

PROVIDERS TAKE NOTE: CMS MAKES CHANGES TO FINAL SPLIT/SHARED VISIT RULE FOR 2024

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At long last, the Centers for Medicare and Medicaid Services (“CMS”) has finalized its *new* split/shared visit rule for physicians and nonphysician practitioners (“NPP”). Importantly, CMS has decided to — once again — revise its definition of what constitutes the “substantive portion” of an evaluation and management (“E/M”) visit.

As background, a split/shared visit is an E/M visit in the facility setting that is performed in part by both a physician and an NPP who are in the same group practice that either provider could bill for if the physician or NPP performed the entire service independently. A “facility setting” means “an institutional setting in which payment for services and supplies furnished incident to a physician or practitioner’s professional services is prohibited under [Medicare] regulations.” The facility setting includes hospital and skilled nursing facility settings. CMS pays the provider who performs the “substantive” portion of the visit.

Over the years, CMS has changed its definition of “substantive portion” a number of times. In the past, a physician could bill a split/shared service if he/she performed any face-to-face portion of the visit, even if the NPP performed the majority of the work. In 2022 rulemaking, CMS revised the rule to allow a provider to bill for the visit if the provider performed any one of these categories: (1) history; (2) performing a physical exam; (3) medical decision-making; or (4) spending time (more than half of the total time spent by the practitioner who bills the visit).

Then, CMS announced that the split/shared visit rule would be changing effective Jan. 1, 2023. CMS indicated that it planned to eliminate all of the service categories (i.e., history, physical exam, and medical decision-making) and move to a time-based definition of what constitutes the substantive portion of a split/shared visit. In other words, only the provider who spent more than half of the total time of the service could bill for the visit. CMS delayed implementation of the new rule, instructing providers to continue using the 2022 rulemaking throughout 2023. Providers anticipated that as of Jan. 1, 2024, CMS would implement the time-based definition of “substantive portion.”

But after a lot of pushback, CMS changed course. Starting Jan. 1, 2024, Medicare will pay for a split/shared E/M visit at the rate of the provider who either (1) spent more than half of the total time spent by the providers

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performing the visit or (2) performed a substantive part of the medical decision-making. This means that providers will still have the ability to bill for a physician's service in a split/shared visit if the physician did not spend more than half of the time with a patient, but performed a "substantive part of the medical decision-making," such as developing the plan of care and assuming the responsibility for the patient. See 88 FR 78818, 78982-78985. CMS made clear that it reached this decision, in part, to align its definition of "substantive portion" of a visit with the Current Procedural Terminology ("CPT") code definition.

Although CMS has aligned its definition with the CPT code, providers should be mindful of CMS' documentation requirements. While the CPT code would allow a physician to merely review a NPP's notes and add his/her signature to show he/she agrees with the NPP, CMS expects that the medical record will contain sufficient documentation to show which provider performed the medical decision-making portion of the visit. This means that a physician's signature, on its own, is likely not enough to support billing at the physician's rate for the split/shared visit.

BOTTOM LINE FOR PROVIDERS

Providers should keep in mind that there are three elements of medical decision-making: (1) number and complexity of diagnoses to be addressed; (2) the amount and/or complexity of data to be reviewed; and (3) the risk of complications or morbidity from testing or treatment. With respect to the data element, remember that only the provider who interprets the test may utilize that element for purposes of satisfying the split/shared visit rule.

If providers elect to utilize the time-based option, they will need to carefully track and document in the medical record the time each provider spends with the patient. The key takeaway for providers utilizing the time-based option is that only one provider can take credit for the minutes with a patient when both providers are in the room. For example, if the physician and NPP were in the room at the same time evaluating the patient for 15 minutes, then either the physician or NPP could count the 15 minutes toward the time-based calculation of "substantive portion."

Providers should also ensure that medical records contain sufficient information to show who performed the substantive portion of the visit; a physician's signature is not enough on its own. The provider who bills the split/shared visit is the provider who must sign and date the medical record. Additionally, all split/shared visits must be submitted with the "FS" modifier.

For more information on split/shared visits, refer to the Nov. 16, 2023, rulemaking available at <https://www.federalregister.gov/documents/2023/11/16/2023-24184/medicare-and-medicaid-programs-cy-2024-payment-policies-under-the-physician-fee-schedule-and-other>.

FOR MORE INFORMATION

If you have questions or want more information regarding CMS' split/shared visit 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 knowledge regarding federal and state regulations affecting the healthcare industry. 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 the legal ramifications of any situation or strategy. For more information, contact Brooke Bennett Aziere at 316.271.9768 or baziere@foulston.com, or Nancy E. Musick at 913.253.2140 or nmusick@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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