October 17, 2022

CAUTION: Compliance with COVID-19 Waivers Still May Violate Medicare Regulations

By Christina M. Kuta

The COVID-19 pandemic has fundamentally changed many areas of healthcare practice. Recognizing that existing healthcare laws may interfere with timely and effective COVID response, federal regulators issued temporary waivers of existing regulations to allow healthcare providers to adapt to COVID restrictions. One such waiver is related to the Physician Self-Referral Law, which is commonly referred to as the "Stark" law (*see* 42 CFR §411.350, et seq.). The Stark waiver, as further explained, has been relied upon by many practices that contract for pathology or radiology services, for example. In complying with the Stark waiver, these practices often overlooked another regulation commonly referred to as the Medicare "Anti-Markup Payment Limitations" (the "AMPL") (*see* 42 CFR 414.50). Practices that have not complied with the AMPL may find themselves recipients of Medicare overpayments subject to repayment.

The Stark law waiver allows for referrals of Medicare-payable "designated health services" (as defined by Stark) to be provided in locations that do not otherwise qualify as a "same building" or "centralized building" for meeting the Stark "in-office ancillary services" exception. Practices that relied upon the in-office ancillary services exception to refer Medicare-payable pathology or radiology services in compliance with Stark generally were required, when the waiver was not in place, for these services to be provided in specific locations under the practice's control or in the same building where the practice provides services. The Stark waiver has allowed the services to be provided at any location without running afoul of the in-office ancillary services exception. To minimize the spread of COVID, many pathology and radiology practices have taken advantage of this temporary waiver, opting to allow providers to render services at home or in other locations.

The Stark waiver applies only to the Physician Self-Referral Law and does not waive any other requirement generally applicable to Medicare claims. The AMPL is a Medicare payment limitation rule that applies when a billing practice (the practice making a claim for payment to Medicare) bills for a service ordered by the practice, but performed by a physician who does not "share a practice" with the billing practice. There are two distinct methods for determining whether a performing physician shares a practice with the billing practice: (1) the performing physician furnishes "substantially all" of the physician's professional services for the billing practice, meaning that the performing physician provides at least 75% of his or her professional services for the billing practice (the "75% Test"); or (2) the performing physician provides the service "in the office" of the billing practice, meaning the medical office space in which the ordering physician regularly performs patient care (the "Site of Service Test").

If the performing physician does not share a practice with the billing practice, then the payment to the billing practice is limited to the lesser of:

- The performing physician's net charge to the billing practice;
- The billing practice's actual charge to Medicare; or
- The fee schedule amount for the test that would be allowed if the performing physician billed Medicare directly.

Most performing physicians do not fall within the 75% Test, and therefore, must meet the Site of Service Test for AMPL compliance. If the billing practice is meeting the Stark waiver, which allows the performing physician to provide service in a location other than where the ordering physician regularly provides patient care, that is insufficient to meet the AMPL requirements. Accordingly, the billed service complies with Stark, but is not compliant with the AMPL. If the service is not compliant with the AMPL, then the billing practice cannot be paid by Medicare more than it paid the performing physician for the service. For example, if the billing practice paid a pathologist $25 for a service, the billing practice cannot charge Medicare more than $25. If the billing practice was paid $35 for the service, then it was overpaid by $10.

Our experience is that many practices have taken advantage of the Stark waiver and either did not consider the AMPL or believed that CMS also waived the AMPL Site of Service Test. Roetzel has received written communication from CMS confirming that the there is no waiver of the AMPL during the COVID pandemic and its requirements are in full force and effect. Practices have an obligation to reform services that otherwise are not compliant with the AMPL and identify and return any payments in violation of this rule. Please contact one of our Roetzel attorneys to discuss whether your practice is operating in compliance with the AMPL and how we can help.

Ericka Adler, Manager
312.582.1602 | eadler@ralaw.com

Avery Delott
312.582.1636 | adelott@ralaw.com

David Hochman
312.582.1686 | dhochman@ralaw.com

Christina Kuta
312.582.1680 | ckuta@ralaw.com

Lee Levin
312.580.1248 | llevin@ralaw.com

John Waters
312.582.1685 | jwaters@ralaw.com