CMS' Cuts to the 340B Drug Payment Program Cause Hospital Uproar

Dec 01, 2017

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The 340B program requires drug or pharmaceutical manufacturers to provide outpatient drugs to eligible health care organizations at significantly reduced prices. Hospitals falling within the following categories are eligible to participate in the program: disproportionate share hospitals, children's hospitals and cancer hospitals exempt from the Medicare prospective payment system, rural sole community hospitals, and critical access hospitals. Notably, this Final Rule does not affect rural, children's or cancer hospitals which will not see a 340B payment decrease.

For the hospitals affected by this Final Rule, CMS will begin to only pay for drugs purchased through the 340B program at their average sales price minus 22.5% rather than their average sales *price plus 6%*. Drugs not purchased under the 340B drug program will continue to be paid for at a rate of their average sales price plus 6% and Medicare payment for vaccines will not change.

Additionally, under the Final Rule, hospitals will have to use two modifiers when billing to identify whether a drug was purchased pursuant to the 340B program. One modifier will be used by hospitals that are subject to the payment reduction and the other modifier will be used by exempted hospitals that purchase drugs under the 340B program. The goal is to better track what drugs are being purchased under the program.

The 340B program aims to lower operating costs for hospitals with a disproportionate number of low-income patients. This cut in 340B payments to hospitals has caused hospital associations to come together and sue CMS for allegedly overstepping its statutory authority. Ted Slafsky, CEO of 340B Health, which represents more than 1,300 hospitals enrolled in the 340B program, said that CMS is not actually lowering costs, and is instead taking an "unprecedented action that will harm patient care." He said that 340B hospitals were unanimous when surveyed earlier this year that cuts to 340B payments would cause them to cut back on services. He called the rule "a backdoor effort to undermine an important

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drug discount program."

On the other hand, CMS maintains that it is cutting the 340B payments to trim its budget for drugs through the program. Seema Verma, the Administrator of CMS, stated "[a]s part of the President's priority to lower the cost of prescription drugs, Medicare is taking steps to lower the costs Medicare patients pay for certain drugs in the hospital outpatient setting. Medicare beneficiaries would benefit from the discounts hospitals receive under the 340B Program by saving an estimated $320 million on copayments for these drugs in 2018 alone." The 340B program does not specifically detail how hospitals can use money generated by the program and critics maintain that hospitals exploit the savings.

While the Final Rule is scheduled to take effect January 1, 2018, there is no telling how the lawsuits against CMS by various hospital associations will impact these regulations. For more information regarding this litigation and other changes affecting hospitals, please contact a member of our Health Care Innovation Team. You can also visit our Health Law Matters blog for more insight into legal issues impacting the health care industry.

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