PUBLICATION

Medicare Access and CHIP Reauthorization Act: Paving the Way for Broader Gainsharing Activities [Ober|Kaler]

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On April 16, 2015, President Obama signed into law H.R.2, the Medicare Access and CHIP Reauthorization Act of 2015 (MACRA), a critical piece of health care legislation which represents significant movement towards a health care payment system focused on quality and value of services rather than volume. In keeping with that effort, MACRA amends the Civil Monetary Penalty (CMP) law to remove what has been considered a legal barrier to gainsharing programs aimed at aligning hospital and physician incentives.

Gainsharing provides a mechanism for aligning hospitals' economic incentives with physicians' interests and is a well-documented, viable method of facilitating this cooperation, to the benefit not only of hospitals but also of patients and payers. Gainsharing is a term that is used to describe arrangements between hospitals and physicians whereby the hospital agrees to share with the physicians any reduction in the hospital's costs for patient care attributable in part to the physicians' efforts. Gainsharing is a powerful physician-alignment tool because physicians control the vast majority of all health care spending and often know where clinical waste exists. Physicians are in the unique position of being able to determine where costs can be decreased without compromising quality of care. Because physicians have both the power and knowledge to reduce health care costs in ways that are neutral or beneficial with respect to patients, physician cooperation is essential to hospitals' efforts to contain costs.

The Department of Health and Human Services (HHS), Office of the Inspector General (OIG) has historically been suspicious of gainsharing programs. In 1999, the OIG issued a Special Advisory Bulletin outlining its concerns with generalized gainsharing (payments tied to overall cost savings rather than payments tied to specific, identifiable cost savings) and took the position that gainsharing arrangements between hospitals and physicians violate current federal law. Specifically, the OIG said that gainsharing violates the CMP that prohibits a hospital from paying a physician to induce reductions or limitations of patient care services to Medicare or Medicaid beneficiaries under the physician's direct care. Hospitals that make such payments, and physicians that receive them, are liable for CMPs of up to $2,000 per patient covered by the payments.

The CMP prohibition is very broad and it is the OIG's position that any hospital gainsharing program that encourages physicians through direct or indirect payments to reduce or limit clinical services violates the statute – even the reduction or limitation of medically unnecessary services. MACRA amends the CMP law by making the CMP prohibition applicable only to hospital payments to physicians for reducing or limiting medically necessary services.

Further, MACRA gives the Secretary of HHS one year to develop and submit to Congress a report presenting potential exceptions and safe harbors to allow gainsharing arrangements that would otherwise be subject to this CMP.

Specifically, the report must:

1. Consider whether such provisions should apply to ownership interests, compensation arrangements, or other relationships;

2. Describe how the recommendations address accountability, transparency, and quality, including how best to limit inducements to stint on care, discharge patients prematurely, or otherwise reduce or limit medically necessary care; and
3. Consider whether a portion of any savings generated by such arrangements (as compared to a historical benchmark or other metric specified by the Secretary to determine the impact of delivery and payment system changes under title XVIII on expenditures made under such title) should accrue to the Medicare program under title XVIII of the Social Security Act.

The HHS report may be the foundation for establishing a more permanent physician-hospital alignment strategy through gainsharing programs, which if structured properly, are proven to eliminate waste, reduce costs, and improve quality of care.