



## Alerts

### Modification of Two-Midnight Rule

July 6, 2015

On Wednesday, July 1<sup>st</sup>, the Centers for Medicare and Medicaid Services (CMS) indicated that instead of abandoning the controversial "two-midnight" rule governing short-term acute care hospital stays, it will modify the rule to permit physicians to use their medical judgment to determine, on a case-by-case basis, whether those stays should be billed as inpatient admissions or outpatient observational stays. Under the modified rule, physicians who admit patients for short inpatient stays may use their clinical judgment to justify a short-term hospital stay as an inpatient stay and not an observational stay (which is billed as an outpatient stay) based on factors that support the decision that the patient qualifies for inpatient admission, such as severity of symptoms and the risk of an adverse medical event occurring during the hospitalization.

Under the prior version of the "two-midnight rule," a short term hospital admission only qualified for Medicare Part A payment as an inpatient stay if the physician certified at the beginning of the admission that he or she anticipated the patient would need hospital care that included at least two midnights. If the patient was expected to need fewer than two midnights in the hospital, the hospital was only paid for outpatient services, and Medicare would not cover the patient's subsequent nursing home care. In addition, the Recovery Audit Contractors (RACs) who monitored the enforcement of the rule were authorized to deny Part A payment if the patient was not in the hospital for two successive midnights. The prior version of the rule created a great deal of uncertainty for patients and hospitals, and many patients found that they were not eligible for Medicare coverage for nursing home care after a hospital stay, because their stay was treated as an outpatient observational stay and not as an inpatient admission.

Under the modified rule, physicians will be able to use their clinical judgment (subject to medical review) to determine whether the patient should be admitted to the hospital as an inpatient. Thus, even if the patient does not stay in the hospital for two midnights, the stay can still be considered an inpatient admission and would qualify for Part A payment. In addition, medical review will be conducted by Quality Improvement Organization (QIO) contractors rather than the Medicare RACs.

The proposed change is set forth in the [2016 Hospital Outpatient Prospective Payment System and Ambulatory Surgical Center Payment System proposed payment rule](#) and will be published in the Federal Register and available [online](#) at on 07/08/2015.

The prior rule, which was adopted in October 2013, received significant opposition from hospitals and consumers, and was put on hold pending further review. Even though the prior version of the rule was intended for patients with 24-hour stays in the hospital, it often affected patients with much longer stays and created uncertainty with regard to how the hospital would be paid for the stay. In its recent report, the Medicare Payment Advisory Commission (MedPAC) recommended rescinding the rule. The new version of the rule should provide more protection and clarity for hospitals and consumers.

Hinshaw & Culbertson LLP has a great deal of expertise in hospital payment and reimbursement issues and is happy to assist you in any area of health care law. Should you have any questions about the two-midnight rule, contact your regular [Hinshaw attorney](#).