Physician supervision and scope of practice issues can create liability

Anytime medical services are provided or billed, there are a number of very fundamental questions that must be asked, such as:

1. Under applicable State or Federal Law, is the individual who is to provide this service licensed, certified or otherwise legally permitted to provide it?

2. Must the services in question be performed at any particular location or facility, and if so, what are the licensure or certification requirements required of the location or facility?

3. If services are being provided by a non-physician, what is the level of prior interaction between a physician and the patient that must have occurred in order for the non-physician services to be provided?

4. If the services are being provided by a non-physician, what sort of supervision by a physician, or coordination of care with a physician, is required in order for the services to be provided, or for the services to be billed at a particular level? What sort of documentation of that supervision or coordination of care is required?

5. What sort of specific training or certification does the physician need in order to provide the requisite supervision of a non-physician who actually renders the service?

6. Do the applicable payors have specific enrollment, credentialing and/or reassignment criteria that must be met in order to bill and receive payment for the services?

7. Are there any special CPT coding, place of service or other claims submission requirements that must be considered?

Some considerations relating to these issues are discussed below.

Potential consequences of failure to satisfy supervision standards

A failure to meet licensure, patient contact, coordination, or supervision requirements can give rise to disciplinary actions by state licensing entities and to the denial of payment by third party payors. Such a failure can also create exposure under the Federal False Claims Act or under the Stark Law, anti-kickback statute or similar state laws.

An example of this is to be found in an August, 2011 decision of a Federal trial court in Tennessee. In *U.S. ex rel. Hobbs v MedQuest Associates, Inc*., the court ruled that affiliated diagnostic testing companies were liable under the Federal False Claims Act for failing to comply with Medicare's direct physician supervision requirements at two of their facilities. This case involved a whistleblower action which had been initiated by a former employee of one of the diagnostic testing firms. The employee in question had been terminated for "poor performance," and two years later initiated the complaint.

The court determined that claims for imaging tests with contrast were false because the physicians supervising the tests were not approved by the Medicare carrier as proficient, and that the failure to provide adequate physician coverage was so significant that in some cases technical staff conducted tests without physician supervision. The court also found that claims for tests furnished at another facility were false due to the continued use of the prior facility's Medicare provider number without notifying the Medicare carrier of the change of ownership or enrolling as an Independent Diagnostic Testing Facility (IDTF).

The increased use of physician extenders, and the offering of new services by physicians, often associated with new technologies, heightens the importance of asking the basic questions noted above.

Physician supervision

The subject of physician supervision, along with the technical elements of the required level of physician coordination or supervision (e.g., having a written plan of care, being in the same exam room/same general office suites/reachable by phone), are important. Diagnostic tests generally must be ordered by the treating physician, and for many modalities, the technical component must be furnished under the appropriate level of physician supervision (general, direct or personal). In order to qualify as direct supervision, which is generally required for imaging tests using contrast media, the physician must be present in the office suite where the procedure is performed and must be immediately available to furnish assistance and direction throughout the performance of the procedure, but is not required to be present in the room during the performance of the procedure. Personal supervision requires the physician to be physically present in the room during the performance of the procedure.

As illustrated in the *MedQuest* case discussed above, Medicare regulations governing IDTFs impose additional physician supervision requirements. The supervising physician must evidence proficiency in the performance and interpretation of the types of diagnostic procedures performed at the IDTF. Proficiency needs to be shown by board certification in the applicable specialty (e.g., radiology for imaging tests) or by criteria established by the Medicare carrier for the geographical area of the IDTF.

Technicians performing tests at an IDTF are required to demonstrate the basic qualifications to perform the tests and must have training and proficiency evidenced by licensure or certification.

If services for Medicare patients within a physician practice fit within the definition of “designated health services” for purposes of the Stark Law then the arrangements will typically need to be structured to satisfy the in-office ancillary services exception under the Stark Law. In addition to location and billing elements, this exception requires that the designated health services are supervised by a physician who satisfies the definition of a “physician in the group” under the Stark Law regulations. This exception also requires that the supervision satisfies Medicare reimbursement standards.

Accreditation

Some payors impose accreditation requirements for certain diagnostic or other ancillary services. Commencing on January 1, 2012, physicians, IDTFs and other suppliers will be required to obtain accreditation and satisfy related quality standards in order to qualify for reimbursement under the Medicare Physician Fee Schedule for the technical component of advanced imaging services such as MRI, CT or PET. Moreover, CLIA certification and/or state laboratory licensure may be required with respect to some pathology or laboratory services.

Impact on reimbursement

Issues involving licensure, accreditation or supervision are important not only for purposes of determining what is and what is not appropriate practice, but for determining the level at which the services can be billed. For example, in order for services of a non-physician to be billed as “incident to” physician services, there are numerous requirements that must be met, including direct supervision by the physician. Failure to meet those requirements can result in a false claim.

Moreover, in many cases, the technical component of a Medicare diagnostic test will be subject to the payment limitations and reporting requirements of the anti-markup rule unless the test is supervised by a physician who satisfies one of the two alternative standards under the anti-markup rule for “sharing” a practice with the physician ordering the test.

Periodic re-examination

On a periodic basis, every medical practice ought to “go back to the basics” and analyze every service it renders to verify that services are being rendered by properly trained, licensed or certified individuals, that all patients have the appropriate level of interaction with a physician, and that the required level of physician supervision is being provided and documented.

For more information, please contact:

Rick L. Hindmand
312.642.2203
rhindmand@mcdonaldhopkins.com

John T. Mulligan
216.348.5435
jmulligan@mcdonaldhopkins.com

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