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HEALTH LAW

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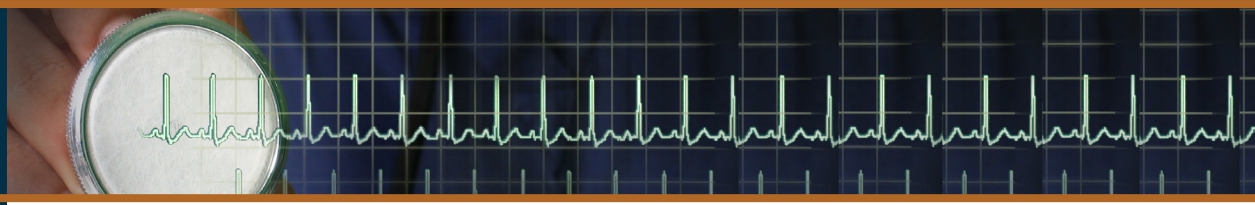

CMS Delays the 2-Midnight Rule For At Least Another 2 Midnights

On January 30, 2014, CMS announced that it is postponing its "Probe & Educate" review process for an additional 6 months through September 30, 2014. CMS will direct RACs and MACs not to conduct post-payment patient status reviews of inpatient claims with dates of admission on or after October 1, 2013 through October 1, 2014.

CMS provided more good news by providing much needed clarification with respect to physician orders for inpatient hospital stays. This specific guidance can be found at http://www.cms.gov/Medicare/Medicare-Fee-for-Service-Payment/AcuteInpatientPPS/Downloads/IP-Certification-and-Order-01-30-14.pdf. The following summary of CMS' guidance with respect to hospital inpatient orders and certification is provided for your convenience:

- When a physician provides his/her order for inpatient admission, he/she is certifying that the hospital inpatient services are reasonable and necessary and provided in accordance with the 2-Midnight Benchmark. The requirement to authenticate the inpatient order may be satisfied by the signature of the certifying physician or a countersignature by the certifying physician.
- The physician certifies or documents the reason for either hospitalization for medical treatment or medically required inpatient diagnostic study or special circumstances. According to CMS, the admitting diagnosis can sometimes be enough.
- The physician certifies the estimated or actual time in the hospital required by the patient. According to CMS, this type of information is typically found in the patient's progress notes or the inpatient order itself.
- The physician certifies as to the plans for post-hospital care as appropriate.
- The certification begins with the order for inpatient admission and it must be completed, signed, dated and documented in the medical record before discharge.
- The certification may be signed by only a physician, dentist or podiatrist responsible for the case or by another physician who has knowledge of the case and is authorized by the responsible physician or by the hospital's medical staff. This is the attending, or the person on call for the attending. The admitting physician of record may be any emergency department physician or hospitalist. Since CMS does not care if the physician who is writing the order has inpatient admission privileges at the hospital, the issue will be hospital and state-specific.
- Physician orders can be on any form and the physician's order could include a statement that indicates that the patient's medical record contains the required information for a medically necessary inpatient stay.
- The order must be provided by a physician or other practitioner ("ordering practitioner")

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who is licensed to admit inpatients, granted privileges by the hospital to admit patients, and knowledgeable about the patient's hospital course at the time of admission. The ordering practitioner need not be the certifying physician. While the admission decision cannot be delegated to an individual who is not authorized by law or the hospital medical staff to admit patients, once the medical staff and state law permits such admissions, a medical resident, a physician assistant and nurse practitioner may act as a proxy for the ordering practitioner. The ordering practitioner must approve and accept responsibility for the admission decision by countersigning the order before discharge. This process may also be used by emergency department physicians who do not have admitting privileges but are authorized by the hospital to bridge inpatient admission orders.

- If a practitioner lacks the authority under state law or the medical staff to admit an inpatient, the ordering practitioner may directly communicate a verbal order for inpatient admission. The staff must document the verbal order in the medical record at the time it is received. The verbal order must identify the ordering practitioner and be countersigned prior to discharge.
- Standing orders cannot substitute for an inpatient order. Only the ordering practitioner or a resident or other practitioner acting on their behalf can take responsibility for the inpatient decision.
- Inpatient status begins at the time of the inpatient order, including the initial order. If the physician countersigning does not agree, the patient is not considered an inpatient and the stay must be billed under Part B.
- CMS considers only the admitting physician of record ("attending"), the physician on call for the attending, covering hospitalists caring for hospital patients, the patient's primary care physician or the person on call for them, or other practitioners qualified to admit and actively treating the patient to have sufficient knowledge of the patient's hospital course, condition or plan of care.
- The order must be furnished at or before the time of the inpatient admission. If the order is written before the admission, the inpatient admission does not begin until the patient is actually admitted as an inpatient. CMS will not honor retroactive orders.
- CMS requires that the inpatient order clearly express the intent to admit the patient as an inpatient. It is not enough to say to admit to a specific unit. If the order is not clear, but the rest of the medical record supports an inpatient admission, CMS will leave it to the contractor to decide using their own discretion, but only in very clear cases.

This clarification was greatly needed and seems very responsive to the request for clarification from the provider community. CMS has also indicated that it will continue to work with the industry to identify appropriate exceptions to the 2-Midnight Benchmark rule.

If you have any questions regarding the implementation of this rule as it relates to your particular state law and hospital medical staff, please contact a member of Shipman & Goodwin's Health Law Practice Group. In addition, please refer to our website for previous publications relating to the 2-Midnight Benchmark rule.

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