

**CHAPTER 75-02-05.2**  
**NURSING FACILITY ENFORCEMENT ACTION**

Section

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**75-02-05.2-01. Definitions.**

1. "Certification of compliance" means a facility is in at least substantial compliance and is eligible to participate in Medicaid as a nursing facility.
2. "Certification of noncompliance" means a facility is not in substantial compliance and is not eligible to participate in Medicaid as a nursing facility.
3. "Deficiency" means the occurrence of a violation recorded by the survey agency, including a violation found during a standard survey, during an extended survey, or in response to a complaint, investigation, visit, or otherwise. A deficiency may include a violation that occurred at a time prior to the date of the survey or visit, even if the violation no longer exists at the time of the survey or visit.
4. "Department" means the department of human services.
5. "Enforcement action" means the process of imposing one or more remedies available under this chapter.
6. "Facility" means an institution or a distinct part of an institution which:
  - a. Is primarily engaged in providing:
    - (1) 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 mental or physical conditions require care and services above the level of basic care that can be made available only through an institutional facility;
  - b. Is required to have in effect a transfer agreement, meeting the requirements of 42 U.S.C. 1396x(1), with one or more hospitals having agreements in effect under 42 U.S.C. 1395cc;
  - c. Is required to meet the requirements for a nursing facility described in 42 U.S.C. 1396r(b), (c), and (d); and
  - d. Is not primarily engaged in providing care and treatment of mental diseases.
7. "Medicaid agency" means the department of human services.
8. "New admission" means a resident is admitted to a facility on or after the effective date of a denial of payment remedy and, if previously admitted, has been discharged before the

effective date of a denial of payment. A resident admitted before the effective date of the denial of payment and taking temporary leave is not considered a new admission.

9. "Noncompliance" means any deficiency that causes a facility not to be in substantial compliance.
10. "Regional office" means the health care financing administration's regional office responsible for program administration in North Dakota.
11. "Repeated noncompliance" means a facility has received three consecutive findings of substandard quality of care on three consecutive standard surveys. The consecutive findings need not be based on the exact tag number of a deficiency.
12. "Secretary" means the secretary of the United States department of health and human services.
13. "Substandard quality of care" means a facility has one or more deficiencies related to participation requirements for resident behavior and facility practices, quality of life, or quality of care that constitute immediate jeopardy to resident health or safety; a pattern of or widespread actual harm that is not immediate jeopardy; or a widespread potential for more than minimum harm, but less than immediate jeopardy, with no actual harm.
14. "Substantial compliance" means compliance with the participation requirements and includes any identified deficiencies posing no greater risk to resident health or safety than the potential for causing minimal harm.
15. "Survey agency" means the state department of health.

**History:** Effective July 1, 1995.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

#### **75-02-05.2-02. Available enforcement remedies.**

The following enforcement remedies may be imposed on a facility that is not in substantial compliance.

1. **Category one remedies:**
  - a. A directed plan of care.
  - b. Directed in-service training.
  - c. State monitoring.
2. **Category two remedies:**
  - a. Denial of payment for all new Medicaid admissions.
  - b. A ban on new admissions of residents.
  - c. A civil money penalty ranging from a minimum of fifty dollars to a maximum of three thousand dollars for each day the facility is not in substantial compliance.
3. **Category three remedies:**
  - a. Termination of the provider agreement.
  - b. Appointment of a receiver to oversee the operation of the facility.

- c. A civil money penalty ranging from a minimum of three thousand fifty dollars to a maximum of ten thousand dollars for each day the facility is not in substantial compliance.
- d. In case of an emergency, transfer of residents to other facilities.
- e. In case of an emergency, transfer of residents to other facilities with closure of the facility.

**History:** Effective July 1, 1995.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

**75-02-05.2-03. Enforcement action.**

The department may impose the enforcement remedies described in section 75-02-05.2-02 if the facility is not in substantial compliance. The scope and severity matrix established by the health care financing administration must be used to determine the appropriate category of enforcement remedy or remedies to be imposed.

1. If immediate jeopardy to the health or safety of residents exists, the department shall impose a remedy provided in subdivision a or b and may, in addition, impose any or all remedies provided in subdivisions c, d, and e. The department may:
  - a. Terminate the provider agreement no later than twenty-three days after the immediate jeopardy is identified if the immediate jeopardy is not removed by the twenty-first day;
  - b. Appoint a receiver to oversee the operation of the facility to ensure the health and safety of residents, where there is a need for a temporary management while:
    - (1) There is an orderly closure of the facility; or
    - (2) Improvements are made in order to bring the facility into substantial compliance;
  - c. Impose a civil money penalty of at least three thousand fifty dollars per day and not exceeding ten thousand dollars per day, effective as of the date the noncompliance was identified;
  - d. Immediately impose state monitoring; or
  - e. Impose any other remedy identified in section 75-02-05.2-02, beginning at least two days from the date the provider receives notice of the remedy to be imposed.
2. If immediate jeopardy does not exist, the department may terminate the provider agreement in effect or apply one or more of the enforcement remedies identified in section 75-02-05.2-02 instead of, or in addition to, termination. The department may:
  - a. Impose a denial of payment for new admissions no sooner than fifteen days after the survey, but must impose a denial of payment for new admissions effective no later than three months after the last day of a standard survey if substantial compliance is not achieved;
  - b. Impose state monitoring without notice;
  - c. Impose a civil money penalty effective as of the date the noncompliance was identified;
  - d. Authorize the survey agency to impose one or more category one remedies; or

- e. Impose other remedies available under section 75-02-05.2-02 no sooner than fifteen days from the date the provider receives notice.
3. If a provider has been found to have provided substandard quality of care on the last three consecutive standard surveys, the department shall:
  - a. Deny payment for all new admissions as soon as possible within, but no later than, ninety days from the last day of the third consecutive survey;
  - b. Impose state monitoring; and
  - c. Provide notification of the finding of substandard quality of care to the attending physician of each resident found to have received the substandard quality of care.
4. If the provider fails to properly post a notice of enforcement action, removes a posted notice without authorization, fails to inform a person inquiring about availability of beds of the enforcement action, or fails to publish a required notice, the department shall impose a civil money penalty.
5. The department may not enter into a provider agreement with any prospective provider who is not in substantial compliance.

**History:** Effective July 1, 1995; amended effective February 1, 1997.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

**75-02-05.2-04. Civil money penalties.**

1. The department may impose a civil money penalty for the number of days a provider is not in substantial compliance with one or more participation requirements.
2. The department may impose a civil money penalty for the number of days of past noncompliance since the last standard survey.
3. A minimum of fifty dollars per day and a maximum of three thousand dollars per day in penalties may be imposed when immediate jeopardy does not exist, but deficiencies either caused actual harm or caused no actual harm, but have the potential for more than minimal harm.
4. A minimum of three thousand fifty dollars per day and a maximum of ten thousand dollars per day in penalties may be imposed when immediate jeopardy exists or when immediate jeopardy does not exist if a penalty in the lower range of penalty identified in subsection 3 was previously imposed and deficiencies are repeated.
5. A civil money penalty imposed under subsection 4 must be decreased to the range of penalties provided in subsection 3 when the penalty was imposed for a situation of immediate jeopardy and the immediate jeopardy is removed, but noncompliance continues.
6. The following factors must be considered in determining the amount of a civil money penalty to impose.
  - a. The seriousness of the deficiency determined by:
    - (1) Severity measured as:
      - (a) No actual harm with a potential for minimal harm;

- (b) No actual harm with a potential for more than minimal harm, but not immediate jeopardy;
    - (c) Actual harm that is not immediate jeopardy; or
    - (d) Immediate jeopardy to residents' health or safety; and
  - (2) Scope measured as:
    - (a) Isolated;
    - (b) Patterned; or
    - (c) Widespread;
  - b. The relationship of one deficiency to another;
  - c. History of noncompliance:
    - (1) For all deficiencies; and
    - (2) For deficiencies specifically related to deficiencies currently cited;
  - d. The provider's financial condition; and
  - e. The likelihood the civil money penalty may achieve correction and continued compliance.
7. A civil money penalty may be increased when continued noncompliance by a provider becomes sufficiently serious to pose immediate jeopardy.
  8. The department shall increase a civil money penalty by twenty-five percent if the provider has repeated deficiencies. The increased civil money penalty may exceed the maximum amount per day established in this section.
  9. A civil money penalty is collectible for the number of days of noncompliance from the date the penalty starts until the date the provider achieves substantial compliance or, if applicable, the date of termination.
  10. The provider may, in accordance with 42 CFR part 431, appeal the decision that resulted in imposition of a civil money penalty.
    - a. The collection of the civil money penalty must be delayed if a hearing is requested.
    - b. The civil money penalty must be reduced by thirty-five percent if the provider, in writing, waives the right to appeal no later than sixty days from the date of the notice of the imposition of the civil money penalty.
  11. Payment of a civil money penalty is due:
    - a. Fifteen days after a provider comes into substantial compliance or the provider agreement is terminated;
    - b. Fifteen days after a final administrative decision is made upholding the imposition of the civil money penalty if the provider has achieved substantial compliance or was terminated prior to the final administrative decision; or
    - c. Fifteen days after the time period for requesting a hearing has expired and the provider has achieved substantial compliance or was terminated prior to the final day the hearing request was due.

12. Interest is payable on the unpaid civil money penalty balance beginning on the due date. Interest will accrue at three times the legal rate.
13. Civil money penalties and applicable interest, if any, not paid within thirty days after the due date must be deducted from any payment owing to the provider.
14. Civil money penalties collected must be used for the protection of the health or property of residents of facilities found deficient.

**History:** Effective July 1, 1995.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

**75-02-05.2-05. Imposition of enforcement remedies.**

1. The survey agency shall recommend enforcement action.
2. The department shall consider the survey agency recommendation when determining the appropriate enforcement action, except 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 remedies for repeated, uncorrected, or pervasive deficiencies or deficiencies presenting a threat to the health, safety, or welfare of residents.
3. The provisions of 42 U.S.C. 1396r(h)(6) govern the imposition of remedies when the department and the regional office do not agree.
4. Enforcement action must cease upon recommendation of the survey agency indicating the conditions or circumstances causing a deficiency appear to be corrected.

**History:** Effective July 1, 1995.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

**75-02-05.2-06. Notice of enforcement action - Delivery or mailing- Posting.**

1. A written notice of enforcement action issued by the department must be hand delivered or mailed to the facility owner, administrator, or head of the facility's governing board. The notice must include:
  - a. The basis for the decision;
  - b. A statement of the deficiencies upon which the decision was based; and
  - c. If the facility is also participating or seeking to participate in Medicare as a skilled nursing facility, and the basis for the department's denial or termination of participation in Medicaid is also a basis for denial or termination in Medicare:
    - (1) That the appeals procedures specified for Medicare facilities in 42 CFR part 498 apply; and
    - (2) A final decision entered under the Medicare appeals procedure is binding on the department.
2. If the department imposes a remedy:
  - a. Except as provided in subdivision b, the department must impose all remedies timely, even if the facility requests a hearing; and

- b. The department may not collect a civil money penalty until after the period for requesting a hearing has elapsed or, if the facility requests a hearing, until issuance of a final administrative decision that supports imposition of the penalty.
3. The facility shall place the notice of enforcement action at all facility entrances and exits. In the event of the imposition of a ban on admission, denial of payment for new admissions, receivership, closure, or termination, the facility shall inform every person inquiring about the availability of beds in the facility of the deficiencies and the enforcement actions. The department may require the facility to publish a notice in area newspapers to achieve public dissemination of information concerning enforcement action.

**History:** Effective July 1, 1995; amended effective February 1, 1997.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

#### **75-02-05.2-07. Prohibition on submission of claims through other providers.**

A facility subject to termination from participation or to any limitation or denial of payment may not submit claims for payment, either directly or indirectly through any clinic, group, corporation, or other association, to the department or any fiscal agent for any services or supplies provided under the medical services program except for any services or supplies provided prior to the effective date of an enforcement action.

**History:** Effective July 1, 1995.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

#### **75-02-05.2-08. Appeals.**

1. A nonstate-owned facility, participating only in Medicaid, dissatisfied with an informal dispute resolution decision of the survey agency may appeal the issue of whether or not a deficiency occurred in the manner provided in section 75-01-03-20. Correction of the deficiency may not be used as a reason for appealing a decision.
2. A facility not entitled to appeal under subsection 1 may appeal under 42 CFR part 498.

**History:** Effective July 1, 1995; amended effective February 1, 1997.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)

#### **75-02-05.2-09. Application.**

The department is responsible for the application of this chapter to nonstate-operated nursing facilities participating only in the Medicaid program. The department may make recommendations to the regional office for the application of this chapter to other nursing facilities. This chapter must be applied on or after July 1, 1995.

**History:** Effective July 1, 1995.

**General Authority:** NDCC 50-24.1-04

**Law Implemented:** 42 USC 1396r(h)