



© 2009 American Health Lawyers Association

November 13, 2009 Vol. VII Issue 45

CMS Finalizes Supervision Requirements For Hospital Outpatient Services

By Joan L. Lowes, Lori A. Wink, and Regan E. Tankersley, Hall Render Killian Heath & Lyman

The waiting is over for hospitals that have been anticipating further word from the Centers for Medicare and Medicaid Services (CMS) on the direct supervision requirements applicable to outpatient hospital services. Late last week, CMS issued the final calendar year 2010 hospital outpatient prospective payment system (OPPS) rule with additional comment period. The rule is effective January 1, 2010. Comments will be accepted until December 29. In this latest publication, CMS essentially adopted the proposals it made in July with several key changes and clarifications noted below.

Hospitals should carefully review all of the supervision provisions in the rule to ensure that the requirements will be met in all on- and off-campus locations. Compliance with the supervision requirements is a condition of coverage. Therefore, noncompliance with the supervision requirements could jeopardize a hospital's Medicare payments. Notably, CMS has indicated it places particular emphasis on ensuring the quality and safety of services provided off-campus and will be looking closely at situations involving noncompliance with the requirements in those locations.

For outpatient *therapeutic* services furnished by hospitals (including critical access hospitals) "incident to" the services of a physician:

- Clinical psychologists, physician assistants, nurse practitioners, clinical nurse specialists, and certified nurse midwives may directly supervise *most* hospital outpatient services they may perform themselves within their state scope of practice and hospital-granted privileges, and provided they meet collaboration and supervision requirements. One change of note: licensed clinical social workers were added to this list.
- These mid-level practitioners may not supervise the provision of pulmonary rehabilitation, cardiac rehabilitation, and intensive cardiac rehabilitation. Only physicians (MD or DO) may supervise these services.

- The supervising physician or nonphysician practitioner must be prepared to step in and perform the service, not just respond to an emergency. CMS explained that the supervisor must be "clinically appropriate" to supervise the service or procedure, i.e. he or she has the knowledge, skills, licensure, or hospital-granted privileges to do so.
- For therapeutic services furnished in the hospital or in on-campus provider-based departments, direct supervision means that the physician or nonphysician practitioner must be present anywhere on the same campus and *immediately available* to furnish assistance and direction throughout the performance of the procedure. Significantly, CMS will allow the physician or nonphysician practitioner to be in a physician's office, on-campus SNF, RHC, or other nonhospital space (provided he or she is *immediately available*).
- While CMS has not defined *immediately available*, it stated that it intends that the physician or nonphysician practitioner be close enough that he or she could intervene "right away."
- For services provided off-campus, the direct supervision requirement means that the physician or nonphysician practitioner must be *physically present* in the off-campus provider based department and immediately available to furnish assistance and direction throughout the performance of the procedure. CMS appears to be giving hospitals no latitude to contract for the provision of supervision by physicians who are located within the same building as the hospital department, even if those physicians are immediately available.
- CMS acknowledged that the supervision requirements for on-campus services required clarification prior to 2008. As a result, the agency stated it planned to use its discretion and decline to enforce where noncompliance was found in 2008 or earlier. However, the agency disagreed with commenters who requested the same tolerance for services furnished off-campus, stating its belief that the requirements were "clearly and consistently stated" in 2000.

CMS noted that the above requirements for *therapeutic* services are not applicable to rehabilitation services (physical therapy, occupational therapy, and speech therapy) because these services are not furnished by hospitals "incident to" the services of a physician.

For outpatient *diagnostic* services:

- All hospital outpatient diagnostic services furnished directly or under arrangement, whether provided in the hospital, in a provider-based department, or at a nonhospital location, such as an independent diagnostic testing facility (IDTF), will be required to follow the Medicare Physician Fee Schedule physician supervision requirements for individual tests (general, direct, personal).
- Only physicians may supervise the provision of diagnostic tests (with a limited exception for psychological and neuropsychological testing, which may be supervised by clinical psychologist). No other diagnostic tests may be supervised by nonphysician practitioners.

Ms. Lowes focuses her practice in the areas of Medicare and Medicaid reimbursement, regulatory compliance, managed care and certificate of need. She advises a variety of health care clients including healthcare systems, hospitals, and physician group practices. Ms. Lowes is a member of the State Bar of Michigan's Health Care Law Section Council, the Eastern Michigan Chapter of HFMA, and a frequent speaker on regulatory topics. Ms.

Lowes previously served as Assistant General Counsel at Blue Cross Blue Shield of Michigan and as Assistant Regional Counsel for the U.S. Department of Health and Human Services in Chicago, Illinois.

Ms. Wink assists clients in the analysis of general health law matters and regulatory issues, including accreditation, certification, licensure, billing and payment, compliance, Medicare appeals, fraud and abuse, and Stark. She advises a variety of healthcare clients including healthcare systems, hospitals, group practices, diagnostic centers, and long-term care facilities. Ms. Wink chairs the Medicare Issues Committee for the Wisconsin chapter of the Healthcare Financial Management Association, and is a frequent speaker on regulatory issues. Prior to practicing law, she was a manager in the audit department of KPMG and was a member of KPMG's Healthcare Practice Group.

Ms. Tankersley concentrates her practice in the areas of Medicare and Medicaid reimbursement as well as regulatory and compliance work. She assists healthcare clients with Medicare administrative appeals, enrollment in the federal healthcare programs, and provides counsel in developing strategies and policies for health care providers to ensure compliance with Medicare and Medicaid programs. Ms. Tankersley works with Medicare contractors to administratively resolve provider cost report appeals and performs reimbursement and compliance analyses for hospitals, physicians, IDTFs, ASCs, and various joint venture arrangements, including provider-based, under arrangements, and hospital within hospital analyses.