Proskauer

Temporary COVID-19 Medicare/Medicaid Changes: Updates in the Second Interim Final Rule

May 8, 2020

On April 30, 2020, the Centers for Medicare & Medicaid Services ("CMS") issued its Second Interim Final Rule in response to the COVID-19 pandemic, which includes additional regulatory waivers and rule changes. After reviewing comments to its First Interim Final Rule published on April 6, 2020, CMS is now attempting to provide even more flexibility to health care providers in furnishing services to combat the spread of COVID-19. To do so, CMS focuses on increasing access to hospital services and laboratory and diagnostic testing in settings that will allow individuals to receive the care without jeopardizing their health or the health of those providing the services.

The Second Interim Final Rule is effective as of today, May 8, 2020. Because it is an interim final rule, comments may be received within 60 days (by July 7, 2020).

Below is a brief summary of the significant provisions of the Second Interim Final Rule, which are only intended to last for the duration of the COVID-19 Public Health Emergency ("PHE"), which was determined to exist nationwide as of January 27, 2020 by the Secretary of Health and Human Services (the "Secretary"). A PHE declaration lasts until the Secretary declares that the PHE no longer exists or upon the expiration of the 90-day period beginning on the date the Secretary declared a PHE exists, whichever occurs first. The Secretary may extend the PHE declaration for subsequent 90-day periods and may terminate the declaration whenever he determines that the PHE has ceased to exist. The Secretary extended the COVID-19 PHE effective as of April 26, 2020. At this time, it is unclear how CMS intends to unwind these regulatory waivers when the PHE terminates or expires so providers should consider the steps needed to phase out the flexibility offered by the Second Interim Final Rule (e.g., including contractual provisions that limit commitments to the period of the PHE).

1. Relocating Provider-Based Departments: Many hospitals have been forced to repurpose existing clinical and non-clinical space for use as temporary expansion sites to furnish inpatient and outpatient care. As a result, CMS will allow (a) payment for outpatient hospital services that are delivered in temporary expansion locations, including parking lot tents, converted hotels, or patients' homes (when they are temporarily designated as part of a hospital); and (b) certain provider-based hospital outpatient departments ("PBDs") that relocate off-campus (including to a patient's home, where appropriate) to obtain a temporary exception and continue to be paid at Outpatient Prospective Payment System ("OPPS") rates, rather than at Physician Fee Schedule ("PFS")-equivalent rates (40% of the standard OPPS hospital outpatient department rates). While CMS instituted a streamlined process for hospitals to receive approval of temporarily relocated PBDs, it noted, however, that approval of temporary relocation alone is insufficient justification to permanently relocate a PBD after the PHE ends. Therefore, following the COVID-19 PHE, if temporarily relocated off-campus PBDs do not return to their original location or otherwise receive approval of permanent relocation through the standard non-PHE relocation process, they will be considered to be non-excepted PBDs and paid the PFS-equivalent rate.
2. Expansion of Scope of Practice: Nurse practitioners ("NPs"), clinical nurse specialists ("CNSs") and physician assistants ("PAs") may now certify the need for and order home health services paid for by the Medicare and Medicaid programs. Moreover, to increase COVID-19-related diagnostic testing capacity, and to increase the flexibility and availability of health care professionals to provide needed care, CMS will allow NPs, CNSs and PAs to order, furnish directly, and supervise the performance of diagnostic tests (which is typically a physician service), subject to applicable state law.
3. Modified Requirements for Ordering and Furnishing Diagnostic Laboratory Tests: Diagnostic laboratory tests for COVID-19 and influenza will be covered even if they are not ordered by a health care provider. This will provide Medicare coverage for such tests for patients who visit community testing sites without an order. In addition, CMS is creating a new hospital outpatient code to support COVID-19 testing.
4. Medicaid Laboratory Services: Under the Medicaid Program, CMS seeks to cover COVID-19 tests, including coverage for tests administered in non-office settings and coverage for laboratory processing of FDA-authorized self-collected COVID-19 tests. Under current regulations, Medicaid coverage is only available for laboratory tests that are (a) ordered and provided by or under the direction of a physician (or other licensed practitioner if authorized under state law); (b) provided in an office or similar facility; and (c) furnished by a laboratory that

meets certain requirements.

5. Serology Testing: CMS will cover COVID-19 serology tests that identify whether a patient has antibodies indicating recent or prior infection.

6. Medical Education: Under current regulations, a hospital cannot receive payment for the time spent by residents training at another hospital. However, CMS will now allow teaching hospitals to send residents, on an emergency basis, without regard to Graduate Medical Education financial considerations, to hospitals where they are most needed. Moreover, teaching physicians can be paid for audio/visual supervision of residents at standard rates for such services.

7. Audio-Only Telephone Services: In CMS's First Interim Final Rule, CMS established separate payment for audio-only telephone evaluation and management services (CPT codes 99441, 99442 and 99443). Now, CMS is broadening that list to include many behavioral health and patient education services. CMS is also increasing payments for these telephone visits to match payments for similar office and outpatient visits. The payments are retroactive to March 1, 2020.

8. Medical Necessity Requirements: CMS reiterated that it is not waiving medical necessity requirements. Therefore, items and services must continue to be furnished and ordered on a reasonable and necessary basis and the medical record must be sufficient to support payment for the services billed (i.e., the services were actually provided, were provided at the level billed, and were medically necessary).

9. Waiver of the "3-Day Rule": CMS is waiving the requirement for a 3-day prior hospitalization for coverage of a SNF stay. In addition, for certain beneficiaries who recently exhausted their SNF benefits, CMS authorizes renewed SNF coverage without first having to start a new benefit period.

10. COVID-19 Reporting Requirements: CMS is now requiring long-term care facilities (including skilled nursing facilities) to electronically report information on: suspected and confirmed COVID-19 infections among residents and staff, including residents previously treated for COVID-19; total deaths and COVID-19 deaths among residents and staff; personal protective equipment and hand hygiene supplies in the facility; ventilator capacity and supplies available in the facility; resident beds and census; access to COVID-19 testing while the resident is in the facility; staffing shortages; and other information specified by the Secretary. CMS will make this information public and will use this information to monitor trends in infection rates.

11. Quality Data Reporting Requirements: CMS is delaying reporting requirements applicable to providers, including (a) measure testing and collection requirements for the Merit-based Incentive Payment System; and (b) data submission

requirements applicable to inpatient rehabilitation facilities, long-term care facilities, and home health agencies under various quality reporting programs.

* * * *

Proskauer's cross-disciplinary, cross-jurisdictional Coronavirus Response Team is focused on supporting and addressing client concerns. We will continue to evaluate the CARES Act, related regulations and any subsequent legislation to provide our clients guidance in real time. Please visit our Coronavirus Resource Center for guidance on risk management measures, practical steps businesses can take and resources to help manage ongoing operations.

Related Professionals

- **Edward S. Kornreich**
- **David Manko**
  Partner