

CHAPTER 33-07-05 NURSING FACILITY SANCTIONS

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33-07-05-01. Purpose.

This chapter is intended to conform North Dakota law to the requirements of 42 U.S.C. 1396r(h) by the creation of an enforcement process to be applied upon a finding, on the basis of a standard, extended, or partial extended survey of a nursing facility, or otherwise, that a nursing facility no longer meets the requirements of 42 U.S.C. 1396r(c) (requirements relating to residents' rights), or 42 U.S.C. 1396r(d) (requirements relating to administration and other matters), or of rules, regulations, or policies adopted to implement those requirements including rules and regulations relating to North Dakota Century Code section 23-16-01.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-02. Authority and objective.

The state department of health is authorized by North Dakota Century Code section 23-01-11 to adopt such rules as necessary to enable the state to be in compliance with any federal laws in order to qualify for any federal funds related to medical facilities or agencies licensed by the department.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-03. Definitions.

1. "Class I violation" refers to a requirement found out of compliance that immediately jeopardizes the health or safety of one or more residents.
2. "Class II violation" refers to requirement found out of compliance that has the potential for causing a direct and substantial threat to the health, safety, welfare, rights of one or more residents, or unauthorized removal of a posted notice of sanction.
3. "Class III violation" refers to a requirement found to be or to have been out of compliance on consecutive surveys or visits, or failure to inform a caller inquiring about the availability of beds in the facility of the violations that are the subject of an order imposing sanctions.
4. "Department" means the state department of health.

5. "Director" means the director of the division of health facilities of the state department of health, or the director's designee.
6. "Facility" or "nursing facility" means an institution or a distinct part of an institution which:
 - a. Is primarily engaged in providing to residents:
 - (1) Skilled nursing care and related services for residents who require medical or nursing care;
 - (2) Rehabilitation services for the rehabilitation of injured, disabled, or sick persons; or
 - (3) On a regular basis, health-related care and services to individuals who because of their mental or physical condition require care and services (above the level of basic care) that can be made available to them only through institutional facilities;
 - b. Is required to have in effect a transfer agreement (meeting the requirements of 42 U.S.C. 1395x(1) with one or more hospitals having agreements in effect under 42 U.S.C. 1395cc; and
 - c. Is required to meet the requirements for a nursing facility described in 42 U.S.C. 1396r(b), (c), and (d) and North Dakota Century Code section 23-16-01.
7. "Initial deficiency" means the first occurrence of a violation recorded by the survey agency, including violations found during a standard survey, during an extended survey, in response to a complaint investigation visit, or otherwise.
8. "Repeat deficiency" means a violation which is substantially similar to a violation cited within the thirty-six preceding months.
9. "Secretary" means the secretary of the United States department of health and human services.
10. "Survey agency" means the state department of health.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-04. Provision of sanctions.

The department may impose any sanction described in section 33-07-05-06 if it is found that a nursing facility no longer meets a requirement of 42 U.S.C. 1396r(b), (c), or (d), or North Dakota Century Code section 23-16-01, and it is further found that the facility's deficiencies are:

1. A class I violation which immediately jeopardizes the health or safety of its residents, in which case the director shall immediately recommend the appointment of a receiver, as provided for in North Dakota Century Code chapter 23-16.1, and as specified in subsection 8 of section 33-07-05-06, or recommend termination of the facility's participation in the medical assistance program, and may provide, in addition, for one or more of the other sanctions described in section 33-07-05-06; or
2. A class II or class III violation which does not immediately jeopardize the health or safety of its residents, in which case the department may:
 - a. Recommend termination of the facility's participation under the state plan;
 - b. Provide for one or more of the remedies described in section 33-07-05-06; or

- c. Do both.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-05. Imposition of sanctions.

1. The department may implement sanctions based on a determination that a nursing facility no longer meets the requirements of 42 U.S.C. 1396r(b), (c), or (d), or of rules or regulations adopted to implement those requirements, including licensure requirements. The determination of appropriate sanctions must be at the discretion of the department. The appointment of a receiver must be as provided in North Dakota Century Code chapter 23-16.1. The department shall provide for the imposition of incrementally more severe sanctions for the violations that are repeated, uncorrected, pervasive, or present a threat to the health, safety, or welfare of the residents. When a determination is made that a civil money penalty will be imposed, the amount of the penalty will be based on recommendations made to the department by a committee composed of a representative from medical services, a representative from aging services, and a representative from health facilities.
2. The following factors must be considered in determining the sanctions to be imposed:
 - a. Seriousness of the violation;
 - b. Extent of the violation;
 - c. History of prior violations;
 - d. Prior imposition of sanctions;
 - e. Prior provision of provider information and training;
 - f. Willingness of facility management to adhere to program rules;
 - g. Agreement to make restitution to residents, the medical assistance program, or other third-party payors; and
 - h. Actions taken or recommended by licensing boards.
3. A sanction, once imposed, must continue until the facility has demonstrated to the department that the conditions or circumstances giving rise to the sanction have been corrected.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-06. Scope of sanctions.

The following sanctions may be imposed upon a finding that a nursing facility no longer meets the requirements of 42 U.S.C. 1396r(b), (c), or (d) or the requirements of North Dakota Century Code section 23-16-01:

1. Preparation, by the facility, of a directed plan of correction which is subject to approval of the department.
2. Mandatory attendance at provider information sessions.

3. Recommendation to the state Medicaid agency to implement one hundred percent review of the facility's claims prior to payment.
4. Recommendation for denial of payment with respect to any individual admitted to the nursing facility after receipt of the order. Denial of payment may not provide a basis for discharge or transfer of the individual.
5. A ban on the admission of residents, except those who were temporarily absent from the facility on hospital or therapeutic leave on the date of receipt of the order or thereafter.
6. Recommendation of denial of payment for any service furnished after receipt of the order. Denial of payment may not provide a basis for discharge, transfer, or denial of service to a resident of the facility.
7. A civil money penalty, not exceeding one hundred fifty dollars per licensed facility bed, assessed, with interest at the legal rate, up to a maximum of ten thousand dollars, for each day the violation existed or continues to exist.
8. The appointment of a receiver to oversee the operation of the facility and to assure the health and safety of the facility's residents, where there is a need for temporary management while:
 - a. There is an orderly closure of the facility; or
 - b. Improvements are made in order to bring the facility into compliance with the requirements of the 42 U.S.C. 1396r(b), (c), and (d) and North Dakota Century Code section 23-16-01
9. In the case of an emergency closure of the facility or transfer of facility residents to other facilities, or both.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-07. Determination of amount of civil money penalties.

A facility which has been subjected to the imposition of a sanction under subsection 7 of section 33-07-05-06 is liable to the state for each day the violation existed or continues to exist. A violation must be presumed to continue to exist from the time it is found until the department finds it to have been corrected. The amount of the civil money penalty must be determined as follows:

1. For each class I violation, not more than fifty dollars per licensed facility bed;
2. For each class II violation, not more than twenty-five dollars per licensed facility bed;
3. For each class III violation, not more than ten dollars per licensed facility bed; and
4. For each repeat violation, not more than three times the amount otherwise provided for under subsection 1, 2, or 3.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-08. Recommendation of prohibition on submission of claims through other providers.

The department shall recommend that any facility which is subject to a suspension or termination from participation or to any limitation or denial of payment shall be prohibited from submitting claims for payment, either directly or through any clinic, group, corporation, or other association, to the division of medical services or any fiscal agent or any services or supplies provided under the medical services program except for any services or supplies provided prior to the effective date of imposition of the remedy. The submission of any claim in violation of this section may subject the provider submitting the claim to sanctions under this chapter.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-09. Order and notice of order.

1. Upon a determination that the circumstances make the imposition of a sanction appropriate, the department shall issue a written order identifying the violations and the sanction imposed. If the violations are of a nature to require the imposition of an incrementally more severe sanction, the order must identify the reasons therefor. A copy of the order must be sent by registered or certified mail, return receipt requested, to the facility's owner, the facility's administrator, or head of the facility's governing board; or hand delivered to the facility's owner, the facility's administrator, or the head of the facility's governing board. The order must specify the terms or conditions under which the sanction will be terminated. The order must also advise the facility of the right to seek reconsideration.
2. When a facility has been subjected to a sanction, the department may notify, as appropriate, applicable professional licensing agencies, boards of registration or licensure, and federal, state, or county agencies of the circumstances and the sanctions imposed.
3. When a facility has been subjected to a sanction, the department shall notify the long-term care ombudsman and the county social service board of each county within seventy-five miles [120.7 kilometers] of the location of the facility. Each county social service board so notified shall post, in a prominent place within its office, the name and location of the facility and the sanction. The posting must remain in place for the entire period of any sanction other than closure or termination from the program and for the first ninety days of a closure or termination.
4. When a facility has been subjected to a sanction, the facility shall place notices of the sanction, supplied by the department, at all facility entrances and exits. In the event a sanction was imposed under subsection 5, 8, or 9 of section 33-07-05-06, the facility shall inform every person inquiring by telephone about the availability of beds in the facility of the violations and the sanctions imposed. Unauthorized removal of a posted notice, or failure to so inform a telephone caller, is a class II violation. The director may also require the facility to purchase space in the print media to achieve the public dissemination of information concerning any sanction.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-10. Request for reconsideration.

1. Within ten days after receipt of the order, the facility may request reconsideration by the department. Within fifteen days after receipt of a request for reconsideration, the department

shall grant or deny the request for reconsideration and may suspend the imposition of any sanction except one imposed under subsection 8 or 9 of section 33-07-05-06, pending a decision on reconsideration.

2. A request for reconsideration must, in any event, be denied unless it identifies, with specificity, each disputed violation and states the factual basis for its contention that the violation was erroneously determined. The correction of the factors which led to the determination of a violation may not be asserted as a basis for a request for reconsideration.
3. If the department denies the request for reconsideration the department shall notify the facility in writing of that decision. If the denial was for any reason other than a failure of the request to conform to the requirements of subsection 2, the notice must advise the facility of the right to appeal.
4. If the department determines to undertake reconsideration, the decision on reconsideration must be rendered within forty days after the issuance of the order. The notice of the decision on reconsideration must advise the facility of the right to appeal.
5. If the facility fails to file a timely request for reconsideration which conforms to the requirements of subsection 2, the order is final in all respects, and no further administrative or judicial review is applicable.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-11. Appeals.

1. A facility dissatisfied with a decision on a timely request for reconsideration, which conforms to the requirements of subsection 2 of section 33-07-05-10, may appeal. An appeal may be perfected by mailing or delivering the information, described in subdivisions a through d, to the department, state capitol, Bismarck, North Dakota, so that the mailed or delivered material arrives at the office of the division of health facilities on or before 5:00 p.m. on the thirty-first day after the date of the determination of the department made with respect to a request for reconsideration. An appeal under this section is perfected only if accompanied by written documents including all of the following information:
 - a. A copy of the notice received from the department advising of the department's decision on the request for reconsideration;
 - b. A statement of each disputed violation and the reason or basis in fact for the dispute;
 - c. The authority in statute or rule upon which the appealing party relies for each disputed item; and
 - d. The name, address, and telephone number of the person upon whom all notices will be served regarding the appeal.
2. Except as otherwise provided in this section, the appeal must be considered as provided in article 98-02.
3. The dispositive issue on appeal must be whether the violation occurred, not whether the violation has been corrected.
4. The hearing officer must make written findings of fact and conclusions of law, and must recommend a decision to the department. The recommended decision must set forth the reasons for the decision and the evidence upon which the decision is based.

5. The department may accept, modify, or reject the recommended decision. If the department rejects the recommended decision, it may remand the matter to the office of administrative hearings with directions. The department may, through its directions, require the receipt of additional evidence, and the submission of amended findings of fact, conclusions of law and recommended decision which reflects consideration of additional evidence. The department may, through its directions, require that the matter be referred to the same or a different hearing officer, and the office of administrative hearings shall comply with that direction unless compliance is impossible.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11

33-07-05-12. Application.

An appeal may not suspend or delay the imposition of a remedy under this chapter. All civil penalties received pursuant to this chapter must be paid into a special fund of the department for the cost of implementation of this chapter, to be applied to the protection of the health or property of residents or patients of facilities that the department or the secretary finds in violation, including payment for the costs for relocation of patients, maintenance of temporary management to operate a facility pending correction of a violation or closure of the facility, or for reimbursement to residents and patients for personal funds lost due to a cited violation.

History: Effective January 1, 1993.

General Authority: NDCC 23-01-03, 28-32-02

Law Implemented: NDCC 23-16-01, 23-16-11