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CLIENT ALERT

Update on the “Two Midnight” Rule

February 5, 2014

In our October 17, 2013 Client Alert, *“Inpatient Admission Issues You Should Know About,”* we told you about the “two-midnight” rule and the requirements for physicians, or non-physician practitioners (i.e., physician assistants or nurse practitioners) to admit patients to a facility. The two-midnight rule directs auditors to assume hospital admissions are reasonable and necessary for patients who stay in a hospital through two midnights.¹ Stays that are shorter than two midnights are also presumed legitimate if coded as “outpatient observation.”

CMS devised the policy in response to complaints that Medicare patients were being exposed to prolonged periods of outpatient observation care in the hospital – which exposes them to 20% co-payments and denies them eligibility for Medicare-covered rehab care upon release. The new rule was intended to cut down on long observation care and clarify the murky rules² about when a Medicare patient should be admitted. In fact, hospitals had been asking for clarity on the issue to insulate their admissions decisions from Medicare’s auditors.

Reaction to the “Two-Midnight” Rule

The two-midnight rule was set to go into effect October 1, 2013. However, the strong reaction to the policy itself and the direct negative financial impact it will have on hospitals has prevented its full implementation. Specifically, the CMS estimated the new policy would increase inpatient expenditures by about \$220 million, so it proposed to offset that by permanently reducing the standard payment rate to hospitals by 0.2%. This, of course, quickly drew the ire of hospital providers. Hospitals say they will lose money because many procedures are appropriate for short inpatient care and now will be reimbursed only under Medicare’s lower outpatient rates.

¹ Thus, a stay that lasts less than two midnights will be assumed to not be legitimate. Exceptions to this rule include surgeries on the CMS’ “inpatient-only” list and cases where a patient unexpectedly dies or leaves the hospital early against medical advice.

² Despite the unclear rules, admission decisions are some of the most heavily audited aspects of Medicare hospital bills.

CMS officials countered this argument, arguing that hospitals actually stand to benefit financially because the two-midnight rule provides that hospital visits that cross two midnights will be presumed legitimate if they include adequate physician notes. This, according to CMS, should allow hospitals to get full inpatient rates on cases that would have been outpatient in the past. The healthcare industry is simply not convinced.

The American Medical Association (“AMA”) “strongly opposes” the policy because it could increase the amount of documentation that physicians will have to file while subjecting some patients to larger financial burdens.

The American Hospital Association (“AHA”) similarly opposes the policy and is not accepting it without a fight. In fact, in mid-January, a few AHA members laid the groundwork for legal action challenging the two-midnight policy by filing appeals asking the CMS Provider Reimbursement Review Board to grant an expedited judicial review for the hospitals’ claims that the 0.2% payment cut is unlawful. The AHA and other hospital associations supported the move. The AHA also supports a House bill that would delay enforcement of the policy until October 1, 2014. This bill would also urge the CMS to implement a new payment policy for short inpatient stays in 2015.

Delays and further delays, but, what does it really mean?

Although the two-midnight rule went into effect on October 1, 2013 (the first day of the government FY 2014), CMS issued the first delay of key enforcement provisions in late September 2013. Specifically, CMS announced that for a period of 90 days, until December 31, 2013, it would not allow recovery-audit companies to review the medical necessity of inpatient admissions of one midnight or less.

The second delay came last week, under growing pressure from the AHA and AMA. The CMS said on Friday, January 31, 2014, that recovery-audit companies will not be able to open investigations under the new rules until after September 30, 2014.

Many healthcare providers are still skeptical despite the most recent delay. No delay in implementation of the policy will alleviate their concerns regarding getting short-changed on patients who spend fewer than two nights in the hospital.

The delay does, however, allow providers and hospitals more time to determine how to block this policy from ever going into effect, whether through negotiations, legislation or litigation. The AHA’s official response to the delay was gracious and diplomatic: “We are pleased that CMS has extended its enforcement moratorium on the two-midnight policy for an additional six months, as the AHA has urged. This action clearly recognized that there are still many unanswered questions about the policy.”

The Next 6 Months

It will be interesting to see what occurs with the policy over the next six months. As discussed in our October 17, 2013 Client Alert, the two-midnight rule not only affects hospitals and reimbursement for inpatient admissions, but also providers who admit patients to hospitals. Providers with admitting privileges and health care practitioners who document admission orders and progress notes will have to become well

educated in the new documentation requirements (in whatever form they take) and make the necessary changes in their own facilities.

If you have questions regarding these changes to the inpatient admission rules for FY 2014, or any health law matter, please contact Stephanie Ottenwess at sottenwess@ottenwesslaw.com or Joseph Campbell at jcampbell@ottenwesslaw.com.

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