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CLIENT ADVISORY

CMS Implements Significant Changes to the Direct Physician Supervision Standard in On-Campus Provider-Based Hospital Outpatient Departments

Beginning on January 1, 2009, on-campus provider-based hospital outpatient departments¹ may have to comply with “clarified” direct supervision requirements for services and supplies that are billed “incident to” a physician’s service.² In the preamble to the 2009 Hospital Outpatient Prospective Payment System Final Rule (the 2009 OPSS Final Rule),³ the Centers for Medicare and Medicaid Services (CMS) indicated that it will no longer “assume” that direct physician supervision is provided in on-campus hospital outpatient departments. Rather, CMS announced:

The direct supervision in § 410.27 (f) requires that the physician must be present and on the premises of the location and immediately

available to furnish assistance and direction throughout the performance of the procedure. . . . This means that the physician must be present in the provider-based department.⁴

Provider’s Understanding of CMS’ Policy Prior to the 2009 OPSS Final Rule

Prior to CMS’ announcement in the 2009 OPSS Final Rule, on-campus provider-based departments relied upon CMS’⁵ guidance in the preamble to the 2000 OPSS Final Rule, which stated:

Our proposed amendment of § 410.27 to require direct supervision of hospital services furnished incident to a physician service to outpatients does not apply to

¹ The term “on-campus provider-based department of a hospital” refers to those hospital departments that are outside the four walls of the main hospital building, but are located on the hospital campus and qualify for provider based status.

² The direct supervision requirements for services furnished incident to a physician’s service at a provider-based department of a hospital are located at 42 C.F.R. § 410.27(f).

³ The relevant portions of the preamble are located at 73 FR 68702-68704 (November 18, 2008).
⁴ 73 FR 68704.

⁵ At the time the 2000 OPSS Final Rule was published, the Medicare program was administered by the Health Care Financing Administration (HCFA). HCFA and CMS will be used interchangeably in this Advisory.



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services furnished in a department of a hospital that is located on the campus of that hospital. For hospital services furnished incident to a physician service to outpatients in a department of a hospital that is located on the campus of the hospital, we assume the direct supervision requirement to be met...⁶

The 2000 OPPS Final Rule further explained:

We assume the physician supervision requirement is met on hospital premises because staff physicians would always be nearby within the hospital. The effect of the regulations in this final rule is to extend this assumption to a department of a provider that is located on the campus of a hospital. However, the regulation *does not* extend the assumption of supervision to a department of a hospital that is located off the campus of the hospital.⁷

Providers have often relied upon these statements in the 2000 Final Rule to mean that CMS would in fact assume that direct supervision was provided in on-campus provider-based departments of a hospital.

CMS' Retreat From the 2000 Standard

In the 2009 OPPS Final Rule, CMS seemingly retreated from its long-standing policy of assuming physician supervision in on-campus provider-based departments but characterized this policy shift as a "clarification."⁸ While CMS acknowledged its statements in the 2000 OPPS Final Rule, CMS explained that it feels providers "misunderstood" its use of the term "assume," stating:

[W]e were concerned that some stakeholders may have misunderstood

our use of the term "assume" in the [April 7, 2000 OPPS final rule] believing that our statement meant that we do not require any supervision in the hospital or in an on-campus provider-based department for therapeutic OPPS services, or that we only require general supervision for those services. This is not the case. It has been our expectation that hospital outpatient therapeutic services are provided under the direct supervision of physicians in the hospital and in all provider-based departments of the hospital, specifically both on-campus and off-campus departments of the hospital.⁹

CMS also explained that it no longer subscribes to its 2000 statement that it assumed "the physician supervision requirement is met on hospital premises because staff physicians would always be nearby within the hospital."¹⁰ Rather, in the 2009 OPPS Final Rule, CMS stated:

The expectation that a physician would always be nearby . . . dates back to a time when inpatient hospital services provided in a single hospital building represented the majority of hospital payments by Medicare. Since that time, advances in medical technology, changes in the patterns of health care delivery, and changes in the organizational structure of hospitals have led to the development of extensive hospital campuses, sometimes spanning several city blocks, as well as off-campus and satellite provider based campuses at different locations.

CMS' policy shift therefore seems to be based, at least in part, on the agency's opinion that supervision can no longer be assumed in on-campus provider-based departments because

⁶ 65 FR 18525 (April 7, 2000).

⁷ *Id.*

⁸ See, 73 FR 68703 (stating "we note that the discussion in the CY 2009 OPPS Proposed rule was not a proposed change in policy but was an intended clarification to assist providers who may have misunderstood the policy in the past.").

⁹ 73 FR 68702-68703.

¹⁰ 65 FR 18525.



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the location of those departments on an expanded hospital campus may preclude the supervising physician from being immediately available.

Summary

When the 2009 OPSS Final Rule goes into effect on January 1, 2009, on-campus provider-based departments of a hospital may be required to have a physician present in the provider-based department to bill for any services provided “incident to” the services of a physician. CMS has stated it will no longer assume physician supervision is met in on-campus provider-based departments. Accordingly, CMS’ new policy may have important implications for many on-campus provider-based outpatient departments that provide outpatient hospital services. Providers should assess their current physician supervision protocols to determine whether they would comply with this new CMS policy announcement.

Although CMS has explained its policy change as a mere “clarification” of existing policy rather than a new standard for direct supervision, in

reality, the direct supervision standard announced in the 2009 OPSS Final Rule may signal a dramatic departure from CMS’ prior policy of “assumed” supervision in on-campus departments. Further, the limited guidance provided in the 2009 OPSS Final rule has left many questions regarding this new standard unanswered. Accordingly, we anticipate that CMS may issue additional guidance or further clarification on this topic shortly. We will disseminate any additional guidance on this topic as it becomes available.

For more information about CMS’ new direct supervision requirements, please contact Mary C. Malone or Rachel J. Suddarth at (804) 967-9604, or by email mmalone@hdjn.com, or rsuddarth@hdjn.com. Additional information about Hancock, Daniel, Johnson & Nagle, P.C. is available on the firm’s website at www.hdjn.com.

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