

Report on Medicare Compliance Volume 29, Number 40. November 09, 2020

Before Rushing to Repay Medicare, Consider Whether 'Rule' Is Binding, Lawyer Says

By Nina Youngstrom

A gastroenterology practice felt comfortable rewarding its physicians with work relative value units for performing a capsule endoscopy as part of their productivity compensation because their attorney said the Stark Law doesn't apply to the procedure. Capsule endoscopy, which involves the patient swallowing a tiny wireless camera that takes pictures of the small intestine, doesn't fall under any of the designated health services (DHS) in the statute (i.e., it's not a radiology service), the attorney, David Glaser, explained. At some point, however, the physicians contacted Glaser when another attorney told them that because the Medicare Physician Fee Schedule regulation's annual update to Stark's DHS codes added capsule endoscopy (CPT 91110), they had to pay back Medicare for the procedures. Glaser strongly disagreed on the grounds that "CMS is going beyond the statute. I told them it was fine, and I said I would not refund the money." Statutes trump regulations. The physicians took Glaser's advice.

The conflict captures the value of not being a black-and-white thinker, "not being too quick to judge the answer," and understanding the hierarchy of laws and regulations, said Glaser, with Fredrikson & Byron in Minneapolis, Minnesota. It also underscores the importance of having compliance officers who don't jump the gun on overpayment returns.

Without tolerance for gray areas, compliance professionals and the employees who come to them with concerns may not back down from a position of "I heard it's illegal." Glaser recommends compliance professionals familiarize themselves with the regulatory hierarchy to ensure they meet their compliance obligations, which tends to coincide with behaving ethically, without going overboard. There's no reason to repay money when providers haven't broken any rules, Glaser said at an Oct. 14 webinar held by his firm. Subregulatory guidance doesn't count.

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