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Providers May Jump the Gun on Some Overpayment Returns; Consider 'Regulatory Hierarchy'

By Nina Youngstrom

Before health care organizations return presumed Medicare overpayments, they should check whether the rule they think they violated was in effect at the time. They may not owe money if a regulation was amended—or suspended in the case of the COVID-19 public health emergency (PHE)—and didn't apply on the date of service. That's one of several ways for organizations to ensure they aren't going overboard with overpayment returns, an attorney said.

"You always have to think, with whatever rule you're looking at: what was the date? That's your perpetual question," said attorney David Glaser, with Fredrikson & Byron in Minneapolis. But don't rely on a Google search for regulatory variations. The best source is the electronic version of the Code of Federal Regulations (eCFR), Glaser said.^[1] "When you go to the eCFR site, it will tell you when the rules were effective up to and when they were last amended," he said. "Google often takes you to an outdated version of the rule."

A prime example is the direct supervision requirement for incident-to billing. Nonphysician practitioners (NPPs) who bill incident to the physician's services must be directly supervised by the physician. During the PHE, CMS allowed physicians to provide direct supervision remotely, with audiovisual technology—in other words, not onsite—and then extended that flexibility through the end of 2024 in the Medicare Physician Fee Schedule (MPFS) rule. As a result, whether a particular claim is compliant with the incident-to supervision requirement depends on the date of service and the rule in effect at the time, he explained at a Jan. 24 HCCA webinar. "You need to create a timeline."

Although returning overpayments is a core competency of a compliance program, providers shouldn't jump the gun on repaying Medicare for medically necessary services they provided in good faith, Glaser said. He recommends they familiarize themselves with the so-called regulatory hierarchy to ensure they meet their compliance obligations. There's no reason to repay money when providers haven't broken any rules, Glaser said. It hinges partly on what language from CMS is binding and what is guidance.

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