# Conditions of Payment

**Bryan Nowicki, JD**
Husch Blackwell LLP |
Bryan.Nowicki@huschblackwell.com
608.234.6012

**Zaina Niles, JD**
Husch Blackwell LLP |
Zaina.Niles@huschblackwell.com
816.983.8210



NHPCO

## Disclosure

- *Bryan Nowicki and Zaina Niles*, faculty for this educational event, have no relevant financial relationships with ineligible companies to disclose.



NHPCO

# Learning Outcomes

- Upon completing this session, participants will be able to:
  1. Identify the Medicare hospice conditions of payment.
  2. Apply the conditions of payment in compliance reviews.



# Roadmap and Goals

- Roadmap. Understand the hierarchy of federal hospice regulatory requirements:
  - What are they?
  - Who enforces them?
  - What is the "penalty" for non-compliance?
- Goals. Help you navigate compliance and advise your organization when non-compliance occurs in the "real world."

# Federal Hospice Regulations

- What are the federal regulations?
- Where are they located?
  - Title 42: Public Health
  - Chapter IV: Centers for Medicare and Medicaid Services, Department of Health and Human Services
  - Subchapter B: Medicare Program
  - Part 418: Hospice Care
  - https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-B/part-418



# The Top Dog: Federal Hospice Conditions of Payment/Coverage

# When They Arrived On the Scene

- The conditions of payment have existed at 42 C.F.R. § 418.200 since the benefit began in 1983.
- BUT little attention was paid to them until 2009, when
  - The federal OIG issued a report examining hospice compliance with Medicare coverage requirements for beneficiaries residing in nursing homes (https://oig.hhs.gov/oei/reports/oei-02-06-00221.pdf).
    - Finding: Of the 450 claims examined, **82% did not meet at least one of the Medicare coverage requirements**.



# So, What Are and Are Not the Medicare Payment Requirements?

- Medicare Conditions of Participation vs. Conditions of Payment
  - Conditions of Participation ("CoPs") = regulatory requirements for participating in the Medicare program.
    - Failure to comply can result in survey citations and ultimately, termination of the Medicare provider agreement.
    - Enforcers: Surveyors.
  - Conditions of Payment = small sub-set of regulatory requirements necessary to get paid by Medicare.
    - Failure to comply can lead to claim denials.
    - Enforcers: MACs and auditors (*e.g.*, UPIC, RAC, CPI, SMRC, and CERT).

## The Short (Yet Complex) List of Medicare Conditions of Payment

- To be covered, hospice services must meet the following requirements:
  1. The services must be reasonable and necessary for the palliation and management of the terminal illness as well as related conditions.
  2. The individual must elect hospice care in accordance with § 418.24.
  3. A plan of care must be established and periodically reviewed by the attending physician, the medical director, and the interdisciplinary group of the hospice program as set forth in § 418.56.
  4. The plan of care must be established before hospice care is provided.
  5. The services provided must be consistent with the plan of care.
  6. A certification that the individual is terminally ill must be completed as set forth in § 418.22.
- See Handout: "Medicare Hospice Regulatory Conditions of Payment."



## The Short (Yet Complex) List of Medicare Conditions of Payment (cont.)

- The cross references in the coverage requirements are important.
  - For example, the OIG report examined not only whether a plan of care existed but also whether it met specific requirements at 42 C.F.R. § 418.58 (now 42 C.F.R. § 418.56).
- Through cross references, new requirements have been added since 2008:
  - Certification of Terminal Illness
    - Physician narrative (2009).
    - Face-to-face encounter (2010).
    - Certifying physicians must be enrolled in or validly opted-out of Medicare (2023).
  - Election Statement
    - Identification of attending physician (2014).
    - Content additions regarding relatedness coverage and election statement addendum (2020).

# What To Do? Election Statement

- Form
  - Should already have compliant one, but monitor for payment errors.
  - Keep track of updates (*e.g.*, attending physician on election).
  - Relatedness language.
- Watch for User Error
  - Form could be completed incorrectly or blanks could be overlooked.
  - Examples: no attending physician, no effective date, authority of person signing.
- Establish Checks
  - Ensure staff understands big picture (*e.g.*, ramifications of not dotting the "I's" and crossing the "T's").
  - Real-time, pre-billing review by another person.
    - Who or what department should do this?



# Beginning 10/1/20: New Required Content and Provision of Addendum

- FY 2020, FY 2021 and FY 2022 Hospice Wage Index Rules **created new Medicare conditions of payment** and **expanded upon existing Medicare conditions of payment**.
  - **New requirement for provision of "addendum"** with patient-specific information about hospice's coverage responsibility.
  - Additional election statement content (built onto existing requirement) regarding **hospice's coverage responsibility and infrequency of hospice-unrelated care**.
  - New election statement content regarding **right to receive addendum**, **BFCC-QIO immediate advocacy**, and **cost-sharing**.
- CMS also updated its **model election statement form** and created **model addendum form**.

# Election Statement: 2020 Changes to Content

- New required content for election statements, for elections on and after 10/1/20 (new content in **bold**):
  - Coverage. "Acknowledgement that the individual has been provided information on the hospice's coverage responsibility and that certain Medicare services . . . are waived by the election. **For hospice elections beginning on or after [10/1/20], this would include providing the individual with information indicating that services unrelated to the terminal illness and related conditions are exceptional and unusual and hospice should be providing virtually all care needed by the individual who has elected hospice.**"
  - Cost-Sharing. **"[T]he Hospice must provide Information on individual cost-sharing for hospice services."**
  - Addendum. **"[T]he Hospice must provide notification of the individual's (or representative's) right to receive an election statement addendum . . . if there are conditions, items, services, and drugs the hospice has determined to be unrelated to the individual's terminal illness and related conditions and would not be covered by the hospice."**
  - BFCC-QIO. **"[T]he Hospice must provide information on the [BFCC-QIO], including the right to immediate advocacy and BFCC-QIO contact information."**



# New Requirement: Provision of Addendum

- For elections on and after 10/1/20, new requirement to provide an election statement addendum.
  - What Is the Trigger for Providing the Addendum? Must be provided only **upon request** and only if "the hospice determines there are conditions, items, services, or drugs that are unrelated to the individual's terminal illness and related conditions."
  - When Must the Addendum Be Provided? (New timeframes per FY 2022 Hospice Wage Index Rule)
    - If requested within first 5 days of election, provide **within 5 days** of request.
    - If requested after first 5 days of election, provide **within 3 days** of request.
  - Keep Addendum Updated. "If there are any changes to the plan of care during the course of hospice care, the **hospice must update the addendum** and provide these updates, in writing, to the individual (or representative)."

# Key Required Content for Addendum

- 42 C.F.R. § 418.24(c) specifies numerous content requirements for the addendum, including:
  - Unrelated Items. List of conditions present on admission (or upon care plan update) and items, services, and drugs not covered by the hospice because the hospice determined them to be unrelated to the terminal illness and related conditions.
  - Clinical Explanation as to why such conditions, items, services, and drugs are unrelated.
  - Immediate Advocacy. Language that immediate advocacy is available through the BFCC-QIO if the patient disagrees with hospice's coverage determination.
  - Signed and Dated. Patient or representative name and signature and date signed.
  - Date Furnished. Date on which the hospice furnished the addendum.
    - **New requirement from FY 2022 Hospice Wage Index Rule**.



# What To Do? The Certification

- Multiple components under 42 C.F.R. § 418.22(b).
- Focusing today on:
  - Timing.
  - Content.
  - Physician Narrative.

# What To Do: The Certification – The Timing

- On the Rise. Timing of certification of terminal illness.
  - Verbal certification.
  - Writing certification.
- Form
  - Single Place. Consider using same page for verbal and written certifications.
  - Printing. Best if EMR prints verbal with written.
- Function. Pre-billing review for completeness of certifications.



# What To Do: The Certification – The Content

- Real Life
  - Certification components scattered on multiple pages.
  - Components not completed:
    - Wrong benefit period span.
    - Unsigned or undated.
    - Not the "right" physicians *(e.g.*, referring physician is not necessarily attending).
- Form Issues
  - EMR can create problems.
    - The value of paper: easy to visualize missing components.
    - Verify how certification prints out.
      - It may surprise you and confuse a reviewer.
- Function Issues
  - Downsides of paper: easily automated information can be forgotten (*e.g.*, benefit period date span).

# What To Do: The Certification – The Narrative

- Intersection between technical and clinical.
- CMS expects the physician to "synthesize the patient's comprehensive medical information in order to compose this brief clinical justification narrative."
- For 3rd and later benefit period, the narrative "must include an explanation of why the clinical findings of the face-to-face encounter support a life expectancy of 6 months or less."
- Demand more from your physicians:
  - Narrative is among the most important documents in substantiating eligibility.
  - Connects and explains the significance of the clinical dots elsewhere in the record.
  - Should expect it will be seen and refute any subsequent reviewer's opinion.
- Two-Way Street. Physicians and nurses can improve each other's documentation.



# What To Do: Plan of Care

- Three components in condition of payment:
  1. Must be established and periodically reviewed by certain persons.
  2. Must be established before hospice care is provided.
  3. Services provided must be consistent with the plan of care.
- Also cross-references lengthy 42 C.F.R. § 418.56.
- On The Rise:
  - Challenges to how hospices show that the plan is periodically reviewed by IDT members.
  - Blurring the lines between conditions of payment and conditions of participation.

# What To Do: Plan of Care (cont.)

- Real Life 1. Denials because documentation does not prove IDT reviewed plan of care.
  - Form and Function. How do you demonstrate care plan is reviewed by all IDT members?
    - Sign-in sheets?
    - Note of individuals in EMR?
- Real Life 2: Denials because scheduled visits did not occur.
  - Function
    - Update plan of care.
    - Document why visit did not occur.
    - EMR help? (*E.g.*, reports or alerts generated to ensure scheduled visits occur).



# Team Discussion Questions

- Do all Medicare hospice regulatory requirements impact payment?
  - What types of requirements impact payment?
  - What types of requirements **do not** impact payment?
- What are some key strategies for ensuring compliance (and avoiding claim denials) with respect to:
  - Election statement and addendum?
  - Certification of terminal illness?
  - Plan of care?
- What else did the faculty share that you found thought provoking?
- What can we replicate in our organization?
- Who else on our team would benefit from this information?




# References


- Centers for Medicare and Medicaid Services, Medicare Hospice Regulations (42 C.F.R. Pt. 418).
  https://www.ecfr.gov/current/title-42/chapter-IV/subchapter-B/part-418.
- Centers for Medicare and Medicaid Services, State Operations Manual, Appendix M (Hospice).
  https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/som107ap_m_hospice.pdf.
- Centers for Medicare and Medicaid Services, Medicare Benefit Policy Manual, ch. 9 (Coverage of Hospice Services Under Hospital Insurance).
  https://www.cms.gov/regulations-and-guidance/guidance/manuals/downloads/bp102c09.pdf.

# Thank You!

**Bryan Nowicki, JD**
**Husch Blackwell LLP**
**Bryan.Nowicki@huschblackwell.com**
**608-234-6012**

**Zaina Niles, JD**
**Husch Blackwell LLP**
**Zaina.Niles@huschblackwell.com**
**816.983.8210**