PUBLICATION

All Right Stop, Collaborate and Listen! CMS Is Back with Its Brand New Invention, Preparing for CJR Gainsharing [Ober|Kaler]

2016: Issue 4 - Focus on Antitrust

Understandably, there is anticipation surrounding the April 1st start date for CMS's newest bundled payment program, the Comprehensive Care for Joint Replacement (CJR) program. As participant hospitals consider gainsharing opportunities and physician alignment they should heed advice from a familiar set of lyrics (Stop, Collaborate and Listen) from a once popular, yet overplayed, 90's hit.

- *Stop* – Hospitals should take time to become familiar with the requirements of the CJR requirements and regulations governing gainsharing, including the CJR fraud and abuse waivers.
- *Listen* –Hospitals should consult with their operational personnel to establish what gainsharing models will work well with their physician population.
- *Collaborate* - Hospitals should put into place the tools for a successful collaboration/gainsharing arrangement with physicians to facilitate achievement of CJR's goals.

Accordingly, we have outlined below five essential steps for CJR participant hospitals' consideration.

1. Establish CJR collaborator selection criteria

Irrespective of the type of provider with which a participant hospital seeks to collaborate – whether it is a skilled nursing facility, home health agency, long term care hospital, inpatient rehabilitation facility, physician group practice (PGP), or physician – a participant hospital must first establish, in writing, its CJR collaborator selection criteria. Selection criteria must be related to the quality of care to be delivered to CJR beneficiaries (such measures may be forward looking, or based on prior performance), and cannot be based, directly or indirectly, on the volume or value of referrals between the parties.

To participate in the CJR program, CJR collaborators must have met, or agree to meet, the participant hospital-established selection criteria.

2. Develop the sharing arrangement methodology

As a preliminary matter, in establishing the parameters of any CJR collaborator sharing arrangement, each participant hospital must develop its gainsharing and/or alignment payment methodology.

- *Gainsharing methodology*: A participant hospital must first ensure its gainsharing methodology takes into account quality measures related to the hospital's broader CJR care redesign metrics. (While these measures may overlap with the CJR collaborator selection criteria, they should be distinct at least in part.) Only those CJR collaborators that meet the quality measures will be eligible to receive a gainsharing payment. The gainsharing payments themselves may be comprised of either internal cost savings (ICS) and/or net payment reconciliation amounts (NPRA), with payments permitted no more frequently than once per performance year. While CMS does not dictate what percentages of ICS and/or NPRA a participant hospital may gainshare, under no circumstances may participant hospitals gainshare with physician or PGP CJR collaborators above the "gainsharing cap:"

   - *Physician Cap*: 50 percent of their Medicare physician fee schedule (PFS) payments for services furnished to the hospital's CJR beneficiaries.
   - *PGP Cap*: 50 percent of the PGP's Medicare PFS for services billed by the PGP and furnished by physician members of the PGP to the hospital's CJR beneficiaries.
- *Alignment payment methodology*: If a CJR collaborator shares downside risk with a participant hospital, CMS imposes limitations on the amount of such shared risk. Specifically, a single CJR collaborator may provide only up to 25 percent of a participant hospital's total repayment amount. Additionally, CJR collaborators collectively may fund no more than 50 percent of a participant hospitals' repayment amount. Furthermore, and like gainsharing payments, alignment payments may be made only once per performance year.

In addition to the above, more technical, requirements, participant hospitals must also be mindful of important fraud and abuse constraints CMS has imposed on all sharing arrangements. For example, participant hospitals may not condition the opportunity to receive a gainsharing payment or make an alignment payment, directly or indirectly, on the volume or value of referrals between the parties (although the gainsharing payment methodology itself may indirectly account for the volume or value of referrals between the parties). Gainsharing or alignment payments may not be a loan, advance payment, or payment for referrals. And participant hospitals must ensure each CJR collaborator retains his or her independent medical judgment and makes decisions in the best interests of the patients (including with respect to the selection of devices, supplies, and treatments).

3. Draft the CJR collaborator agreement and/or distribution agreement

Upon establishing the CJR collaborator selection criteria and the sharing arrangement methodology, the parties must next document their arrangement in a CJR collaborator agreement. The agreement must include, for example, not only the CJR collaborator selection criteria and the financial terms of the gainsharing arrangement, but also:

- Plans regarding care redesign
- Changes in care coordination or delivery to be applied to either or both parties
- A description of how success will be measured
- Management and staffing responsible for changes to care

Compliance terms must likewise be set forth in the agreement. For example, each party must agree to adhere to all CJR program requirements. In addition, each CJR collaborator must (a) ensure compliance with provider enrollment requirements, (b) meet CJR documentation and record retention requirements, and (c) ensure that its compliance program includes oversight of its performance under the CJR program.

To the extent a CJR collaborator is a PGP and the PGP desires to gainshare with its members (i.e., physicians, non-physician practitioners, or therapists who are owners or employees of the PGP), the PGP and its interested members must enter into a downstream "distribution agreement." Among other requirements, the distribution agreement must mandate that the PGP members adhere to the terms of the CJR collaborator agreement and CJR rule.

4. Beneficiary notification & choice

Upon entering into a sharing arrangement, participant hospitals must also adjust their beneficiary notification processes. Specifically, participant hospitals must provide notice to CJR beneficiaries regarding the CJR program at either the time of admission or immediately following the decision to schedule a lower extremity

joint replacement surgery (whichever occurs later). This notice must include a list of all of the participant hospital's CJR collaborators. CMS has provided a template notice form for participant hospitals.

CMS likewise imposes beneficiary notice requirements on CJR collaborators. CJR collaborators must inform their CJR beneficiary patients regarding their participation in the CJR program. If the CJR collaborator is a physician or PGP, notice must be provided at the point of the decision to proceed to surgery. If the CJR collaborator is a non-physician, the notice must be provided prior to the furnishing of the first service provided by the CJR collaborator that is related to the joint replacement. As with the participant hospital admission notice, CMS has provided a template CJR collaborator notice form.

5. Compliance

Because CMS is exercising limited direct oversight over the CJR program, participant hospitals and their CJR collaborators face considerable compliance requirements. The compliance requirements relate not only to updating compliance plans, but also to documentation and board or other governing body oversight.

- *Compliance plan*: Participant hospitals must update their compliance programs to include oversight of the sharing arrangement and compliance with the requirements of the CJR model. While CMS has issued little guidance relating to this requirement, CJR collaborators are expected to do the same.
- *Board oversight*: A participant hospital must ensure that its board or other governing body has responsibility for oversight of the hospital's participation in CJR, its arrangements with CJR collaborators, its payment of gainsharing payments, and its use of beneficiary incentives in the CJR model.
- *Document*: As previously noted, participant hospitals must develop and maintain a set of written policies for selecting CJR collaborators. In addition, each hospital must (a) maintain current and historical lists of its CJR collaborators, to be published on the participant hospital's website and updated quarterly; (b) keep records of its process for determining and verifying the eligibility of each CJR collaborator to participate in Medicare; (c) maintain contemporaneous documentation of the payment or receipt of any gainsharing payment or alignment payment; and (d) maintain documentation on the participant hospital's organizational readiness. To the extent a PGP collaborator enters into a distribution agreement, it too faces significant documentation requirements relating to the gainsharing arrangement.

Of note, the CJR rule imposes no audit requirements on participant hospitals or their CJR collaborators (although it does afford CMS extensive audit rights). However, and in light of the fact that participant hospitals are ultimately responsible for not only their own compliance but that of their CJR collaborators, periodic audits to ensure compliance may be of use to participant hospitals.

Ober|Kaler's Comments

The CJR fraud and abuse waivers afford participant hospitals greater flexibility to implement physician alignment strategies such as gainsharing. Gainsharing is an instrumental element of the CJR program and participant hospitals' success in the CJR program. Protection under the fraud and abuse waivers requires compliance with all of the CJR program requirements. That said, and as evident from the above key considerations, the CJR program requirements are numerous and often complex. Accordingly, hospitals should take time to: (1) Stop and become familiar with both the CJR requirements and related CJR fraud and abuse waivers; (2) Listen, or consult with operational personnel on how best to implement gainsharing, in order to help ensure compliance and continued protection under the CJR program fraud and abuse waivers; and (3) Collaborate with physicians for purposes of gainsharing.