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Clearing the COVID-19 surgical backlog: Compliance implications of overlapping surgeries

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For years, healthcare providers, including hospitals and surgical centers, have relied on the practice of overlapping surgeries to maximize patient access to care, physician efficiency, and utilization of operating suites. In general, the term overlapping surgeries refers to situations where one lead attending surgeon is responsible for procedures that overlap in time. As an example, the lead surgeon is present for and performs the key or critical portions of Procedure 1, and then a resident physician closes the surgical site while the lead surgeon begins Procedure 2. In contrast, the term concurrent surgeries is often used to describe situations where the key or critical portions of more than one procedure are simultaneous, and therefore the lead surgeon who is responsible for both is unable to be present for the entirety of both key and critical portions of the procedures.

Now more than ever, healthcare providers may be considering adopting or expanding the scheduling of overlapping surgeries to address backlogs created due to elective procedure cancellations during the COVID-19 pandemic. Although overlapping surgery practices have the positive effect of increasing patient care, surgical efficiency, and operating room capacity, healthcare providers should be mindful of compliance implications. Indeed, government enforcement actions and media scrutiny in this area has increased considerably in the last seven years. As such, healthcare providers would be well advised to confirm that their overlapping surgery policies and practices comply with the Centers for Medicare & Medicaid Services (CMS) rules and industry standards.

Overlapping surgery background

Overlapping surgeries may occur in both the teaching hospital setting (often with the assistance of resident or fellow surgeons) and the nonteaching hospital setting. With respect to teaching settings, CMS regulations dictate certain requirements that must be followed for billing the physician professional fees when a teaching physician is responsible for two overlapping procedures. In the nonteaching context, CMS regulations do not explicitly address overlapping surgeries, although industry groups such as the American College of Surgeons (ACS) have released guidance on the topic. In addition, CMS conditions of participation and state laws governing informed consent must also be considered.



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In the teaching setting, CMS requires that the teaching physician be present during all key or critical portions of both overlapping operations and document in the medical record that they were physically present during the key or critical portions of both procedures in order to bill for their professional fees.^[1] Notably, CMS does not define the key or critical portions of each procedure, and instead provides the teaching physician with the discretion to determine which parts of each procedure are key or critical. In addition, CMS requires that if the teaching physician is not present during non-key or critical portions of the procedure, they must be immediately available to return to the procedure. If the teaching physician is not immediately available, they must arrange for another qualified surgeon to be immediately available to assist in the first case, should the need arise. In the case of three overlapping surgical procedures, the role of the teaching surgeon is classified by CMS as a supervisory service to the hospital and is not billable to government payers under the Medicare physician fee schedule.

With respect to concurrent surgeries, the ACS Statements on Principles states that concurrent surgeries are not appropriate and defines concurrent operations as surgical procedures that “occur when the critical or key components of the procedures for which the primary attending surgeon is responsible are occurring all or in part at the same time.”^[2] While CMS does not differentiate between the terms “overlapping” and “concurrent,” it will not make payment under the Medicare physician fee schedule for concurrent procedures in the teaching setting because teaching surgeons are required to be present for the key or critical parts of all procedures.^[3]

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