

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

Cloud Over Consignment Closets:

Despite A Delayed Effective Date, CMS Transmittal May Virtually Eliminate Use Of Consignment Closets In Physician Offices

September 23, 2009

On September 1, 2009, the Centers for Medicare & Medicaid Services ("CMS") issued Transmittal 300,¹ which significantly limits consignment closet and "stock and bill" arrangements in physician and non-physician practitioner offices.² These changes, originally scheduled to take effect on September 8, 2009, have now been delayed until March 1, 2010. Assuming the Transmittal takes effect as written in March, the practical effect could be to eliminate consignment closets in all but rural physician offices. Note that the Transmittal does not currently affect consignment closets in hospitals, ambulatory surgery centers, or other health care facilities, but rather only in physician and non-physician practitioner offices.

Under Transmittal 300, CMS allows use of consignment closets and/or stock and bill arrangements only when the following specific compliance standards are met and verified by the National Supplier Clearinghouse Medicare Administrative Contractor (NSC-MAC):

- (1) Title to the durable medical equipment, prosthetics, orthotics, and supplies ("DMEPOS") must transfer to the physician/practitioner's practice at the time the DMEPOS is furnished to the beneficiary;
- (2) The DMEPOS supplies and services must be billed for by the physician/practitioner's practice using his or her own DMEPOS billing number;

¹ This transmittal rescinds and replaces an earlier Transmittal, i.e., Transmittal 297, but does not make any changes other than the implementation date.

² Transmittal 297 defines a "closet consignment" or "stock and bill" arrangement as one where an enrolled supplier of durable medical equipment, prosthetics, orthotics, and supplies ("DMEPOS") maintains inventory at a practice location which is not owned by the enrolled DMEPOS supplier, but rather, owned by a physician, non-physician practitioner or other health care professional for the purpose of distribution.

(3) All services concerning fitting or use of the DMEPOS shall be performed by individuals being paid by the physician/practitioner's practice and not by the DMEPOS supplier; and

(4) Beneficiaries are instructed to contact the physician/practitioner's practice and not the DMEPOS supplier for problems or questions with the DMEPOS. The NSC-MAC is also directed to verify that no more than one enrolled DMEPOS supplier is located at the same practice location and that each practice location has a separate entrance and a separate physical address recognized by the U.S. Postal Service.

The requirement that physicians bill for DMEPOS supplies and services using their own enrolled DMEPOS billing number raises not only the practical issues of physician practices attempting to obtain new DMEPOS numbers if they don't already have them, but also raises significant issues under the federal physician self-referral law known as the Stark Law. The in-office ancillary services exception under Stark Law, on which most physician groups rely in providing "designated health services" ("DHS") to their patients, does not protect the provision of most durable medical equipment ("DME"), which is one of the categories of DHS.³

Therefore, it may be difficult or impossible for physician practices (except those located in rural areas, for which there is a separate Stark exception) to bill Medicare for any DME beyond the limited items allowed by the in-office ancillary services exception. As an alternative, physicians in the practice may personally provide all aspects of the DME services (personally performed services are not "referrals" for Stark purposes), but as CMS noted, this scenario is "highly unlikely" given the manner in which physicians typically operate their practices."⁴ Note that physicians can still use the in-office ancillary services exception for prosthetics and orthotics, as opposed to DME, although they will face the practical challenges of obtaining a DMEPOS supplier number if they don't already have one.

One perhaps unintended consequence of Transmittal 300, since it effectively ends consignment closets in most physician practice offices, will be the inconvenience for patients who now will have to travel to another location in order to obtain the supply or item a physician has deemed medically necessary for the patient's health. If you have any questions on this Health Law Update, please contact any of the attorneys in our Healthcare Practice Group listed below.

³ See 42 C.F.R. § 411.355(b)(4). DME covered by the in-office ancillary services exception includes only limited items such as canes, crutches, walkers and folding manual wheelchairs, and blood glucose monitors, as well as certain infusion pumps that constitute DME, all of which are subject to certain specified requirements.

⁴ CMS states: "The enrollment requirements and professional supplier standards are not waived in those situations in which a physician furnishes DME directly to the patient. Thus, there are few, if any, situations in which a referring physician would personally furnish DME and supplies to a patient, because doing so would require that the physician himself or herself be enrolled in Medicare as a DME supplier and personally perform all of the duties of a supplier as set forth in the supplier standards in § 424.57(c)." 72 Fed. Reg 51019-51020 (Sept. 5, 2007).

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