

# PUBLICATION

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## CY 2023 Medicare PFS Final Rule Relaxes Supervision Requirements for Incident To Behavioral Health Services

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**On November 1, 2022, the Centers for Medicare & Medicaid Services (CMS) issued its 2023 Physician Fee Schedule Final Rule (Final Rule). The Final Rule made several noteworthy changes, including expanding access to covered behavioral health services through changes to supervision requirements applicable to auxiliary personnel furnishing behavioral health services incident to a physician's or other qualified non-physician practitioner's (NPP's) professional services.**

Building on a previous article discussing the 2023 Physician Fee Schedule Proposed Rule (Proposed Rule), this article summarizes the Final Rule changes that relax supervision requirements for services provided incident to physician services. These relaxed requirements will make it easier for supervising physicians and certain NPPs who are permitted to bill for incident-to services (including physician assistants, nurse practitioners, clinical nurse specialists, nurse midwives, and clinical psychologists) and be reimbursed for behavioral health services furnished by an expanded clinical team.

### The Final Rule's Changes to Supervision Requirements

Prior restrictions on the supervision requirement to bill Medicare for behavioral health services furnished by clinical staff incident to a physician's or qualified NPP's professional services, in tandem with other factors such as worker shortages, have presented barriers to accessing behavioral health services. Licensed behavioral health providers without their own Medicare benefit categories (e.g., mental health and substance abuse social workers, school counselors, and marriage and family therapists) cannot bill independently for behavioral health services. Supervising physicians and qualified NPPs have found it challenging to meet the direct supervision requirement (immediate availability in the office suite) to bill for services furnished by these clinical professionals. Since certain auxiliary personnel cannot bill Medicare independently, this incident to billing restriction has meant that these clinical staff only can provide billable services when a supervising physician is also available to supervise directly. CMS aims to alleviate some of these concerns and achieve its stated goals of improving access to and quality of mental health care services by amending supervision requirements applicable to certain behavioral health providers under the Final Rule.

Specifically, the Final Rule amends the direct supervision requirement under the incident-to billing regulation at § 410.26 to allow behavioral health services to be furnished under the general (instead of direct) supervision of a physician or NPP when these services or supplies are provided by auxiliary personnel (such as such licensed professional counselors (LPCs) and licensed marriage and family therapists (LMFTs)) incident to the services of a physician or NPP.

Through this change, the Final Rule aims to provide greater flexibility. "General supervision" means that the supervising physician provides "overall direction and control" over the service without necessarily being present while the service is being performed. 42 CFR § 410.26. "Direct supervision" means that the supervising physician/NPP must be present in the office where the services are being provided (or through virtual presence via audio/video technology during the PHE). 42 CFR § 410.32(b)(3)(ii). The Final Rule change to require general instead of direct supervision to bill behavioral health services on an incident-to basis will

mean that the physician's presence will not be required in the office or building when auxiliary personnel render behavioral health services to Medicare beneficiaries. 42 CFR § 410.32(b)(3)(i).

This Final Rule change should provide beneficiaries seeking behavioral health services, particularly in rural and underserved areas, with easier access to more comprehensive care by eliminating certain barriers to reimbursement. In addition, this change should allow greater use of behavioral health providers like LPCs and LMFTs, as well as other licensed clinicians, to help address the growing behavioral health needs of beneficiaries.

The auxiliary personnel providing the services would still have to meet all of the applicable requirements to provide incident-to services, including any licensure requirements imposed by the state in which the services are being furnished, as described in § 410.26(a)(1). This will ensure that beneficiaries are still treated by qualified individuals.

### **The Impact for Behavioral Health Providers**

The Final Rule provides for greater access to behavioral health providers working under supervision, which should serve to expand access to care but will also, as a result, require providers to ensure they are properly coordinating patient care. Physicians and qualified NPPs who have an incident-to benefit still must play a supervisory role and be up to date about their patients' care, even if they are not required to be present in the office or building during visits. Physicians/NPPs should also take care to review patient progress notes in a timely way to remain informed and implement effective communication procedures with any co-providers working as auxiliary personnel.

While we believe that this change under the Final Rule will have a net positive practical result, particularly in the context of providing access to care, we do note some of its limitations. CMS made clear in the Final Rule that its new exception for incident-to billing applies *only* to "behavioral health services" and not auxiliary personnel providing other types of services incident to physician services. However, CMS then declined to specifically define (by HCPCS codes or otherwise) which behavioral health services are eligible for general supervision under the new exception, stating only that it generally considers the term behavioral health services to mean "any service furnished or the diagnosis, evaluation, or treatment of a mental health disorder, including substance use disorders."

CMS also declined to specifically list all types of clinicians that could qualify as auxiliary personnel, instead relying on the definition at 42 C.F.R. § 410.26(a)(1), which requires auxiliary personnel to meet "applicable requirements to provide incident to services, including licensure imposed by the State in which the Services are being furnished."

While, on the one hand, this might appear to provide some flexibility for providers in implementing the new rule, many commenters to the prior Proposed Rule expressed concern at the lack of specificity, particularly given that various state laws assign different scopes of practice to clinicians bearing the same licensure titles. CMS confirmed in the Final Rule that "[m]any clinician types" could satisfy the definition of "auxiliary personnel" for purposes of this new general supervision rule, but the responsibility for identifying practitioners that meet applicable billing requirements remains with the provider.

### **Moving Forward**

Behavioral health providers should continue to watch for CMS to implement future rules that seek to improve the behavioral health profession. For example, in CY 2024 rulemaking, CMS plans to specifically create new codes for purposes of reimbursing caregiver behavioral health management training, and additional proposals for codes for other behavioral health services are also being developed. These proposed future changes, in addition to the new incident-to exception for behavioral health auxiliary personnel under the Final Rule, seek to

implement CMS's stated goals and objectives in its [2022 Behavioral Health Strategy](#) – specifically, to improve access to, and quality of, mental health care services, coupled with an objective to "increase detection, effective management, and/or recovery of mental health conditions through coordination and integration between primary and specialty care providers."

The Final Rule goes into effect on January 1, 2023.

For more information, please contact any member of Baker Donelson's Reimbursement team.