HANCOCK DANIEL
The Health Law Solution

Webinar: COVID-19 and the CV Service Line: Legal Questions You Never Thought to Ask - Part 4

Q&A

April 2, 2020

1. **Compensation:**
    a. **Can we change comp distribution process for say 2-3 months and then revert?**
    It depends on whether the distribution plan is changed by an entity that employs the physician (like a group practice or a hospital's physician employment vehicle), or the compensation plan is based on a PSA arrangement. In any event, the Covid-19 waivers will not alter the applicable standard. Stark has always permitted compensation of employed physicians to be changed prospectively (subject to any contractual limitations outside of Stark). For PSAs, compensation must be set in advance for at least 1 year. While waivers provide flexibility as to other standards, such as FMV, they do not alter the set in advance standard.

    b. Can we change thresholds – as long as we are starting 4/1 and go forward and not back? Can we do any of this retroactively?
    There is no waiver that allows for retroactive adjustments to compensation or that waive the "set in advance" standard. Any prospective changes to physician comp would need to meet "set in advance" standards.

    c. Will any of the waivers allow for comp stabilization – or do we need amendments in place now to "guarantee" comp?
    No waivers provide for "guaranteed" compensation to physicians. There is a waiver that would enable an entity, such as a hospital, to make a loan to physician with interest rates below fair market value or under terms that are not generally available from a lender.

    d. How does this scenario impact FMV analyses going forward? wRVUs were pretty much presumed "guaranteed" income and now it's clear that's not the case.
    The waivers (including the relaxation of FMV standards in limited cases) are temporary and, as such, will not have application beyond the state of emergency due to the Covid-19 outbreak. Absent permanent changes to Stark, the FMV standard will continue to apply to many Stark exceptions.

    e. Can we change the compensation model? Once or can we adjust now and then prior to year-end?
    See response to question 1.a.

f. **Does change need to be for entire contract period or can it be for a specific period (i.e. Starting 3/1/20)?**
See response to question 1.a.

g. **Is there a limit on what changes we can make? Total revamp or just some elements?**
   i. **Change thresholds?**
   ii. **% of productivity, % call, etc.?**
   iii. **Do some things set in advance need to remain (like TVU values)?**

See response to question 1.a.

h. **Can we use historical (YTD per COVID or prior year) wRVU's in calculating productivity or meeting other thresholds rather than actual wRVU's.**
See response to question 1.a.

i. **If physician ends up w/ negative undistributed earnings (draw is higher than actual, calculated earnings per model), can physician repay negative balance in following contract year?**
   i. **How long can repayment term be?**

A waiver could apply if it is solely related to a Covid-19 Purpose (as defined in the waiver announcement). Waiver protection expires when the state of emergency is lifted.

j. **Have employed practices compelled employer to provide a compensation protection statement (e.g. some form of guarantee of continued compensation)**
Review Webinar Recording: COVID-19 and the CV Service Line: How to Survive the Financial Tsunami - Part 5

2. **Staffing:**
   a. **Any creative ideas for use of ICR staff now that those are closed**
   The short answer is some are doing weekly calls with the patient and most have shut down completely. In addition to this -- AACVPR is working with ACC to try to obtain some waivers to perhaps to try some telehealth -- so stay tuned.

3. **Cares Act 2020:**
   a. **$100,000.00 in section 1106 are the referring to a yearly amount or during the 8 week period. Assuming annual but I have been asked twice now**
   Yes, they are referring to a cap of $100,000 annually. Section 1106 states that the employees that are referred to in the forgiveness restrictions of the PPP are those who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in amount more than $100,000.

   b. **Can Jim cover tonight if there are revenue caps for the small business loan in order to qualify if you read 11 02 7A there is a chart in there that says physician practices & it says 12 million. I can't seem to get an answer from anyone around here on is that mean a practice is not eligible if they had over 12 million in revenue? Both banks that I talked to continue to say they're waiting for the details and local to local attorneys keep saying that we will qualify!**
   The cap applies to the standard SBA "small business concern" loans but does not apply to the new 7(a) Paycheck Protection Program loans. Section 1102 of the CARES Act defines the eligible business to be the greater of 500 employees OR if applicable, the size standards in number of employees established by the Administration. The SBA size standards for the various healthcare

related entities lists size standards in millions of dollars, but not size standards in number of employees. In this case, the threshold is the size limit of up to 500 employees.

4. **TeleHealth:**
   a. **Licensure requirements across state lines – Did CMS waive? Does this cover all licensure requirements in the state? Does this impact my malpractice coverage?**
   Answer: CMS is temporarily waiving requirements for Medicare and Medicaid that out-of-state practitioners be licensed in the state where they are providing services when they are licensed in another state. CMS will waive the physician or non-physician practitioner licensing requirements when the following four conditions are met: 1) must be enrolled as such in the Medicare program; 2) must possess a valid license to practice in the state which relates to his or her Medicare enrollment; 3) is furnishing services – whether in person or via telehealth – in a state in which the emergency is occurring in order to contribute to relief efforts in his or her professional capacity; and, 4) is not affirmatively excluded from practice in the state or any other state that is part of the 1135 emergency area. These are all subject to state specific requirements and HHS has encouraged states to follow suit. Check with the board of health professions in the state where you will be providing services to confirm.

   b. **Any identified underlying repercussions with HIPAA violations with electronic platforms?**
   Answer: The HHS Office for Civil Rights (OCR) will exercise enforcement discretion and waive penalties for HIPAA violations against health care providers that serve patients in good faith through everyday communications technologies, such as FaceTime or Skype, during the COVID-19 nationwide public health emergency.

   c. **If patients initiate contact with the provider through a patient portal are, we able to use the e-visit codes?**
   Answer: Recent changes to billing practices under the proposed interim rule will address these concerns.

   d. **Is there any forgiveness in this process to allow us to bill for our time with office codes and modifiers or e-visits other than G code for 10 min, when all calls take so much longer and require in depth assessment?**
   Recent changes to billing practices under the proposed interim rule will address these concerns.

   e. **Does the patient have to initiate the call for the virtual visits - and what does that mean exactly?**
   Answer: The patient does not have to initiate the visit. You can explain the visit, etc. and obtain verbal consent, another easy thing to do is make a check box on your phone visit template - stating patient consents to call/video visit

   f. **Do telehealth- video visits require documentation of a physical exam?**
   Answer: Telehealth requires audio and video - a visual exam may be documented however basis for the selection of the EM service code is time or MDM. Recent changes to billing practices under the proposed interim rule will address these concerns.

   g. **Is there an 8-week period between telehealth appointments during this waiver?** Answer: Recent changes to billing practices under the proposed interim rule will address these concerns.

h. **Do we expect the video requirement for telehealth billing will be waived?**
Answer: Great question -- there is a lot of debate on this -- we need feedback from the field -- so let us know -- Advocacy is thinking that perhaps we try one more time (keep in mind we have tired this for the last 2 "bills") that perhaps we ask for a crosswalk -- virtual/phone to a Level 3 established.....thoughts?? Recent changes to billing practices under the proposed interim rule will address these concerns.

5. **Stark:**
   a. **Stark concerns over waiving coinsurance/deductibles? Should we waive this for all patients or only those with an out of pocket expense?**
   Stark is not implicated in this situation (and, as such a waiver would not apply). Stark only applies to physician referrals of "designated health services" to an entity with which he/she has a financial relationship. However, waivers of copays could implicate the Antikickack Statute and the Civil Monetary Penalties law, for which no waivers were issued.

6. **Billing/Coding:**
   a. **For telephone (audio only), for Medicare patients we can now bill 99441-3 with POS 11?**
   Yes and recent changes to billing practices under the proposed interim rule will address these concerns.
   b. **Sorry to repeat a question but I'm confused about the POS for telehealth office visits 99201-99215. They have been on the Telehealth list for some time; they aren't "new" codes to Telehealth and have traditionally been billed with POS 02 to Medicare. But now they have to be billed to Medicare with the appropriate office POS and 95 modifier? Is that correct?**
   Correct newly released by CMS late yesterday in the interim final rule (4/1/20)

   c. **Can I clarify that 99201-99205 have been allowed for telephone consults?**
   99201-99205 are allowed for telehealth services which required audio and video

   d. **What new pt codes are allowed when physicians are using telephone services only?**
   Only available codes for telephone only services expanded to new pts are virtual visits - G2012, 99441-43 or portal/electronic visits

   e. **Practically, what exactly does waiving the 3-year rule for new patients?**
   The Coronavirus Preparedness and Response Supplemental Appropriations Act specified that only providers who themselves or through their practice had furnished the patient with an item or service paid by Medicare in the three years prior to the telehealth service were qualified to bill Medicare covered telehealth services. However, the Act specifically gave the Secretary of HHS the authority to amend certain requirements by program instruction. Under the 1135 telehealth waiver, to the extent the Act "requires that the patient have a prior established relationship with a particular practitioner, HHS will not conduct audits to ensure that such a prior relationship existed for claims submitted during this public health emergency." Thus, HHS is not enforcing the 3-year requirement for telehealth visits. However, for purposes of the waivers, an "established" patient relationship must be in place for e-visits and virtual check ins. Additionally, the 2020 MPFS states that whether a patient is "established" is usually determined under state law and typically requires a full examination of the patient's current condition(s) and medical history. Recent changes under the proposed interim rule will further address these concerns.

f. **If you use video to do an inpatient visit, do we need to attach the GT modifier like we do in the OP setting?**
GT is being required by some payers -- not Medicare -- 95 seems to be the modifier being asked for, For CMS if you are billing these as telehealth - they are stating bill the POS as you would normally and append modifier 95. This will provide reimbursement the same as you were reimbursed prior to the waiver.

g. **Telemed visit E&M (99213) will now be POS 11 or is this just the Virtual visit (99441-443)?**
Answer: CMS released 3/30 - the following "report the POS code that would have been reported had the service been furnished in person". Also require modifier 95 for CMS telehealth

h. **Not Telehealth related question - but is there any guidance on if you can still bill a hospital consult without the physical exam if you document PE not done due to Covid19 emergency?**
Not any guidance I am aware of for consults specifically as CMS does not recognize these codes. However, many programs are documenting the inability to obtain PE etc., to add to Nicole -- use the no-touch exam -- it works well

i. **All services are now billed when telehealth as pos of the clinic? Including PBB clinics? POS 22**
Per the CMS interim rule report the POS code that would have been reported had the service been furnished in person "Physician practicing in an office setting who, under the PHE for the COVID-19 pandemic, sees patients via telehealth instead of in person would be paid at the non-facility, or office, rate for these services. Similarly, a physician who typically sees patients in an outpatient provider-based clinic of a hospital would be paid the facility rate for services newly furnished via telehealth", this is one of the key changes -- check page 15 of the rule

j. **So patient consent for billing purposes is the same as patient initiated? They appear to be two different criteria.**
With the waiver, etc. they have stated these services do not have to be patient initiated and patients may be informed of the service. Consent is required.

k. **Can you provide a reference for waiving the patient-initiated criteria for virtual check-ins? March 17 CMS said, "We expect that these virtual services will be initiated by the patient; however, practitioners may need to educate beneficiaries on the availability of the service prior to patient initiation."**
Answer: CMS interim final rule - https://www.cms.gov/files/document/covid-final-ifc.pdf

l. **99441, 99442, & 99443 can we start using if there is a 60-day comment period?**
Yes, you can use them immediately

m. **So, if we see a patient thru video in our office, we do not have to use POS 02, we can use POS 11?**
Yes, for CMS with modifier 95 and if your normal POS for the visit is POS 11. Commercials vary.

n. **Can the CPT codes for Online Digital Management (99421-99423) be used for Video Visits- Real time vs. using E/M Codes 99201-99215?**

Answer: 99421-23 - are for video transmission not E&M give us a few and we will cover this, sorry I meant to say those are the e-clinic visits -- they need to go thru the portal vs the telehealth codes

o. **When billing claims for Medicare Pts with the established E/M CPT codes 99211-99215 we should bill with POS 11 since that is where we normally bill with the 95 modifier so that we will be reimbursed at the non-facility rate? Or will we be reimbursed at the facility rate which is less?**
Correct and it will be reimbursed with the latest CMS release at the non-facility rate

p. **Can Transitional Care Management now be billed as a Telehealth Service?**
TCM has always been on the CMS approved telehealth code list

q. **This may have already been answered... do commercial insurances require a specific modifier for telehealth visits?**
It varies across payers and states unfortunately. Some are requiring 95 or GT

r. **99441-3 is still not on the Medicare approved Telehealth codes which was updated 3/30.**
Answer: These CPT codes are not telehealth services - these are virtual visit codes billed with your normal place of service

s. **For virtual visit to bill by time: Is the time for billing the actual time on the phone/video with the patient, or the total amount of time for the encounter including charting, coordination of care, review of studies, placing orders etc.?**
The Virtual visit code represent a provider contact, time is based on provider time.

For the most up-to-date information on all topics above, please visit our website and review our COVID-19 Taskforce and Resource Center page. Here, you'll find our latest advisories, countless reference points, and information on our team of attorneys who can advise you during this time.