



News & Updates

CMS REQUIRES MEDICARE-CERTIFIED HEALTH CARE FACILITIES TO ADOPT WATER MANAGEMENT POLICIES AND PROCEDURES TO MINIMIZE WATERBORNE PATHOGEN RISKS

The intersection of building maintenance and infection control in health care facilities is under scrutiny by regulators and public health officials — and it may soon become a significant driver of cost, risk, and legal exposure.

On June 2, The Centers for Medicare and Medicaid Service (CMS) issued a survey and certification memorandum announcing that Medicare-certified health care facilities must develop and implement policies and procedures to minimize the risk of growth of *Legionella* — the waterborne bacterium that causes a type of pneumonia known as Legionnaires' disease — and other waterborne pathogens in building water systems. On June 9, CMS confirmed that the new policy applies to Medicare certified Hospitals, Critical Access Hospitals, and Long-Term Care facilities but also serves to raise the general awareness about waterborne pathogen risks for all healthcare organizations.

CMS surveyors and accrediting organizations will evaluate compliance with this mandate, which takes effect immediately.

This CMS memorandum — “Requirement to Reduce Legionella Risk in Healthcare Facility Water Systems to Prevent Cases and Outbreaks of Legionnaires' Disease (LD)” (Ref: S&C 17-30- Hospitals/CAHs/NHs) — is driven by the public health community's increasing concern about the risk of transmission of Legionnaires' disease in health care facilities, detailed in a *Vital Signs* report, “Health Care–Associated Legionnaires' Disease Surveillance Data from 20 States and a Large Metropolitan Area — United States, 2015,” published by the United States Centers for Disease Control and Prevention (CDC) on June 6, 2017.

Over the past several years, outbreaks of Legionnaires' disease have made headlines across the country. As media attention, regulation, and litigation has escalated, so has the pressure on public health agencies and building owners to identify sources and minimize the risk of exposure. In June 2015, to promote proactive *Legionella* risk-management practices, an industry association, ASHRAE (formerly known as the American Society of Heating, Refrigerating, and Air-Conditioning Engineers) issued its set of guidelines, *Legionellosis: Risk Management for Building Water Systems*, more commonly referred to as “ASHRAE 188.” ASHRAE 188 describes a process for developing water management plans for at-risk facilities. One year later, the CDC issued a *Vital Signs* report and a “toolkit” illustrating the ASHRAE 188 process. The CDC issued an updated version of the “toolkit” on June 5, 2017.

The CMS memorandum and the CDC's new June 2017 *Vital Signs* report refer to ASHRAE 188 and the CDC's June 2016 “toolkit” as a framework for developing water management policies and procedures. Neither ASHRAE 188 nor the CDC “toolkit” offer specific practices or procedures for *Legionella* control in building water systems. Rather, plan design is left to the discretion of the designated “Program Team.”

While there have been no scientific studies to date that validate the process set forth in ASHRAE 188 as effective at reducing *Legionella* growth and transmission, the CDC, and now CMS, have embraced its risk-management approach.

Despite the lack of validation, in the aftermath of an outbreak or even a sporadic case of disease associated with a building, many will assume that compliance would have reduced or even eliminated risk and prevented the contraction of disease.

No court as yet has declared that ASHRAE 188 or any other guideline is a definitive standard of care for the management and control of *Legionella*. Whether any industry standard or guideline will be recognized as a legally binding standard of care that represents a baseline level of reasonable conduct a building owner or operator will be expected to abide by remains to be seen. That issue must be resolved in the courts. In the meantime, the CMS memorandum explicitly requires that Medicare certified Hospitals, Critical Access Hospitals, and Long-Term Care facilities institute preventative measures to minimize the growth and transmission of *Legionella* and other waterborne pathogens to maintain certification. Those involved in the ownership and operation of Medicare certified health care facilities should be aware of CMS's new requirement and its heightened focus on health care-associated infections caused by waterborne pathogens. The complex and dynamic world of health care facilities management has now become exponentially more complex and dynamic.

It is fair to say that public health officials and regulators increasingly expect that the designers, builders, owners, and managers of health care and other facilities recognize the risks associated with waterborne pathogens and implement a proactive approach to minimize growth and transition to patients, employees, and visitors. Against this backdrop, however, there are many unresolved legal and technical issues. Policies and procedures that appear to have a protective effect may, in fact, create new legal risk. Practices that appear to be state-of-the-art may lack scientific validation and may have undesirable collateral impacts.

Stakeholders should consider how the shifting risk and legal landscape may impact their risk management and facilities management programs.

To learn more about the potential impact of this development on your business, contact a member of Goldberg Segalla's Toxic Tort Practice Group.

Attorney Advertising © 2018 Goldberg Segalla
Prior results do not guarantee a similar outcome.

- New York
- Chicago
- Los Angeles
- Orange County
- Orlando
- West Palm Beach
- St. Louis
- Philadelphia
- Miami
- Baltimore
- Newark
- Garden City
- Hartford
- Princeton
- Greensboro
- Raleigh
- Buffalo
- Rochester
- Syracuse
- Albany
- White Plains
- London