

# Physicians' *Legal Alert*



Jeffrey Adest, Andrew E. Blustein, Managing Editors

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## **The Center for Medicare and Medicaid Services (“CMS”) Announced its Second Round of Competitive Bidding for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS)—What does this mean for physicians?**

CMS has announced that, with limited exceptions, suppliers of Medicare will no longer be permitted to provide many DMEPOS items to Medicare beneficiaries unless they are the winning bidder in a competitive bidding process.

In an apparent effort to reduce cost and limit the number of suppliers of DMEPOS to Medicare beneficiaries, CMS has announced that most areas in New York, New Jersey and Connecticut will be subject to the competitive bidding process. The process requires a bidder to bid on all items in a specific category for an entire zip code or regional area. The types of DMEPOS subject to the bidding process include, but are not limited to, oxygen supplies, power wheelchairs, scooters, enteral nutrients and equipment, continuous positive airway pressure (CPAP) devices, negative pressure wound therapy pumps and walkers.

CMS plans to announce in the spring of 2008 the actual zip codes and the specific items in each

product category that are included in the competitive bidding process. The actual bidding process is planned to begin in the summer of 2008 and will be open for sixty (60) days.

There are some exceptions to this rule, including an exception designed specifically for physicians. Physicians who have Medicare DMEPOS supplier numbers may continue to supply crutches, canes, walkers, folding manual wheelchairs, blood glucose monitors and/or infusion pumps to their own patients as part of their professional care, if those items are billed under the physician's, treating practitioner's, or group practice's billing number. Any other items will be subject to the competitive billing process.

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## **Project Program to Avoid Malpractice Litigation**

In Pennsylvania, the Montgomery County Bar Association is collaborating with Abington Memorial Hospital to commence a pilot project aiming to avoid malpractice litigation. The trigger for the project came about three years ago when the Pennsylvania Supreme Court encouraged counties to develop alternatives to adjudication due to skyrocketing malpractice rates and physicians' threats to leave the State. The project will involve lawyers and physicians working in teams to mediate conflicts between patients and hospitals/physicians.

The project seeks to achieve its objective through a two-step process. First, physicians and nurses at Abington Memorial have been trained in listening and responding to patient's complaints, providing as much information and explanation as possible. The rationale for this step is the belief

### **IN THIS ISSUE**

- **Center for Medicare and Medicaid Services (“CMS”) Announced its Second Round of Competitive Bidding for Durable Medical Equipment, Prosthetics, Orthotics, and Supplies (DMEPOS) - What does this mean for physicians?**
- **Project Program to Avoid Malpractice Litigation**
- **Office-Based Surgery Update**

*Continued on page 2*

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that patients sue primarily to get answers and information. If the first step does not resolve the conflict, then the patient may move towards mediation. In contrast to an arbitration, the mediator does not decide the case or determine a settlement, but rather helps facilitate communication between the two sides. Ultimately, the patient and physician and their respective attorneys will have to come to an acceptable outcome, and if not, then the parties can litigate the matter.

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### Office Based Surgery Update

As of January 14, 2008, all physicians, physician assistants ("PA") and specialist assistants ("SA") are required to report certain adverse events occurring in office-based surgery ("OBS") to the Patient Safety Center ("PSC") of the Department of Health ("DOH"). The report must be made within one business day of the occurrence of the event (or of learning of the event).

This reporting requirement is not limited to professionals directly or indirectly involved with the OBS procedure but also requires a professional (regardless of whether they were involved in the OBS procedure) to report an adverse event if he or she believes that a patient complaint, complication, condition, emergency room visit, hospital admission or death is related to an OBS procedure. Hospitals are encouraged, but not required to report adverse events occurring in an OBS setting of which they become aware in their hospital.

An "adverse event" is defined in the New Law as; (1) a patient death within thirty (30) days; (2) an unplanned transfer to a hospital; (3) an unscheduled hospital admission, for longer than twenty-four (24) hours and within seventy-two (72) hours of the office-based surgery; or (4) any other serious or life-threatening event resulting in temporary or permanent physical loss or mental impairment of bodily function; and/or which substantially limits one or more of the major life activities of the individual.

The accreditation requirement of the OBS Law, which becomes effective July 14, 2009 requires all OBS practices to obtain and maintain full accredited status with a nationally recognized accrediting agency. DOH recently designated three approved accrediting agencies: the Accreditation Association for Ambulatory Health Care (AAAHC); the American Association for Accreditation of Ambulatory Surgery Facilities, Inc. (AAAASF); and the Joint Commission. Since the accreditation process takes many months to complete, and many practices will be seeking accreditation simultaneously, OBS practices are urged to start the accreditation process as soon as possible.

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For more information, please contact Jeff Adest, Managing Editor, at (516) 393-2294 or [jadest@gwtlaw.com](mailto:jadest@gwtlaw.com).

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