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HEALTH INDUSTRY ALERT

FEDERAL COURT RULES THAT RESIDENT RESEARCH TIME MUST BE INCLUDED IN CALCULATING INDIRECT MEDICAL EDUCATION ADJUSTMENT

Certain teaching hospitals that receive indirect medical education (IME) adjustments from Medicare may be able to recover additional IME payments for cost reporting periods ending prior to October 1, 2001. *See University Medical Center v. Leavitt*, 2007 WL 891195 (D. Ariz. 2007); *see also* 66 Fed. Reg. 39,828, 39,896 (Aug. 1, 2001) (regarding effective date of regulatory changes relating to resident research time). The U.S. District Court for Arizona has ruled that CMS improperly applied its own regulation governing the calculation of the IME adjustment by seeking to exclude time spent by residents on research activities from the IME calculation. This is the second federal court to hold that CMS improperly attempted to limit the IME count of full-time-equivalent (FTE) residents to time spent on direct patient care activities for cost reporting periods as to which its regulations authorized no such limitation. *See University Medical Center; Riverside Methodist Hospital v. Thompson*, 2003 U.S. Dist. LEXIS 15163 (S.D. Ohio 2003).

Prospective payment system (PPS) hospitals are paid on a per-discharge basis for the services they provide to Medicare patients. The per-discharge payments are based on the average costs necessary to treat patients with similar diagnoses, adjusted to take into account variations in wage costs in the hospitals' locations. Hospitals that operate medical residency programs receive additional payments that are intended to compensate them for increased indirect costs they incur as a result of these programs. These payments are known as IME adjustments. A hospital's IME payment calculation is based on its ratio of residents to beds. The higher this ratio, the greater the IME payment received by the hospital.

In *University Medical Center*, the hospital had included in its IME FTE counts for its 1998 and 1999 cost reports time spent by residents engaged in research who were assigned to the hospital. On audit, the hospital's fiscal intermediary excluded this research time from the FTE count on the grounds that residents involved in research rotations were not "involved in usual patient care." *University Medical Center*, 2007 WL 891195 at *5.

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Significantly, the regulation in effect for the cost reporting periods in question did not include any language limiting the FTE count to time spent on patient care. The relevant portion of the regulation simply stated that "[i]n order to be counted, the resident must be assigned to one of the following areas: (A) The portion of the hospital subject to the prospective payment system [or] (B) The outpatient department of the hospital." *See* 42 C.F.R. § 412.105(f)(1)(ii)(1999). It was not until 2001 that CMS issued regulations requiring research time to be excluded from the resident count for IME purposes. *See* 66 Fed. Reg. at 39,896. In doing so, CMS argued that its rule change was merely a "clarification" of its "longstanding policy" of excluding research time from the IME resident count. *See id.* at 39,897.

When the hospital appealed the intermediary's disallowances to the Provider Reimbursement Review Board (PRRB), the board issued a decision in the hospital's favor. The board held that CMS' regulation did not exclude resident research time from the FTE count, and did not require resident time to be related to patient care in order to be included in the count. Moreover, the board specifically rejected the intermediary's argument that the 2001 amendment excluding research time from the IME resident count was merely a clarification of previously existing policy. Instead, the board held that the regulatory amendment represented a change in policy that could not be applied retroactively to the hospital's 1998 and 1999 cost reporting periods.

When the CMS administrator overturned the board's ruling in favor of the hospital, the hospital brought the lawsuit that resulted in the recent Arizona federal court decision. In its defense, CMS argued that the 1999 version of the regulation governing the FTE count, which required residents to be assigned to the "portion of the hospital subject to the prospective payment system," could reasonably be read to exclude research time from the FTE count. *See University Medical Center*, at *8.

The court rejected CMS' argument. Following the decision in *Riverside Methodist*, the court held that the regulation was not ambiguous, and that "it is evident that all time spent by residents in research and other scholarly activities while they are 'assigned to' the Hospital must be included when determining the Hospital's resident count for purposes of calculating the IME payment." *See id.* at *9. In so ruling, the court also rejected CMS' argument that the regulation's reference to the "portion" of the hospital subject to PPS implied a direct patient care requirement. *See id.* (citing *Alhambra Hospital v. Thompson*, 259 F.3d 1071, 1073-75 (9th Cir. 2001)).

With the decision in *University Medical Center* and the previous decision in *Riverside Methodist*, there are now two federal district court decisions ruling that time spent in the hospital by residents as part of their approved residency training programs must be included in the FTE count, regardless of whether the time is spent in patient care activities. Some teaching hospitals may be able to take advantage of the increasing weight of the authorities on this issue. However, because the regulation was amended in 2001, the benefits of these case law developments are generally limited to hospitals that have pending appeals for cost reporting periods ending before October 1, 2001. Generally, if such hospitals had research time excluded from their resident count and had any intermediary adjustments to their FTE counts, they may have an opportunity to add the resident research issue to their appeals. Note also that, because 1996 is the base year for later years' FTE caps affecting medical education payments, some hospitals may have an opportunity to increase their caps going forward if they were subject to 1996 reductions in their FTE counts based on resident research time.

Akin Gump is forming group appeals focusing on this issue. Because the calculations affecting medical education payments are complicated, and because there may be complex jurisdictional issues related to appealing this issue for many hospitals, the analysis of whether the issue is viable for a particular hospital must be made on a case-by-case basis.

CONTACT INFORMATION

If you believe your hospital is entitled to additional resident FTEs based upon time spent on research by residents for years preceding 2001, or if you have other questions regarding the count of FTE residents for IME and GME purposes, please contact:

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