HALL RENDER
KILLIAN HEATH & LYMAN

HEALTH LAW NEWS

JANUARY 15, 2018

PROVIDER-BASED MID-BUILD EXCEPTION STARTS TO PAY OFF FOR HOSPITALS

CMS recently released a series of Frequently Asked Questions ("FAQs") on its website providing some much needed guidance to hospitals. Among other things, CMS will allow hospitals that submitted attestations and mid-build certifications last February to get full payment under the Outpatient Prospective Payment System ("OPPS") for dates of service on or after January 1, 2018 even if they have not yet received approval from CMS. Hospitals should review the mid-build FAQs (which are available here) and evaluate whether they can start getting full OPPS payments for their mid-build sites.

MID-BUILD BACKGROUND

Section 603 of the Bipartisan Budget Act of 2015 ("Section 603") effectively reduces Medicare reimbursement for certain off-campus provider-based departments ("PBDs"), as defined in 42 C.F.R. § 413.65 (the Medicare "provider-based rule"), by eliminating eligibility for payment under the OPPS effective January 1, 2017. Section 603 also grandfathers ("excepts") any off-campus departments of a hospital that billed Medicare under the OPPS for services furnished prior to November 2, 2015. During calendar year 2017, services at non-excepted locations were paid based on 50 percent of the OPPS rate, and this rate was further reduced to 40 percent of the OPPS for dates of service on or after January 1, 2018.

In the CY 2017 OPPS Final Rule, CMS took the position that it could not create an "under development" exception based on the statute, which meant that hospitals with facilities under development or construction at the time of enactment would not be grandfathered (i.e., would not be eligible to receive higher reimbursement under the OPPS).

To remedy this problem, Section 16001 of the 21st Century Cures Act revised Section 603 to provide an exception for off-campus PBDs that were mid-build or under development prior to November 2, 2015. Hospitals that met the definition of mid-build and submitted an attestation and certification for a facility to CMS by February 13, 2017 may qualify for full OPPS payments starting January 1, 2018.

CMS released a short document in early 2017 that basically regurgitated the mid-build statutory requirements. Other than that short document, CMS did not address the mid-build process or requirements in the Calendar Year 2018 OPPS rulemaking process and had not released any other written guidance until the FAQs were recently added to its website.

CMS FREQUENTLY ASKED QUESTIONS

In the FAQs, CMS confirms that beginning with dates of service on or after January 1, 2018, hospitals may remove the PN modifier from claims if the hospital reasonably believes that it meets all of the mid-build requirements. This would allow the hospital to be paid for services at the full OPPS rates. It is important to note that hospitals that remove the PN modifier should still use the PO modifier indicating that the PBD is an excepted off-campus location.

Alternatively, if a hospital is unsure if its PBD meets all of the mid-build requirements, it should continue to bill with the PN modifier. While CMS does not explicitly state it in the FAQ, presumably if a hospital subsequently receives a mid-build approval, it could re-bill for those services without the PN modifier assuming those claims still fall within the timely filing window.

CMS also states that it will conduct the mid-build audit process between January and December of 2018. The audit process is required by the mid-build statutory language, and CMS will be reviewing the main hospital's provider-based attestation, enrollment record and mid-build certification for compliance with Section 16001 of the 21st Century Cures Act.

PRACTICAL TAKEAWAYS

- If a hospital reasonably believes that it meets all of the mid-build requirements for a facility, it may remove the PN modifier from claims and receive full OPPS payments for dates of service on or after January 1, 2018. The hospital should still use the PO modifier to indicate that the location is an excepted off-campus PBD.
- If a hospital is unsure of whether it meets the mid-build requirements or otherwise chooses to wait until it receives its mid-build approval to change its billing systems, it may continue to use the PN modifier. Once the hospital receives an approval of mid-build status, it should be able to re-bill for services without the PN modifier assuming those claims are still within the timely filing window.

- Hospitals should reach out to their Medicare Administrative Contractor if they have not received an acknowledgement of the submission of a mid-build certification package.
- Finally, hospitals should keep an eye out for additional communication from CMS during 2018 regarding the audit of their compliance with the mid-build requirements.

If you have questions or would like additional information about this topic, please contact:

- David Snow at (303) 801-3536 or dsnow@hallrender.com;
- Lori Wink at (414) 721-0456 or lwink@hallrender.com;
- Regan Tankersley at (317) 977-1445 or rtankersley@hallrender.com;
- Joseph Krause at (414) 721-0906 or jkrause@hallrender.com;
- Lisa Lucido at (248) 457-7812 or llucido@hallrender.com; or
- Your regular Hall Render attorney.