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Significant Change Effective July 1, 2010 In Requirement For Medicare Payment For Resident Rotations To The Nonprovider Setting

The Patient Protection and Affordable Care Act, Public Law 111-148 (PPACA) reformed Medicare indirect medical education (IME) and direct graduate medical education payment (GME) for residents rotating off of the hospital campus to the so-called "nonprovider setting," which typically is a private physician practice.

Current Law

Primarily as a result of the ambiguous and frequently revised regulations the Centers for Medicare and Medicaid Services (CMS) has published over the past ten years, Medicare payment for rotations to the nonprovider setting has been contentious and has resulted in numerous appeals. In 1999, CMS adopted an undefined "written agreement" requirement, which became optional as of October 1, 2004. Moreover, in 2003 CMS "clarified" for the first time the requirement that a hospital must compensate the nonprovider setting for the costs relating to the services of the teaching and supervising physician, and as of July 1, 2007 provided long-awaited guidance regarding the compensation requirement. In light of the significant delay between the cost report filing date and the final settlement, many hospitals were deemed to be out of compliance with the CMS requirements.

Amended Law

Effective July 1, 2010, the PPACA abolishes these requirements, and instead simply provides that a hospital is entitled to payment "if a hospital incurs the costs of the stipends and fringe benefits of the resident during the time the resident spends in that setting." (The Health Care and Education Reconciliation Act of 2010 did not address this provision.) Thus, the PPACA provides that, as of July 1, 2010, a hospital claiming Medicare IME and GME payment for residents rotating to the nonprovider setting is not required to have a written agreement with that setting and is not required to compensate the nonprovider setting. Although the written agreement requirement clearly is optional under the CMS regulations and the PPACA, a hospital should consider whether, as a matter of sound business practice, it is desirable to enter into a written agreement with the nonprovider setting to memorialize the rotation schedule, teaching and supervision requirements and similar matters.

Additionally, this legislation directly addressed and reformed payment where, as is common, two or more hospitals jointly fund a resident education program conducted by a nonprovider setting which CMS refers to as a "third party" entity. Typically, a third party entity is a separate corporation which obtains accreditation and conducts resident training at its facilities and at other nonprovider sites. While CMS has not acted consistently, it has required in certain instances that each of the hospitals enter into a "written agreement" with the third party entity. Rather than require a "written agreement" between each of the hospitals and the third party entity, however, the PPACA provides for a contract between (or among) the hospitals jointly funding the program conducted by the third party entity. PPACA requires that the contract provide that each hospital counts a proportional share of the time that a resident spends training in that setting. This requirement reflects the more typical existing contractual arrangement between (or among) hospitals jointly funding a third party entity.

Impact on Settled Cost Reports

Finally, although these provisions are effective July 1, 2010, the PPACA provides somewhat cryptically as follows regarding settled cost reports:

The amendments made by this section shall not be applied in a manner that requires reopening of any settled hospital cost reports as to which there is not a jurisdictionally proper appeal pending as of the date of the enactment of this Act on the issue of payment for the indirect costs of medical education under section 1886(d)(5)(B) of the Social Security Act (42 U.S.C. § 1395ww(d)(5)) or for direct graduate medical education costs under section 1886(h) of such Act).

The converse of this provision is that these amendments “shall be applied in a manner that requires reopening of any settled hospital cost reports as to which there is a jurisdictionally proper appeal pending as of the date of the enactment of this Act. Pending the issuance of regulations by CMS, time will tell whether that interpretation is accurate.

Action Steps

Presumably, CMS will issue regulations that are consistent with these statutory provisions. Moreover, the regulations presumably will explain the rights of a hospitals with jurisdictionally proper appeals pending. In the interim, the following action steps are prudent:

- Teaching hospitals are well advised to review their nonprovider setting arrangements to come into compliance with these new requirements by July 1, 2010. Specifically, as of that date teaching hospitals are no longer required to compensate the nonprovider setting.
- Teaching hospitals which jointly fund a “third party” entity should enter into agreements with each other providing for the proportional share of the residents claimed by each hospital.
- Pending appeals challenging the prior regulations should be preserved in light of the prospect for relief for jurisdictionally proper pending appeals.

For assistance in reviewing or modifying these arrangements, please contract Kenneth Marcus or any member of the Health Care Department.

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