

2015 Health Care Year in Review

by Howard E. Bogard

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In 2015, ICD-10 finally became a reality, and the dire predictions of problems seem to be wrong. Providers now have codes to describe just about every conceivable (and a few simply bizarre) medical occurrences. If a patient is ever sucked into a jet engine, remember code V97.33XD, or if a patient is burned due to water-skis on fire (is that even possible?), code V91.07XD can be used. On a more serious note, this year may be viewed as the turning point for pay-for-value reimbursement, with CMS pursuing several new initiatives and private payers, including BCBS of Alabama and VIVA, implementing value-based payment programs for primary care physicians. As with other years, the government continues to aggressively pursue fraud, waste and abuse, with a reported return on investment of \$7.70 for every dollar spent pursuing improper payments. According to the late Yogi Berra, "the future ain't what it used to be." With that in mind, following are my top ten 2015 health care events for Alabama providers.

- 10. New OIG Rules and Guidance.** -- This year brought a host of new rules and guidance in the area of fraud and abuse. In April, the Civil Monetary Penalty law was amended to give hospitals the green light to pay physicians to reduce Medicare costs by eliminating "medically unnecessary" services. Prior to the change, the law prohibited payment to limit any services, thereby calling into question many gain-sharing arrangements between hospitals and physicians. In addition, the OIG issued a new Fraud Alert in June, entitled "Physician Compensation Arrangements Should be Scrutinized", warning providers that compensation arrangements between referral sources must reflect fair market value for bona fide services. In September, the Department of Justice issued a Memorandum on individual accountability for corporate wrongdoing, signaling a new focus on holding corporate officers responsible for fraud and abuse violations within their organizations.
- 9. Medicare ALJ Logjam.** In December of 2013, the Office of Medicare Hearings and Appeals ("OMHA") announced that providers appealing adverse audit findings will wait approximately 24 months before receiving a hearing before an Administrative Law Judge ("ALJ"). This delay is despite the fact that the law requires a hearing in 90 days. According to testimony in April of this year before the Senate Finance Committee, there are over 500,000 pending appeals across the first three levels of appeal and the average number of days for an appeal to be processed has grown from approximately 95 in fiscal year 2009 to 547 in fiscal year 2015. Unfortunately, providers who have challenged the failure of OMHA to provide an ALJ hearing in the required 90 days have been unsuccessful. *See Cumberland County Hosp. Sys., Inc. v. Burrell*, No. 5:14-CV-508-BR (E.D.N.C. Mar. 18, 2015).
- 8. ICD-10 Implementation.** ICD-10 became effective October 1, 2015, and initial reports indicate that the transition has gone relatively smoothly. ICD-10 is a coding system that attaches a number for every known disease of trauma. Due to concerns raised by the provider community, in July CMS announced that it would provide flexibility during the transition to ICD-10. Specifically, through October 31, 2016, Medicare will not deny physician or other practitioner claims billed under Medicare Part B based solely on the specificity of the ICD-10 diagnosis code as long as the

physician/practitioner uses a valid code from the right family. According to Emdoen, a revenue cycle management company, 86% of claims received since October 1, 2015 are ICD-10 claims with little change in reimbursement.

- 7. Grandview Medical Center Opens.** Fourteen years after first being announced by HealthSouth Corporation, the so-called "digital hospital" on Highway 280 in Birmingham finally opened on October 10 as Grandview Medical Center. The new hospital heralded the end of Trinity Medical Center, located on Montclair Road. Grandview has 372 beds and is owned by Community Health Systems, the same company that owned Trinity.
- 6. Stark Law Revisions.** As part of the Medicare 2016 Physician Fee Schedule, CMS made several significant changes to the federal Stark Law. These changes include a new exception permitting hospitals, federally qualified health centers and rural health clinics to pay physicians for recruiting and compensating non-physician practitioners under certain circumstances. The changes also provide a new exception for timeshare lease arrangements. Most significantly, the changes relax the prior inflexible requirements under many Stark Law exceptions regarding written agreements, signatures and prohibitions on hold-over arrangements beyond six months. The Stark Law revisions were published as part of the Physician Fee Schedule in the November 16, 2015 Federal Register.
- 5. ACA 60-Day Repayment Rule Clarified.** Under the Affordable Care Act ("ACA"), any provider who has received a Medicare or Medicaid overpayment is required to return the money within 60 days following the date on which the overpayment is "identified." Providers who do not meet this deadline face significant penalties under the federal False Claims Act. In August of this year, a New York Court found that an entity has "identified" an overpayment when it "has determined, or should have determined through the exercise of reasonable diligence" that it has received an overpayment. *United States ex rel. Kane v. Continuum Health Partners, Inc.*, No. 1:11-CV-02325-ER (S.D.N.Y. Aug. 3, 2015). In connection with a settlement involving a physician practice in Georgia that was accused of failing to comply with the 60-day rule, the U.S. Attorney for the Northern District of Georgia was quoted as saying: "Participants in federal health care programs are required to actively investigate whether they have received overpayments and, if so, promptly return the overpayments." It is clear that the government will increasingly use the 60-day rule in fraud investigations and providers are encouraged to actively and in good faith review whether any overpayments have been received.
- 4. ACA Exchanges.** The new open enrollment period for the ACA mandated insurance exchanges began November 1, 2015 and runs through January 31, 2016. Approximately 10 million people are predicted to be enrolled in both federal and state exchanges for the coming year. According to the U.S. Department of Health and Human Services, in Alabama 171,641 residents signed up for an exchange plan during the 2015 open enrollment period. Nationwide, an estimated 83% of marketplace enrollees will qualify for subsidies, with subsidies averaging 72% of the insurance premium. In Alabama last year, 91% of enrollees qualified for premium subsidies, with an average amount of \$268 per month. It has been reported that the three carriers (BCBS of Alabama, Humana and United Healthcare) who offered individual plans for the 2015 exchange will increase rates this upcoming year by an average of 24%.
- 3. Supreme Court Saves the ACA – Again.** In June of this year, the U.S. Supreme Court saved the ACA for the second time. In *King v. Burwell*, 576 U.S. ____ (2015), the petitioners challenged the legality of subsidies to participants in federally sponsored exchanges or marketplaces. The challenge hinged

on the phrase in the ACA that says "exchanges established by the State" can issue subsidies, but did not mention exchanges created by the federal government. In a 6-3 ruling, the Supreme Court found that despite the poor wording of the section in question, when read in context with the entire legislation it would not make sense to allow subsidies for state-run exchanges but deny subsidies for similar federally-run exchanges.

2. **Alabama Medicaid.** In order to try and control Medicaid costs in Alabama, legislation was approved dividing the State into five regions and in each region one or more regional care organizations ("RCOs") will be established. In exchange for a capitated payment, each RCO will be responsible for providing health benefits to assigned Medicaid beneficiaries. The RCOs will make money if they can provide care for less than the capitated payment. As of October of this year, there are eleven "probationary" RCOs, covering all five of the RCO regions. The RCOs are required to go-live October 1, 2016. However, Alabama Medicaid is still waiting for approval of the program from CMS, and has yet to release information to the RCOs on the capitated fee to be paid by Medicaid for assigned beneficiaries. By May of next year, the RCOs must have provider networks in place. Underpinning the uncertainty about the RCO program is the continued reluctance of the Governor to expand Medicaid to approximately 200,000 Alabama citizens without health insurance coverage. One must wonder whether CMS is leveraging its approval of the RCO program to force Medicaid expansion.
1. **Move Toward Pay-for-Value.** In January of 2015, CMS Secretary Burwell announced that in 2016 30% of Medicare provider payments will be made under alternative payment models (*e.g.*, ACOs, bundled care payment initiatives, medical homes, *etc.*), with that percentage rising to 50% in 2018. Secretary Burwell also announced that in 2016 85% of Medicare fee-for-service payments will be tied to quality and value, with that percentage rising to 90% in 2018. Shortly thereafter, as part of the Medicare Access and CHIP Authorization Act of 2015 (MACRA), CMS announced that beginning in 2019 incentives under the Meaningful Use program, PQRS and Value-Based Purchasing program will be combined into a new "Merit-Based Incentive Payment System" (MIPS). Finally, as a precursor of things to come, CMS announced this year a new hospital mandatory bundled payment program for hip and knee replacements in certain Metropolitan Statistical Areas. The new program, called the Medicare Comprehensive Care For Joint Replacement, will pay a single (*i.e.*, bundled) fee for all physician, hospital and post-acute care starting with the date of surgery and running 90 days thereafter, thereby leaving the participating providers to negotiate the division of fees.

May all of you have a happy, healthy and successful 2016!

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