

HEALTH INDUSTRY ALERT

CMS ISSUES FAQs REGARDING RESIDENT TRAINING AT NONHOSPITAL SITES



The Centers for Medicare & Medicaid Services (CMS) recently posted on its Web site a series of frequently asked questions (FAQs) titled “Medicare Policy Clarifications on Graduate Medical Education Payments for Residents Training in Non-Hospital Settings.” The FAQs and an introductory statement from CMS Administrator Mark McClellan can be found at <http://www.cms.hhs.gov/providers/hipps/gme.asp>.

With an emphasis on teaching physician compensation and volunteer arrangements, CMS is attempting to bring some clarity to its policies regarding how and when hospitals may include time spent by residents training in nonhospital sites (e.g., doctors’ offices, clinics, nursing homes) in their full-time equivalent (FTE) resident counts for purposes of their graduate medical education (GME) reimbursements and indirect medical education (IME) adjustments.

Generally speaking, as described in detail in our April 6, 2004, *Health Industry Alert*, the Medicare Act provides that the time spent by residents in an approved training program in a nonhospital setting shall be included in the GME and IME FTE counts if the residents are engaged in patient care activities and “the hospital incurs all, or substantially all, of the costs for the training program in that setting.” See 42 U.S.C. §1395ww(d)(5)(B)(iv) (IME provisions); 42 U.S.C. §1395ww(h)(4)(E) (GME provisions).

CMS has interpreted this statutory language broadly. After January 1, 1999, in order to count time spent by residents at nonhospital sites for GME and IME payment purposes, in addition to incurring all or substantially all of the costs of the training program at the nonhospital site, a hospital must have a written agreement with the nonhospital site that complies with Medicare rules. Among other things, the written agreement, which must be in place prior to resident training, must provide that the hospital is incurring all or substantially all of the program costs at the nonhospital site and indicate the amount of compensation provided by the hospital to the

site for teaching activities. *See* 42 C.F.R. §413.78(d) (formerly 42 C.F.R. §413.86(f)(3), (4)) (pertaining to GME) and §412.105(f)(1)(ii)(C) (pertaining to IME). Notably, however, effective October 1, 2004, the hospital may either have a written agreement with the nonhospital site or documentation that it has paid for all or substantially all of the costs of the training at the nonhospital site by the end of the third month following a month in which training at the site occurred. *See* 42 C.F.R. §413.78(e).

Many of the concepts in the FAQs are not new, but they do provide some helpful insights into a number of issues regarding CMS's broad interpretation of the Medicare Act that have been problematic for hospitals and resulted in inconsistent application and interpretation of the Medicare rules by fiscal intermediaries.

VOLUNTEER ARRANGEMENTS

A major concern in the industry has been whether volunteer arrangements with nonhospital sites are permissible. This is an important issue since, as the Health and Human Services Office of Inspector General (OIG) recently reported, approximately 79 percent of supervisory physicians volunteer their time to teach residents in nonhospital settings. *See Health and Human Services, OIG, Alternative Medicare Payment Methodologies for the Costs of Training Medical Residents in Nonhospital Settings, Report to Congress No. A-02-04-01012* (Dec. 2004). Although earlier Medicare policy seemed to allow volunteer arrangements, in recent years CMS has increasingly called into question such arrangements. The FAQs now make clear that "the relevant question is *not* whether volunteerism is permissible, but whether *there is a cost* to the nonhospital site for supervising the resident training." If there is a cost, CMS requires the hospital to reimburse the nonhospital site for such cost. Therefore, whether the physician is volunteering has no relevance under CMS policy.

TEACHING PHYSICIAN COSTS

CMS wants hospitals to verify whether there is a cost associated with resident training at nonhospital sites and, if so, to compensate the sites for such cost. If a physician is a member of a clinic or group practice and "the physician receives a predetermined compensation amount for his/her time," CMS will assume that a portion of that compensation relates to training. The cost associated with that time must be paid by the hospital. Conversely, as most often exemplified in the solo practitioner setting, there is typically no cost if the teaching physician's compensation "is based solely and directly on the number of patients treated and for which he/she bills."

The FAQs also clarify that in determining the amount of compensation that should be paid to a nonhospital site, the hospital is only required to compensate for teaching physician activities provided in connection with an approved residency program *other* than the supervision of residents while furnishing billable patient care services. This is an important and helpful clarification since most of the time spent by residents and teaching physicians at nonhospital sites is on billable patient care activities.

If the teaching physician is an employee of the hospital and does not receive any additional compensation from the nonhospital site, no payment to the nonhospital site is needed because CMS will assume that the salary paid to the teaching physician covers teaching costs both inside and outside the hospital. In this event, however, the agreement should indicate that the physician is the hospital's employee and the teaching costs are incurred directly by the hospital.

In short, the determination of teaching physician costs depends upon the physician's salary and the amount of time devoted to teaching activities that are not related to billable patient care activities. Although as a practical matter determining such costs is likely to be riddled with problems, CMS does provide one example of how to determine these costs in FAQ Answer 5.

THE WRITTEN AGREEMENT

In addressing another area of confusion for hospitals and intermediaries, CMS clarifies that in circumstances where the physician is a solo practitioner, the physician and the nonhospital entity are one and the same, and the agreement should be with that physician. In circumstances where the physician is an employee or otherwise reports to others at the nonhospital site, then the agreement must be between the hospital and an authorized representative of the nonhospital site. Finally, in FAQ Answer 9, CMS provides examples of situations where there are and are not teaching physician costs associated with residents training in nonhospital sites. These examples provide guidance regarding the structure of written agreements and in determining whether the hospital must pay the nonhospital site for teaching physician costs in order to count the residents in its FTE counts.

CONTACT INFORMATION

If you have any questions about the FAQs or CMS' general FTE count policies, need assistance with critically analyzing or drafting agreements with nonhospital sites, or require counsel regarding associated Medicare appeals, please contact:

John R. Jacob202.887.4582jjacob@akingump.comWashington
 Eugene E. Elder202.887.4149gelder@akingump.comWashington
 Elizabeth H. Goldman202.887.4423egoldman@akingump.comWashington

Austin	Brussels	Dallas	Houston	London	Los Angeles	Moscow
New York	Philadelphia	Riyadh (Affiliate)	San Antonio	San Francisco	Washington, D.C.	