Medicaid RAC Program Up and Running - 26 States Award RAC Contracts

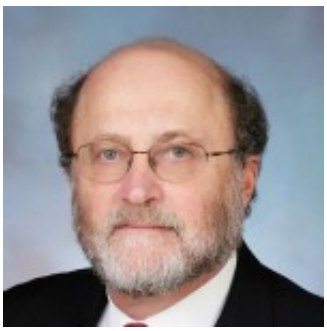
Introduction: The Medicaid RAC Program

At a conference last week in Baltimore, Angela Brice-Smith, Acting Director of the Centers for Medicare & Medicaid Services (CMS) Medicaid Integrity Group, stated that 26 states have awarded contracts under the Medicaid RAC program, and a quarter of those states' Medicaid RACs are now reviewing claims. Ms. Brice-Smith added that CMS has allowed exceptions for all territories and several states, such as those with low Medicaid payment error rates for a year or two. Otherwise, all of the remaining states should be in the process of awarding contracts to implement the Medicaid RAC program.

As background, the Affordable Care Act mandated that states contract with Medicaid RACs to review and identify over and under payments under the Medicaid program and to recoup overpayments. CMS published proposed rules on Medicaid RACs in November 2010 (*see* **HHS Releases Proposed Rules on Medicaid RACs**, Nov. 30, 2011), under which states were required to implement their programs by April 2011. In February 2011, CMS delayed the implementation date. However, in September 2011, CMS published final rules that became effective January 1, 2012. While not all states have begun their Medicaid RAC programs as of today, except for the few states that have received waivers of the January 1 deadline, we can anticipate that the remaining states will be working to implement these programs in the near future.

Unlike the Medicare RAC program, the final rules leave substantial flexibility to the individual states on how they implement their Medicaid RAC programs. They are required to identify over and under payments, and are required to recoup overpayments. However, it is left to the states whether to refund underpayments that the Medicaid RACs identify, although the regulations require that Medicaid RACs notify providers of these underpayments and the preamble commentary encourages states to refund underpayments consistent with state law.

Working with the Medicaid RAC Program



In the past, Liles Parker attorneys have assisted providers and a state trade association comprised of providers to obtain modifications to a program that was similar to the current Medicaid RAC program and

to appeal attempted recoupments under the state appeals process. For example, where the Medicaid RAC identified claims that it believed should have been made on an outpatient instead of inpatient basis, the state recovery practice was modified to permit the provider to rebill the state for payment at the outpatient rates even if the time for filing outpatient claims had expired. We strongly recommend that providers and their state associations engage the state in structuring the program as early as possible.

Possible issues that could arise will include:

- the qualification of reviewers
- the number of records that can be requested during any particular period
- the types of claims that can be reviewed
- whether there will be advance approval and notice of the issues that will be reviewed – especially with respect to medical necessity reviews
- the nature and timing of any reconsideration process.

A myriad of other issues may also come up. In this vein, we found it extremely helpful for providers to quantify the costs of complying with the initial process, which was helpful in convincing the state to make certain modifications in several of these areas.

In these discussions, it is also helpful to understand the degree to which the state currently underfunds Medicaid provider payments. It may be helpful both for individual providers and their trade associations to remind the agency of the potential need to seek an increase in these provider rates to account for the additional administrative costs generated by unnecessary or unreasonable Medicaid RAC processes – at least as a potential bargaining chip. While the CMS final rules impose some requirements on this process (*e.g.* the retention by the Medicaid RAC of 1 FTE physician to serve as medical director), the final rule provides the states substantial discretion in these areas.

Other Considerations for the Medicaid RAC Program

Additionally, providers should be prepared to respond quickly to identified overpayments and underpayments. This includes developing a process to ensure that there is one person or group with responsibility to respond to record requests, that there is an internal process to respond for purposes of providing clinical justifications and additional documentation, and that there is a process for analyzing recouped payments to appeal under the state's appeal process where warranted, including the identification of attorneys to assist where cost effective and appropriate, and the incorporation of any weaknesses identified into the provider's internal compliance and quality assurance processes.

The key to minimizing unnecessary adverse results is educating both clinical and administrative staff and developing key processes to minimize adverse findings and to respond to those findings – both internally and externally. This includes processes to determine whether and how to appeal recoupments, and where appropriate, engage in a constructive dialogue with the state and Medicaid RAC contractor in the development and modification of the process.

Liles Parker attorneys have extensive experience in working with providers and their associations on matters of this nature, including responding to adverse findings through the appeals process, providing assistance in negotiating with states and commenting on rules implementing the process, and advising clients on revising their compliance programs in response to these audits. For a free consultation, contact Michael Cook **at (202) 298-8750.**