

## ISSUE ALERTS

### **CMS EASES SUPERVISION REQUIREMENTS FOR OUTPATIENT THERAPEUTIC SERVICES PROVIDED IN HOSPITALS AND CRITICAL ACCESS HOSPITALS**

December 12, 2019

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On November 12, 2019, the Centers for Medicare & Medicaid Services ("CMS") finalized the 2020 Outpatient Prospective Payment System Final Rule ("2020 OPPS Rule"). Under the 2020 OPPS Rule, the minimum level of supervision required of physicians and non-physician practitioners for outpatient therapeutic services changed from direct to general supervision in all hospitals and critical access hospitals ("CAHs"). Therapeutic services are non-diagnostic services and supplies, including drugs and biologicals, furnished to outpatients that aid the physician or non-physician practitioner in the treatment of the patient.

#### **HISTORY**

In 2009, CMS finalized a rule requiring direct supervision for all outpatient therapeutic services provided at hospitals, including CAHs. This meant a physician or non-physician practitioner, such as a nurse practitioner or physician assistant, must be immediately available, but not physically present, to furnish assistance and direction throughout the performance of the procedure. CAHs and small rural hospitals were challenged to meet the rule because of physician and non-physician practitioner shortages. A year after the rule took effect, CMS directed Medicare Administrative Contractors ("MACs") to not enforce the direct supervision requirements for CAHs and small rural hospitals with fewer than 100 beds. Instead, these small hospitals were required to provide general supervision of all outpatient therapeutic services. Since 2009, either CMS or Congress has continuously extended nonenforcement of the direct supervision standard, but not without causing CAHs and small rural hospitals considerable angst. Potential application of the direct supervision requirement to CAHs and small rural hospitals has lingered every year for the past decade.

#### **NEW RULE**

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Effective January 1, 2020, the supervision standard will be lowered to general supervision for outpatient therapeutic services provided in the hospital or CAH, or in an outpatient department of the hospital or CAH, including both on- and off-campus hospital departments. General supervision means the therapeutic service is provided under the physician's or non-physician practitioner's general control, primarily through the use of protocols and other established procedures, but not in the physician's or non-physician practitioner's presence.

## CMS' REASONING FOR THE SUPERVISION CHANGE

CMS' reasoning for the lower supervision standard is that direct supervision is often unnecessary. State laws regarding scope of practice are already in place to protect Medicare patients and to ensure that the services are properly supervised. By observing and reviewing the data and information provided by CAHs and small rural hospitals, CMS believes providers furnish similar care for therapeutic services regardless of whether the required supervision is direct or general.

## CAUTION

Hospitals and CAHs should be aware that not all supervision rules are changing under the new 2020 OPPS Rule:

- These rules are limited to the hospital setting; the 2020 OPPS Rule does not change the supervision requirements in the freestanding clinic setting.
- Non-physician practitioners only may supervise outpatient therapeutic services that are within the scope of their practice under state law and their hospital- or CAH-granted privileges.
- The supervising physician or non-physician practitioner must be knowledgeable about the service and clinically able to perform the service.
- Pulmonary rehabilitation, cardiac rehabilitation, and intensive cardiac rehabilitation services still must be provided under the direct supervision of a physician.
- Designated non-surgical extended duration therapeutic services ("NSED") will continue to require direct supervision during the initiation of the service and general supervision for the remainder of the service.

## BOTTOM LINE

The 2020 OPPS Rule eases supervision requirements for outpatient therapeutic services provided at all hospitals and CAHs. Importantly for CAHs and small rural hospitals, the 2020 OPPS Rule provides some much-needed certainty that the direct supervision requirements will not be imposed on them in the future. Despite the rule change, CMS made clear that hospitals and CAHs may choose to provide direct or personal supervision for outpatient services "when the physicians administering the medical procedures decide that it is appropriate to do so." These supervision requirements should be set forth in medical staff bylaws and hospital policies commensurate with the complexity of each service. The full text of the 2020 OPPS Rule can be found [here](#).

## FOR MORE INFORMATION

If you have questions or want more information regarding the 2020 OPPS Final Rule, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. Foulston's healthcare lawyers maintain a high level of expertise regarding federal and state regulations affecting the healthcare industry. The firm devotes significant resources to ensure our attorneys remain up-to-date on developments. At the same time, our healthcare practice group's relationship with Foulston's other practice groups, including the taxation, general business, labor and employment, and commercial litigation groups, enhances our ability to consider all of the legal ramifications of any situation or strategy. For more information about the Final Rule, contact **Brooke Bennett Aziere** at 316.291.9768 or

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