COVID-19: CMS ANNOUNCES PLAN TO RESTART THE AUDIT MACHINES ON 3 AUGUST 2020 AND ADDITIONAL CHANGES TO ENFORCEMENT POLICIES

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U.S. Health Care Alert

Since 30 March 2020, the Centers for Medicare & Medicaid Services (CMS) exercised enforcement discretion to suspend most Medicare Fee-For-Service medical reviews and relax related requirements during the COVID-19 public health emergency. However, CMS recently released guidance (FAQ) indicating that the agency will no longer exercise enforcement discretion in this area.[1] Beginning on 3 August 2020, CMS is expected to restart suspended medical reviews and initiate new audits.[2]

K&L Gates LLP published an alert on 19 May 2020 detailing the sweeping regulatory shifts within the U.S. Department of Health and Human Services (HHS). As discussed in that alert, while varying time frames were considered, the majority of HHS divisions and other federal agencies suggested that enforcement discretion would cease simultaneously with the end of the public health emergency. As a result, CMS's plan to resume enforcement in August may come as a surprise to providers and suppliers.

This alert provides an overview of the Medicare Fee-For-Service medical reviews that are set to resume on 3 August 2020. It also highlights additional information contained in the FAQ and looks forward to consider what to expect as the industry continues to grapple with an evolving regulatory landscape in the midst of COVID-19.

MEDICARE FEE-FOR-SERVICE MEDICAL REVIEWS

The Medicare Fee-For-Service medical reviews that will resume this August include pre-payment medical reviews conducted by Medicare Administrative Contractors (MAC) under the Targeted Probe and Educate Program and post-payment reviews performed by MACs, Supplemental Medical Review Contractors, and Recovery Audit Contractors. The FAQ notes that CMS is planning to resume medical reviews "regardless of the status of the public health emergency."[3]

Providers selected to participate in reviews are encouraged to discuss any hardships related to COVID-19 with their MACs—especially if submitting a timely audit response could be problematic. This suggestion indicates that there may be some flexibility extended to a provider that is willing to collaborate with their MAC to reach a mutually agreeable path forward. The FAQ indicates that claims selected for review will be evaluated in accordance with any waivers in effect during the dates of service. However, due to the evolving nature of the waivers during implementation, providers should carefully review claims submitted under the waivers for compliance.

ADDITIONAL HIGHLIGHTS FROM THE FAQ

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A high-level overview of additional considerations from the FAQ is included below.

- CMS is not expected to enforce signature requirements for proof of delivery for Part B drugs and certain durable medical equipment. Instead, suppliers are encouraged to document the date of delivery in the medical record with a notation indicating that signatures were not obtained due to COVID-19.
- CMS is not expected to enforce the requirement that medical professionals sign and certify that nonemergency ambulance services are medically necessary during the public health emergency if there is no indication of fraud or abuse. CMS defines this period as beginning on 27 January 2020 and lasting through the expiration of the public health emergency. Medicare Part B providers should proceed with caution, as the FAQ indicates that certain criteria necessary to obtain coverage will not be relaxed.
- With regard to the Repetitive, Scheduled Non-Emergent Ambulance Transport (RSNAT) Prior Authorization Model, CMS is expected to cease exercising enforcement discretion on 3 August 2020. MACs will also conduct post-payment reviews on certain claims paid during the lag in enforcement. The RSNAT Prior Authorization Model is expected to end as scheduled on 1 December 2020, and CMS is not considering an extension at this time.
- Claims submitted under the Review Choice Demonstration (RCD) for home health services. CMS is expected to cease exercising enforcement discretion on 3 August 2020. Post-payment reviews will be conducted by MACs on claims submitted during the lag in enforcement once the demonstration resumes. CMS is expected to post additional details regarding the choice period on its demonstration website in the coming weeks.[4] However, CMS is not expected to extend the RCD beyond its scheduled end-date of 31 May 2024.
- Durable medical equipment, prosthetics, orthotics, and supplies (DMEPOS). CMS will discontinue exercising enforcement discretion on 3 August 2020, and the Prior Authorization Program will resume for certain DMEPOS.
    - All DMEPOS require a signature prior to submitting claims for payment.
    - DMEPOS may be ordered verbally; however power mobility devices will require a signature prior to delivery. Orders signed by electronic signature are acceptable.
    - The FAQ also specifies dates of service for which prior authorization will resume for lower limb prosthetics.

LOOKING AHEAD

The regulatory landscape continues to dramatically change. However, there is a clear shift towards old enforcement practices, even as the COVID-19 public health emergency persists. During the onset of the pandemic, agency enforcement discretion allowed for a rapid transition into a pliable regulatory framework. However, the same flexibility that allowed for the exercise of enforcement discretion could result in a rapid return to a more rigid regulatory framework. Considering the tremendous amount of funds that were paid under relaxed or new regulation, a substantial increase in auditor scrutiny is anticipated. K&L Gates LLP's national health care team and provider-payor dispute team are on the forefront of defense and prevention of these audits.

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For more information regarding the legal implications of the COVID-19 outbreak, visit K&L Gates LLP's HUB webpage and subscribe to receive updates.

FOOTNOTES

[1] CTRS. FOR MEDICARE & MEDICAID SERVS., CORONAVIRUS DISEASE 2019 (COVID-19) PROVIDER BURDEN RELIEF FREQUENTLY ASKED QUESTIONS (FAQS) (July 2020).

[2] *Id*. at 1.

[3] *Id*.

[4] *See* CTRS. FOR MEDICARE & MEDICAID SERVS., REVIEW CHOICE DEMONSTRATION FOR HOME HEALTH SERVICES (July 7, 2020, 4:00 PM).

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