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Legal Alert

ADVERTISING MATERIAL

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CMS FINALIZES MORE RELAXED PHYSICIAN SUPERVISION RULES FOR HOSPITAL OUTPATIENT SERVICES

The Centers for Medicare & Medicaid Services (CMS) has issued its much anticipated final rule regarding physician supervision of hospital outpatient services. The new rules are contained in the Hospital Outpatient Prospective Payment System (OPPS)/Ambulatory Surgical Center Payment System and Payment Rate final rule ("OPPS final rule") for Calendar Year 2010, which is published in today's Federal Register. These new rules significantly relax the controversial "clarification" that CMS issued in 2008 in the OPPS final rule for 2009.

In 2008, CMS "clarified" that it expected physicians to be physically present in the outpatient or provider-based department when supervising outpatient therapeutic services, even if such departments were located in the hospital or on the hospital's main campus. In response to the outcry from industry leaders, hospitals and other stakeholders, CMS issued proposed rules in July of 2009 relaxing the more stringent supervision expectations that it "clarified" in 2008. Below is a summary of Medicare's new rules governing the supervision of therapeutic and diagnostic services rendered in a hospital outpatient setting. These new rules go into effect January 1, 2010.

HOSPITAL OUTPATIENT THERAPEUTIC SERVICES (42 CFR §410.27)

WHO MAY SUPERVISE THERAPEUTIC SERVICES

Under current CMS policy, only physicians can perform the direct supervision that is necessary for hospital outpatient therapeutic services. As of January 1, 2010, CMS will allow such supervision to be provided by non-physician practitioners (NPPs) -- including clinical psychologists, physician assistants, nurse practitioners, clinical nurse specialists, certified nurse midwives and licensed clinical social workers -- in lieu of physicians; provided, however, that the supervising NPP is authorized to perform the services him or herself within his or her scope of practice and hospital-granted privileges, and meets all additional requirements, including any collaboration or supervision requirements. While this allows hospitals greater flexibility in providing the necessary supervision of outpatient therapeutic services, such NPPs can only supervise services that they are otherwise able to personally perform.

CMS did not extend the ability of NPPs to supervise the provision of cardiac rehabilitation (CR), intensive cardiac rehabilitation (ICR) or pulmonary rehabilitation (PR) services, which still require direct physician (MD or DO) supervision. However, with respect to such physician supervision, the same location requirements discussed below for hospital outpatient therapeutic services apply to CR, ICR and PR services, and vary depending on where the service is provided.

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LOCATION REQUIREMENT VARIES BASED ON WHERE THE SERVICE IS PERFORMED

Under CMS's new rule, the location where the physician or NPP must be in order to adequately supervise outpatient therapeutic services differs depending on whether the services are rendered in an on- or off-campus location.

- ∅ *In a Hospital or On-Campus Provider-Based Department:* If therapeutic services are provided in the hospital or in an on-campus provider-based department of the hospital, providers will no longer need a physician to be in the actual department of the hospital or provider-based department. Under the new rule, the physician or NPP may provide the "direct" supervision so long as they are present "anywhere on the hospital campus" provided they are immediately available to furnish assistance and direction throughout the performance of the service. Most notably, the physician or NPP can provide such supervision from an on-campus location that is not provider-based, such as a physician's office, on-campus skilled nursing facility, rural health clinic or "other nonhospital space". However, in order for the physician or NPP to be "immediately available" to furnish assistance, they must be close enough to intervene "right away". In addition, the physician or NPP must be able to not only respond to an emergency, but must be able to step in and perform the service.
- ∅ *Off-Campus Provider-Based Department:* If therapeutic services are provided in an off-campus provider-based department of the hospital, the current rule remains in place. The physician or NPP must be present in the actual provider-based department (but need not be in the room when the procedure is performed) and be immediately available to furnish assistance and direction throughout the performance of the procedure. So, for example, if an off-campus facility has multiple provider-based departments, the facility must employ a supervising physician or NPP for each provider-based department and such physician or NPP must be physically located in the department for which they are providing supervision.

HOSPITAL OUTPATIENT DIAGNOSTIC SERVICES (42 CFR §410.28)**WHO MAY SUPERVISE DIAGNOSTIC SERVICES**

Supervision of hospital outpatient diagnostic services, unlike therapeutic services, can only be provided by a physician, not an NPP (with the limited exception for psychological and neuropsychological testing which may be supervised by clinical psychologists). While NPPs may, under state law, be authorized to order and perform diagnostic tests, they may not supervise such tests because diagnostic tests must be furnished under the appropriate level of supervision by a physician as defined in the Social Security Act (which is not defined to include NPPs). The level of supervision (*i.e.*, general, direct or personal supervision) is determined by the physician supervision requirements for individual tests as listed in the Medicare physician fee schedule, regardless of where the service is performed.

LOCATION REQUIREMENT VARIES BASED ON WHERE THE SERVICE IS PERFORMED

For diagnostic services requiring general supervision or personal supervision, there are no changes to the governing regulation. For those diagnostic services requiring direct supervision, however, the definition of direct supervision differs depending on the location where the services are being performed.

- ∅ *In a Hospital or On-Campus Provider-Based Department:* For diagnostic services furnished directly or under arrangement in hospital or on-campus provider-based department, direct supervision has the same meaning as it does for therapeutic services (*i.e.*, that the physician must be present on the same campus, in the hospital or on-campus provider-based department

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of the hospital, and be immediately available to furnish assistance and direction throughout the performance of the service).

- Ø Off-Campus Provider-Based Departments: For diagnostic services furnished directly or under arrangement off-campus in a provider-based department of the hospital, direct supervision means that the physician must be present in the off-campus provider-based department and be immediately available to furnish assistance and direction throughout the performance of the procedures.
- Ø Physician Offices or Other Non-hospital Locations: For all hospital outpatient diagnostic services provided under arrangement in non-hospital locations, such as independent diagnostic testing facilities and physicians' offices, direct supervision means that the physician must be in the office suite and be immediately available to furnish assistance and direction throughout the performance of the procedure. It does not mean that the physician must be present in the room when the procedure is performed.

ENFORCEMENT

In the 2010 OPSS proposed rule published in July 2009, CMS expressly instructed its contractors not to delay initiation of enforcement actions and not to discontinue pursuing pending enforcement actions regarding physician supervision of hospital outpatient services. However, in the preamble to the 2010 OPSS final rule, CMS states that it will exercise its discretion and will not institute enforcement actions involving claims in 2000 through 2008 for hospital outpatient therapeutic services furnished on a hospital's campus where the hospital did not comply with the direct physician supervision requirements "as a result of errors or mistakes". The preamble does not suggest that such discretion will be exercised for 2009.

The new, relaxed supervision rules do not go into effect until January 1, 2010. Therefore, providers should continue to ensure that they are complying with the current rule for direct supervision, which requires a physician's physical presence in all outpatient departments and provider-based departments, whether on- or off-campus through December 31, 2009.

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If you have any questions, please contact the GWT attorney with whom you regularly consult.

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