility receives this reduction, even if they filed an appeal with the ALJ and subsequently withdraw it and waive their right to appeal within that timeframe.

A facility can only challenge the s/s of a citation if it will affect the remedy that was imposed.

- Per Day CMP for an IJ
- NATCEP

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CMPs, Scope and Severity and Hearings

For LTC providers there are three types of CMPs:

- Per Day IJ CMP
 - Can only be imposed for IJ level non-compliance
- Per Day Non-IJ CMP
 - Can be imposed for any substantial non-compliance that is not IJ ("D" to "I")
- Per Instance CMP
 - Any noncompliance D or higher

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Steps Five—the DAB

ALJ decisions can be appealed by either CMS or the provider to the Departmental Appeals Board (DAB)

- ALJ decisions do not carry precedential weight
- DAB decisions reflect the final decision of the HHS Secretary
- 42 CFR 498.5(a)(2) authorizes a provider to appeal an adverse DAB decision to Federal Court
- The DAB will only revise an adverse decision for CMS if CMS was able to provide some additional evidence that would support reopening the case (42 CFR 498.102)

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Step Six--the DAB Decision

The DAB has several standards of review they utilize for a given case:

- Summary Judgment—de novo (most favorable towards non-moving party)
- Factual issue—substantial evidence (less than preponderance—would a reasonable mind accept the evidence as adequate)
- Dispute of law—erroneous

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Step Seven: Federal Court Appeals

The provider must determine the appropriate court to file their appeal:

- Appeals for CMP remedies are heard by the U.S. Court of Appeals for the given jurisdiction
- Other remedies are heard by the U.S. District Court for the given jurisdiction

Key Federal Court Doctrines:

- Chevron Standard
- Auer standard

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Step Six--the DAB Decision

The DAB Dispute of law standard—erroneous
Avon Nursing Home, DAB No. 2830, November 6, 2017

- A complaint survey conducted by two dietitians found IJ level noncompliance
- Section 1819(g)(2) of the Social Security Act requires that a survey team include a Registered Nurse
- ALJ determined that because a nurse was not on the team, there was no "lawful basis" for CMS's determination of noncompliance and imposition of remedies.

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Case Example: Elgin

Non-compliance is identified under 483.35(i) Kitchen Sanitation (2010 citation)

Facts of the case:

- The facility served runny eggs to residents (evidence was the observation of smeared yolks)
- F371 was cited at a K (*Facility must store, prepare, distribute and serve food under sanitary conditions*)
- A per instance CMP of \$5000 was imposed
- The facility filed an appeal of the CMP

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Case Example: Elgin

Guidance in the SOM (in 2010):

Foods should reach the following internal temperatures:

Unpasteurized eggs when cooked to order in response to resident request and to be eaten promptly after cooking; - 145 degrees F for 15 seconds until the white is completely set and the yolk is congealed;

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Case Example: Elgin

The DAB Decision:

Facility argues:

- They rebutted CMS's prima facie evidence as it is cooking time and temperature not egg consistency that makes the egg safe.
- The facility provided video evidence that their method of cooking eggs achieved an internal yolk temperature of over 145 degrees that maintained a runny yolk.

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Case Example: Elgin

The ALJ Decision:

Facility arguments:

- SOM guidance does not have the effect of enforceable regulations
- Texas State law does not require the yolk to be congealed, just cooked to 145 degrees for 15 seconds
- The eggs were cooked at 145 degrees for 15 seconds even though they were runny
- Finally, they argued this was resident choice

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Case Example: Elgin

Federal Court Decision (U.S. Court of Appeals as the remedy was a CMP)

Court determined how much deference to give CMS.

Three levels:

- The CFR--CMS' interpretation of 42 U.S.C. § 1320a-7j (Chevron)
- The SOM--CMS' interpretation of the CFR (Auer)
- CMS' interpretation of the SOM

The court determined the CMS' interpretation of prong three was in error and should not be given deference.

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Case Example: Elgin

The same SOM text today:

If the facility is using unpasteurized eggs these eggs must be cooked until all parts of the egg are completely firm, regardless of a resident's request for such things as "sunny side up". To accommodate residents choice for items such as "sunny side up" the facility must use pasteurized eggs only;

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Questions? Comments



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