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CMS: Hospital-M.D. Time-Shares Are Surveyed Under CoPs, But Not Leases

By Nina Youngstrom

Surveys of hospital compliance with the Medicare conditions of participation (CoPs) will include space that's time-shared with physicians, but not space leased to physicians, according to Danielle Adams, the CMS official who wrote its November 2021 "Guidance for Hospital Co-location with Other Hospitals or Healthcare Facilities" (revised).[1]

The co-location guidance doesn't extend to physician practices, including leases and timeshares, because it only applies to Medicare-certified entities. But there's a distinction between leases and time-shares, said Adams, a nurse consultant for CMS's Quality, Safety & Oversight Group, at a Feb. 9 webinar on the co-location guidance sponsored by the American Health Law Association.[2]

"We need to differentiate between physicians coming in and using that space" and physicians leasing that space, she said. "A hospital that leases the space is no longer responsible for that space under the lease arrangement." The same isn't true for time-share arrangements. If the hospital retains authority over that space, "the hospital is responsible for it," Adams explained. Hospitals should mention the arrangements to surveyors during the entrance conference. "You have to identify leases and areas of the hospital not under hospital control. They are not certified. We can only be responsible for hospitals and whatever services they're required to provide," she said. In other words, the leased spaces won't be surveyed.

Co-location refers to two Medicare-certified hospitals or a Medicare-certified hospital and another certified entity on the same campus or in the same building and sharing space, staff or services. For example, part of a hospital's inpatient services may be located in another hospital's building, or an outpatient department may be found in another hospital's building, according to the memo, which is directed at state surveyors, who will use the guidance to evaluate CoP compliance. CMS emphasized that "all co-located hospitals must demonstrate independent compliance with the hospital CoPs." But surveyors don't come to hospitals on the hunt for co-location violations specifically, Adams noted. "We want to make sure we communicate to the provider community that when surveyors come in to evaluate compliance with the conditions of participation for that hospital at that time, they're not looking for co-location. Co-locations are not part of the conditions of participation."

Leases vs. Time-Shares Comes From Stark

The difference between leased space and time-shares presumably is meant to be consistent with the Stark Law regulations, said attorney Judy Waltz, who moderated the webinar. She said the revised Stark rule that took effect in January 2021 explained that leased space "involves the transfer of dominion and control," which isn't the case with a time-share.[3] Also, before the regulatory changes, leases had to last at least a year to satisfy a Stark exception, while time-shares can be less than a year assuming other requirements are met under 42 C.F.R. § 411.357(y). She said time-shares give new market entrants some flexibility in testing their business models and may offer support for smaller providers and suppliers.

"While the legal distinction between leases and timeshares may seem somewhat artificial, the position in the co-location guidance makes sense from a survey and certification viewpoint: Only those parts of the hospital that are under the hospital's control are subject to survey (i.e., those that do not have a lease and where control has not been transferred), even though the time-share space is subject to additional requirements under Stark," said Waltz, with Foley & Lardner LLP. "The distinction underscores the need for clear documentation of the contemplated arrangement in any agreement, as well as illustrating one theme that CMS stressed as of critical importance with respect to the co-location guidance—that you know who your partner is in any such arrangements."

The Provider-Based Dilemma

The final co-location guidance was a departure from its 2019 draft in substance and style.[4] The new version contains few examples and is silent on shared hallways, lobbies and elevators. CMS pulled back in light of the 2019 Supreme Court decision in *Azar v. Allina Health Services,* which requires CMS to use rulemaking, with its notice-and-comment period, for "substantive" changes to policies that affect payment and scope of benefits, Adams explained at the webinar.[5] For example, "we got rid of all that shared space" language, she said. "If you're walking down a hallway, you're walking down a hallway. We don't really have the legal authority to determine" whether sharing a hallway or elevator is a violation of the COPs because there's nothing about it in the regulations.

Provider-based departments (PBDs) that are co-located in unrelated hospitals are in a tight spot, as Adams acknowledged. For one thing, the regulations governing provider-based space (42 C.F.R. § 413.65) require it to always be used as provider-based space with respect to billing for Medicare patients; PBDs aren't permitted to treat some Medicare patients as hospital outpatients and others as physician office patients (42 C.F.R. § 413.65(g)(5)). "How do you get to 'always' if it's a co-located entity?" Waltz said. The regulations also require PBDs to have signs announcing they're part of a hospital, but it's a little strange to have a sign that says they're part of ABC Hospital when they're located on the campus of XYZ Hospital.

Adams said "we defer to the payment side" of CMS (the Division of Technical Payment Policy) on provider-based matters. "They have been made aware we have updated our [co-location] guidance and there could be potential conflicts," Adams said. "They would be responsible for updating payment [policies]. They may say they are not changing."

'It's a Matter of Perspective'

Payment is outside the scope of the Quality, Safety & Oversight Group. "There are provider-based rules on the payment side and we can't touch it." The mission of her group "is to ensure the health and safety of patients who enter Medicare-certified facilities and to ensure they are in compliance with the CoPs at all times," Adams said. It's similar to their thoughts on physician offices located on hospital campuses. They may be great for hospitals and one-stop shopping for patients, but there's still the matter of CoP compliance, she said.

"It's a matter of perspective. We don't look at it from a financial perspective. We look from a health and safety perspective."

She suggested knowing "who you are getting into an arrangement with." Hospitals should consider whether an arrangement for staffing, emergency services or space could jeopardize their compliance with the CoPs. "Then as long as you know you can maintain compliance, proceed with the arrangement," she said.

The co-location guidance is the end of it. There won't be answers to frequently asked questions because "co-location is not a regulation or a survey requirement," Adams said. "We released this guidance…to try to give a

little understanding."

Contact Waltz at jwaltz@foley.com. Questions about co-location can be submitted to hospitalscg@cms.hhs.gov.

1 CMS, "Guidance for Hospital Co-location with Other Hospitals or Healthcare Facilities," memorandum, Ref: QSO-19-13-Hospital, revised November 12, 2021, https://go.cms.gov/3Cbzl9m.
2 Danielle Adams and Judy Waltz, "CMS' Final Guidance on Hospital Co-Location Arrangements, American Health Law Association," American Health Law Association, February 9, 2022.
3 Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 Fed. Reg. 77,492 (December 2, 2020), https://bit.ly/3g3eprL.
4 CMS, "DRAFT ONLY- Guidance for Hospital Co-location with Other Hospitals or Healthcare Facilities," memorandum, Ref: QSO-19-13-Hospital, May 3, 2019, https://go.cms.gov/3cq0b3q.
5 Azar v. Allina Health Services, No. 17-1484, 587 U. S. _____, 139 S. Ct. 1804 (2019), https://bit.ly/3ns0hhN.