New Face-to-Face Requirements for Hospices and Home Health Agencies

(May 8, 2011): Over the last year, both hospice and home health agencies have faced a number of regulatory challenges, including but not limited to the face-to-face issue. In many instances (including the new requirement discussed below), these regulatory changes have been implemented in an effort to better ensure that the services ordered are reasonable and medically necessary. Regulators have long expressed concern regarding the ordering of hospice or home health services which are not medically required. As set out below, the Affordable Care Act (ACA), signed in to law by President Obama on March 23, 2010, included mandates aimed at addressing these concerns. The new face-to-face requirements for hospices and home health agencies are intended to clarify the government's expectations in terms of documentation.

I. Introduction:

Under the ACA, physicians and certain non-physician practitioners are now required to perform face-to-face encounters with patients when evaluating their need for ***hospice*** or ***home health*** services. This rule was originally intended to go into effect on January 1, 2011. However, the Centers for Medicare and Medicaid Services (CMS) postponed implementation of the rule to April 1, 2011. CMS now expects hospices and home health agencies to fully comply with the provisions of this new regulation. This rule is a condition of payment, and any certification documents that do not attest to a face-to-face encounter between the physician and the patient are, by definition, incomplete. Consequently, home health and hospice providers should review the fundamentals of the new rule to ensure effective compliance. This article will examine the practical application of this rule by hospice and home health agencies.

II. Home Health Face-to-Face Requirements:

A. Who is covered under the new face-to-face requirements?

To be eligible for covered home health services, Medicare patients must now have a ***face-to-face encounter*** with their physicians or covered non-physician practitioner. The rule defines a covered “non-physician practitioner” (NPP) as:

- **Nurse Practitioner.**
- **Clinical Nurse Specialist.**
- **Certified Nurse Midwife.**
- **Physician's Assistant.**

If an NPP conducts the face-to-face encounter with the patient, he or she must document the clinical findings of that encounter and communicate them to the physician. Although an NPP can conduct a face-to-face encounter with a patient, it is important to note that only a physician can sign a home health certification.

B. When must the face-to-face encounter take place?

This face-to-face encounter must take place:

- **Within 90 days before a patient's start** of care date with a home health agency; or
- **Within 30 days after a patient's start of home health services.**

For a visit within the 90 days preceding the patient's start of care to qualify under this rule, the patient must have seen the physician for a condition that is related to his or her need for home health services. The face-to-face encounter rule only applies to the initial certification at the start of care; this requirement does not apply to subsequent treatment episodes.

C. What else is required?

In addition to the home health certification, the physician or NPP conducting the patient encounter must now compose a brief narrative describing how the patient's clinical condition supports the patient's homebound status and need for skilled care. This documentation must be signed and dated by the certifying physician. All of this documentation **must be completed by the physician**; it is unacceptable for the physician to orally communicate this information to a home health agency where the health agency then documents this information to be signed by the physician.

D. Where can the face-to-face encounter take place?

The face-to-face encounter can take place in person or via a telehealth service in an ***approved originating site.*** The originating sites currently authorized by law include:

- **The office of a physician or practitioner.**
- **A hospital.**
- **A critical access hospital.**
- **A rural health clinic.**
- **A federally qualified health center.**
- **A hospital-based renal dialysis center.**
- **A skilled nursing facility.**
- **A community mental health center.**

Additionally, a physician who cares for a patient in an acute or post-acute setting may conduct a face-to-face encounter with the patient and then certify that patient's need for home health services. That physician would then transfer care of the patient to the patient's community-based physician.

III. Hospice Face-to-Face Requirements:

A. Who qualifies to perform the new face-to-face encounter?

The new hospice rule similarly requires that hospice patients have a face-to-face encounter with a hospice physician or a hospice nurse practitioner. A hospice physician is one who is **employed** by the hospice or contracts to perform work for the hospice, and a hospice nurse practitioner is one who is **employed** by the hospice. CMS considers an "employee" to be one who:

- **Works for the hospice and for whom the hospice is required to issue a W–2 form on his or her behalf;**
- **If the hospice is a subdivision of an agency or organization, an employee of the agency or organization who is assigned to the hospice; or**
- **Is a volunteer under the jurisdiction of the hospice.**

If a hospice nurse practitioner performs the face-to-face encounter, then he or she must document the clinical findings of the encounter and communicate them to the hospice physician. As with home health services, it is important to note that ***only a physician (who is employed by the hospice) can certify a patient's eligibility for the hospice benefit.***

B. When must the face-to-face encounter take place?

The encounter must take place no more than ***30 days prior to the patient's third benefit period AND each subsequent benefit period thereafter***. In some instances, a hospice patient could be an emergency weekend admission, or the hospice may be unaware that the patient is in the third benefit period. In such exceptional cases, the face-to-face encounter may occur within 2 days following the patient's admission. Additionally, in such circumstances, if a patient dies within 2 days of admission to the hospice without a face-to-face encounter, then the encounter requirement will be deemed satisfied.

C. What else is required?

The hospice physician or nurse practitioner who conducts the face-to-face encounter must attest that the encounter took place, document the date of the encounter, and sign the attestation clause.

Additionally, physicians have been required since October 2009 to compose a brief narrative explaining the clinical findings that support a patient life expectancy of 6 months or less. With the implementation of the new face-to-face requirement, physicians must now include in the narrative for the third benefit period (and each subsequent benefit period) an explanation of why the clinical findings of the face-to-face encounter support a patient life expectancy of 6 months or less. If these narratives are included on the certification form, then they must be located immediately above the physician's signature. If the narrative is part of an addendum to the certification form, then the addendum must also be signed by the physician.

Although the physician's certification and face-to-face attestation are separate requirements, hospice physicians are also now required to include with the certification or re-certification the benefit period dates that the certification or recertification covers. Physicians and nurse practitioners will thus be able to readily identify when the face-to-face encounter must be performed.

D. Where must the face-to-face encounter take place?

Hospice patients are not required to travel to the location of the hospice physician or nurse practitioner. If traveling would not optimize the patient's comfort or be consistent with the patient's or family's goals for hospice care, then the physician or nurse must travel to the patient's location to conduct the face-to-face encounter.

IV. Here Come the ZPICs, PSCs and RACs:

Following the implementation of this new rule, CMS stated that, ***"we will issue instructions to the contractors who perform medical reviews to ensure compliance with this regulation."*** As the number of both pre-payment and post-payment audits of hospice and home health agencies increases now and in the future, this requirement will be carefully examined by Zone Program Integrity Contractors (ZPICs), Program Safeguard Contractors (PSCs) and Recovery Audit

Contractors (RACs).

V. Compliance Considerations:

In addition to these new face-to-face encounter requirements, the ACA also required that all Medicare providers (not merely hospice and home health providers), implement the elements of an effective Compliance Plan. Unfortunately, at this time, many hospice and home health agencies have not dedicated the time and resources to develop and implement an effective Compliance Program.

Regardless of whether or not you have implemented an effective Compliance Plan, it is important that hospices and home health agencies take note of the following considerations when implementing this new face-to-face requirement:

- **Improper Financial Relationships.** Like physicians, NPPs conducting the face-to-face home health encounter cannot establish or maintain any improper financial relationships with home health agencies. Improper financial relationships are those which violate Stark laws and/or the anti-kickback statute (and, by extension, the False Claims Act). Providers who are concerned whether a financial relationship violates any of these statutory provisions should contact qualified counsel to conduct the requisite analysis.
- **Documenting the Face-to-Face Requirement.** Although the new face-to-face encounter rule, like the physician's certification, is a condition of payment for hospice and home health services, compliance with the two requirements should be documented separately. CMS has advised ***that documentation of the face-to-face encounter be a separate and distinct section of, or addendum to, the certification form. As such, providers should not simply insert standardized face-to-face encounter language on their certification forms.***
- **Consistency of Documentation.** Many home health providers are rightly concerned that inconsistencies could emerge between the documentation maintained by a physician and that of the home health agency, thereby serving as a basis for Medicare contractors to deny home health claims. Although CMS has stated **that it is *"not our intent to penalize the [home health agency] if the physician's own medical record documentation is not in good order,"* it remains to be seen whether this intent will be carried out by the contractors.**

V. Conclusion:

Now, more than ever before, it is essential that hospice and home health providers ensure that

their practices fully comply with this and other applicable regulatory requirements. To do so, it is recommended that organizations regularly review their documentation, coding and billing practices. When conducting internal reviews, it is recommended that you discuss the approach to be taken with legal counsel prior to initiating such a review. As a final point, should you identify an overpayment, pursuant to another mandate under the ACA, the identified overpayment must be repaid to the government within 60 days. Failure to do so will constitute a violation of the False Claims Act.

In light of these new considerations and mandates, all hospice and home health agencies should review their current Compliance Plan to verify that these new risk issues have been incorporated into the plan. If you have not developed and implemented an effective Compliance Plan, we recommend that you immediately contact qualified legal counsel and engage them to prepare an effective Compliance Plan which takes your organization's specific risks into account.

Liles Parker attorneys have extensive experience working with Medicare providers (including hospice and home health agencies) to help ensure that their practices are compliant with applicable statutory and regulatory requirements. Additionally, our attorneys are experienced in representing hospices and home health agencies in post-payment audits by ZPICs and other Medicare contractors. Need assistance? Call us Robert W. Liles for a complimentary initial consultation. Robert can be reached at: 1 (800) 475-1006