COVID-19: IMPACT ON HOSPITALS OF THE TEMPORARY ELIMINATION OF THE 2% MEDICARE SEQUESTRATION CUTS

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U.S. Health Care Alert

Certain provisions of the recent CARES Act[1] impact how hospitals are reimbursed under original Fee-For-Service Medicare (i.e., Part A and Part B) and existing Medicare Advantage contracts. Specifically, the CARES Act temporarily suspends the 2% Medicare sequestration cuts between May 1, 2020 through December 31, 2020.[2] However, the CARES Act also extends mandatory sequestration for an additional year, through fiscal year 2030. This Alert:

1. outlines the contexts in which this temporary "Sequestration Cut Abeyance Period" may impact hospitals' Medicare and Medicare Advantage reimbursement; and
2. warns of issues for hospitals to monitor.

ORIGINAL MEDICARE AND OON MEDICARE ADVANTAGE

The impact of the Sequestration Cut Abeyance Period on original Medicare is easy to discern. For original Medicare, payments to hospitals will not be reduced by the historical 2% sequestration cuts during this Sequestration Cut Abeyance Period. Effectively, this should result in a 2% increase in Fee-For-Service Medicare payments. The impact is equally clear for hospitals that are out-of-network ("OON") with a Medicare Advantage Organization ("MAO") payor. Hospitals with any OON MAOs should see the same result as with original Medicare. The sequestration cuts that OON MAOs are historically allowed to pass along, should not be imposed during the Sequestration Cut Abeyance Period because there are no such cuts to pass along.

IN-NETWORK MEDICARE ADVANTAGE CONTRACTS

For hospitals that are in-network with an MAO, the Sequestration Cut Abeyance Period's impact will depend on the terms of the parties' Medicare Advantage Agreement (the "Agreement") and whether the MAO has been passing along the 2% cuts prior to the Sequestration Cut Abeyance Period. For an in-network hospital, where the MAO has not historically passed along the 2% cuts per the Agreement, there should be no impact. In other words, if the 2% cut was not passed along prior to the Sequestration Cut Abeyance Period, such cuts would obviously be inappropriate for an MAO to impose on an in-network hospital when there are no cuts to pass along during the Sequestration Cut Abeyance Period.

For any in-network hospitals where the MAO has historically passed along the 2% cuts per the Agreement, such hospitals should examine their Agreement language to make sure the MAO is complying with the Agreement's reimbursement terms during the Sequestration Cut Abeyance Period. Although the outcome will depend on each Agreement's language, it should be rare language that would permit an MAO to continue "passing along" the 2%

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cut during this Sequestration Cut Abeyance Period when there is no cut to pass along. Thus, in-network hospitals should verify that any sequestration cuts historically imposed by their MAO do not simply continue on auto-pilot during this Sequestration Cut Abeyance Period.

If hospitals want help interpreting their Medicare Advantage Agreements regarding this Sequestration Cut Abeyance Period, we have experience interpreting, negotiating, and litigating in this area, and would be happy to assist.

FOOTNOTES

[1] Section 3709 of the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") imposes what we are calling the "Sequestration Cut Abeyance Period."

[2] *Id.*

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