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Alerts

# Changes Affecting Hospital and Critical Access Hospital Medicare Conditions of Participation Governing Telemedicine Credentialing and Privileging

**May 10, 2011**
*Health Care Alert*

The Centers for Medicare & Medicaid Services (CMS) has released its final rule revising Conditions of Participation (CoPs) regarding the credentialing and privileging of telemedicine providers who deliver services to Medicare hospitals and critical access hospitals (CAHs). These changes permit hospitals and CAHs to rely on privileging and credentialing decisions made by offsite telemedicine providers pursuant to written agreements, effective July 2, 2011.

**Existing Medicare CoPs Require Duplicitous and Burdensome Credentialing and Privileging of Telemedicine Practitioners**
CoPs for Medicare hospitals currently require: (1) the hospital's governing body to make all privileging and credentialing decisions based upon the recommendations of the hospital's own medical staff; and (2) the medical staff to examine and verify the credentials of physicians and other practitioners applying for privileges, using specific criteria. 42 C.F.R. § § 482.12(a)(2), 482.22(a)(2). CoPs for CAHs similarly require that every CAH that is a member of a rural health network have an agreement with a hospital that is a member of the network, a Medicare Quality Improvement Organization, or another qualified entity identified in the state's rural health plan, to review physicians and other practitioners seeking privileges at the CAH. 42 C.F.R. § 485.616(b). These hospital and CAH CoPs do not distinguish between the credentialing and privileging of physicians and practitioners who provide services onsite and those providing services remotely through "telemedicine," i.e., from a distance via electronic communications.

CMS recognized the burdensome nature of the privileging and credentialing process, especially as to physicians and other practitioners who provide telemedicine services to hospital or CAH patients. Small hospital medical staffs, for example, may lack the resources and/or clinical expertise to adequately evaluate and make privileging recommendations for large numbers of physicians and practitioners across numerous specialties who are available to provide telemedicine services. Adding to the concern, many hospitals accredited by the Joint Commission previously engaged in "privileging by proxy," with one accredited facility accepting the privileging decisions of another. However, as of July 15, 2010, hospitals accredited by the Joint Commission are no longer statutorily deemed to meet the Medicare CoPs. As a result of this change in deemed status, the Joint Commission changed its credentialing and privileging standards to bring them into conformity with the CoPs. This has caused some hospitals concern about their ability to sustain existing telemedicine agreements previously pursued under a "privileging-by-proxy" standard.

**Revised CoPs Allow Hospitals and CAHs to Rely on the Credentialing and Privileging of Other Hospitals and Telemedicine Entities Pursuant to Written Agreements, Provided That Certain Criteria Are Met**
CMS revised both the credentialing and privileging requirements for hospitals and CAHs to allow these entities to rely on the privileging or credentialing activities of distant-site hospitals or other telemedicine entities if such reliance is pursuant to a written agreement that meets specified criteria. The revised CoPs apply whenever a hospital or CAH has patients who receive clinical services via telemedicine, whether or not the clinical services are provided "simultaneously" (i.e., in "real time"). The new CoP provisions set forth specific criteria for agreements between hospitals (or CAHs) and other Medicare-participating hospitals, as well as other criteria for agreements between hospitals (or CAHs) and nonhospital telemedicine entities.

It should be noted that the new CoPs do not prevent a hospital or CAH from engaging in its own credentialing and privileging of telemedicine providers.

**Hospitals or CAHs Contracting With Other Hospitals for Telemedicine Services**

Under the revised CoPs, when telemedicine services are furnished to hospital or CAH patients through an agreement with a distant-site hospital, the governing body of the hospital or CAH whose patients are receiving telemedicine services may choose to have its medical staff rely on credentialing and privileging decisions made by the distant-site hospital if a written agreement between the two hospitals includes the following provisions:

1. Medicare Participation. The distant-site hospital providing telemedicine services is a Medicare-participating hospital;
2. Privileges at Distant Site. The individual distant-site physician or practitioner providing services is privileged at the distant-site hospital, which shall provide a current list of the distant-site physician's or practitioner's privileges at the distant-site hospital;
3. Licensure. The physician or practitioner holds a license issued or recognized by the state in which the hospital or CAH whose patients are receiving the telemedicine services is located;
4. Internal Review. With respect to a distant-site physician or practitioner who holds current privileges at the hospital or CAH whose patients are receiving the telemedicine services, the hospital or CAH has evidence of an internal review of the distant-site physician's or practitioner's performance of these privileges and sends the distant-site hospital such performance information for use in the periodic appraisal of the distant-site physician or practitioner. (At a minimum, this information must include all adverse events that result from the telemedicine services provided by the distant-site physician or practitioner to the hospital's patients and all complaints the hospital has received about such physician or practitioner.)
5. Distant-site hospital's responsibilities. For hospitals other than CAHs, the written agreement must provide that the distant-site hospital providing telemedicine services will be responsible for meeting the requirements of 42 C.F.R. § § 482.12(a)(1)-(7) (existing provisions regarding a governing body's responsibilities for medical staff). For CAHs, the written agreement must provide that the distant-site hospital's governing body will meet the requirements set forth under 42 C.F.R. §§ 485.616(c)(1)(i)-(vii) with regard to its physicians or practitioners providing telemedicine services. 42 C.F.R. §§ 482.12(a)(8), 482.22(a)(3) and 485.616(c)(2).

**Hospitals or CAHs Contracting for Telemedicine Services From Non-Hospital Telemedicine Entities**

CMS' May 26, 2010, proposed rule was initially limited to agreements between hospitals. However, in response to public comment, CMS determined that a streamlined credentialing and privileging process should also be made available to hospitals and CAHs when contracting with distant-site "telemedicine entities" that are not Medicare-participating hospitals. For example, physicians and other practitioners may provide to hospital patients telemedicine services such as teleradiology, teleICU, teleneurology and telepathology, under the auspices of a nonhospital entity that has met a national accreditation organization's standards for credentialing and privileging medical staff.

Noting that it lacks regulatory or oversight authority over such distant-site telemedicine entities, CMS now provides for an alternative mechanism that holds accountable both the distant-site telemedicine entities and the hospitals or CAHs when making use of the streamlined credentialing and privileging process. Thus, a written agreement between the hospital or CAH and the telemedicine entity is required and must provide:

1. Contractor Status. The distant-site telemedicine entity is a contractor of services to the hospital or CAH and as such, in accordance with 42 C.F.R. § 482.12(e) (hospitals) or 42 C.F.R. § 485.635(c)(4)(ii) (CAHs), furnishes the contracted services in a manner that permits the hospital to comply with all applicable CoPs for the contracted services;
2. Credentialing Standards. The distant-site telemedicine entity's medical staff credentialing and privileging process and standards at least meet the standards at 42 C.F.R. §§ 482.12(a)(1)-(7) and 42 C.F.R. §§ 482.22(a)(1)-(2) (hospitals) or 42 C.F.R. §§ 485.616(c)(1)(i)-(vii) (CAHs).
3. Privileges at Distant Site. The individual distant-site physician or practitioner is privileged at the distant-site telemedicine entity providing the telemedicine services, which entity provides the hospital or CAH with a current list of the distant-site physician's or practitioner's privileges at the distant-site telemedicine entity.

4. Licensure. The individual distant-site physician or practitioner holds a license issued or recognized by the state in which the hospital or CAH whose patients are receiving such telemedicine services is located.
5. Internal Review. With respect to a distant-site physician or practitioner who holds current privileges at the hospital or CAH whose patients are receiving the telemedicine services, the hospital or CAH has evidence of an internal review of the distant-site physician's or practitioner's performance of these privileges and sends the distant-site telemedicine entity such performance information for use in the periodic appraisal of the distant-site physician or practitioner. At a minimum, this information must include all adverse events that result from the telemedicine services provided by the distant-site physician or practitioner to the hospital's patients, and all complaints the hospital has received about the distant-site physician or practitioner. 42 C.F.R. §§ 482.12(a)(9), 482.22(a)(4) and 485.616(c)(3)-(4).

**Conclusion**

Hospitals and CAHs whose patients receive telemedicine from distant-site providers, as well as physicians and practitioners who provide such services, should prepare "written" agreements for telemedicine services or review existing agreements to ensure compliance. There exists the potential for legal risk and liability involving ostensible responsibility for professional negligence as well as negligent credentialing claims as a result of the use of the streamlined approach to credentialing and privileging. Therefore, the governing bodies of each hospital and CAH should consider and manage such risks via the written agreement.

*This alert has been prepared by Hinshaw & Culbertson LLP to provide information on recent legal developments of interest to our readers. It is not intended to provide legal advice for a specific situation or to create an attorney-client relationship.*