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Fraud and Abuse

Payment Code Change May Hinder Medicare Whistleblowers

Proposed medical coding changes for office visits and outpatient services could mean doctors face fewer false claims lawsuits related to Medicare coding errors, some health-care attorneys predict. But whether that is a good thing depends on who you ask.

The Centers for Medicare & Medicaid Services in July proposed combining four evaluation and management (E/M) code levels to reduce the administrative burden for doctors and improve payment accuracy. E/M codes are used to determine how much a doctor should bill Medicare for certain services ranging from simple blood pressure checks to more complicated medical exams that could last longer than 40 minutes.

''It takes E/M off the table on the FCA. Whether the patient was there five minutes or two hours, you've got one code,'' David Honig, an attorney at Hall Render in Indianapolis who represents health-care clients in FCA cases, told Bloomberg Law.

''My concern would be it's a way to potentially circumvent potential FCA claims because the consolidation of the codes would be bringing more services into one category. That leaves a lot more room for malfeasance,'' Brian Markovitz, an attorney at Joesph, Greenwald & Laake PA in Greenbelt, Md., who represents whistleblowers in false claims litigation, told Bloomberg Law.

Upcoding has long been a source of False Claims Act litigation, with whistleblowers calling out doctors and medical professionals who bill for visits at a higher code level to receive higher reimbursement.

The combination of E/M codes 2 through 5 could reduce False Claims Act litigation based on incorrect coding. False claims cases based on coding are relatively easy to prove through the use of statistics and data.

Five-Level Coding The more complex the patient's office visit, the higher the code level. The three factors that go into making a code determination are the patient's history, the examination, and the medical decision making.

Level 1 visits, which won't change under the proposed rule, are the only visits that don't require a doctor to be present and are short visits, such as blood pressure checks, dressing changes, drug screenings, and injections.

Level 2 visits require about a 10 minute face-to-face meeting with a doctor featuring a problem-focused history or exam for issues like the common cold. Level 3 is a roughly 15-minute visit with a doctor featuring an expanded problem-focused history or exam. Level 4 covers a more detailed history or exam that lasts around 25 minutes. Level 5 is a comprehensive appointment that may last 40 minutes or longer.

Under the proposed rule, levels 2 through 5, which range from low severity to high severity problems, will be combined into one single coding level that has one payment rate based on the frequency each code was used over the past five years. That means some general doctors may make more, while some specialists may make less.

''If you're going to have two categories, doctor and not doctor, that leaves a lot of room for overbilling issues,'' Markovitz said. ''If you've got multiple codes, you can use stats to show somebody is not coding properly. If you've got 50, 70, 80 percent coming in at the top two tiers, that helps you establish something's wrong.''

But Brad Robertson, a partner at Bradley Arant Boult Cummings in Birmingham, Ala., who defends providers in false claims actions, said the CMS is making a move toward ''more practical real-world documentation'' that will allow a doctor to better describe what is happening with a patient and the manner in which it is being treated.''

Stirring the Pot According to attorneys who spoke to Bloomberg Law, if the proposed rule went into place, the amount of FCA litigation over E/M codes would decrease.

David Schumacher, an attorney who represents health-care providers in fraud and abuse compliance and defense issues at Hooper, Lundy & Bookman PC in Boston, said that many E/M code investigations are hypertechnical and based on missing documentation, but the changes would greatly simplify the coding doctors would have to do. ''These changes would dramatically reduce the possibility that a physician submits an E&M code with insufficient documentation—and reduce the potential for a False Claims Act investigation,'' Schumacher told Bloomberg Law.

''I say that this result would be unintended because the driving force of the proposed change appears to be simplifying regulatory burdens—not reducing False Claims Act exposure,'' Schumacher added.

Honig told Bloomberg Law E/M codes are ripe for FCA litigation because it's relatively easy to allege miscoding.

''They're really easy for the government and whistleblowers to look at because they have those times [length of appointments]. Times are not part of the rule, but they're shorthand and used to create a case whether it's valid or not,'' Honig said. He said that even if docu-

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mentation is perfect, there can be questions as to whether so much time is necessary for a visit.

It can be difficult to defend such cases because a provider can't just argue the law, but has to argue facts and medical judgment. ''Instead of saying you're reading this regulation wrong, you're into did this person really have a medical condition that required this level of evaluation and management?,'' Honig explained.

More to Come If the proposed rule is made final, E/M cases already underway or alleging facts while the old rule was in place will still be litigated.

Robertson said doctors still need to make sure their documentation is thorough and accurate, although it's less likely they'll get tripped up on minor requirements. He thinks the CMS's proposed change could open up arguments in existing litigation about the relevance of the codes.

''There's an argument to be made that the difference in documentation between the codes wasn't material previously given the CMS is deciding to discard them,'' Roberston said.

And while some doctors dealing with more complex issues may be upset at the possibility of making less money under a new coding scheme, Honig said they'll make up any losses in reduced risk.

''Any money that you lose, you more than make up for in the reduced risk and you certainly more than make up for it if you're one of those unfortunates who get sued under the FCA under a bad E&M claim,'' Honig said.

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