

Medicare Advantage Plans May Soon Offer Personal Care Services



(April 10, 2018): On April 2, the Centers for Medicare and Medicaid Services (CMS) announced an expansion of the benefits that private health plans may offer Medicare beneficiaries under the Medicare Advantage (MA) program in 2019. In its Final Call Letter for bids from plans that participate in the MA program (“MA plans”) for 2019, CMS expanded the services that plans would be permitted to offer in 2019 as supplemental health related benefits, **even if the primary purpose of those benefits includes daily maintenance.** While these benefits are not required to be included in MA plans, plans are provided the latitude to include them if they choose and may very well change the reimbursement landscape for personal care agencies around the country.

I. Background:

As background, MA Plans are permitted to offer certain benefits that are not included as part of the Medicare fee for service, or Original Medicare, benefits, if those benefits are, among other things, primarily health related. As discussed in the Final Call Letter, CMS considers an item or service to be primarily health related “...if the primary purpose of the item or service is to prevent, cure, or diminish an illness or injury.” However, **CMS previously has not considered a service to fit within this category if the primary purpose is daily maintenance.**

II. Expansion of Coverage for Personal Care Services:

In the Final Call Letter, CMS recognizes that there is value in certain services that “diminish the impact of injuries or health related conditions and reduce avoidable emergency and health care utilization.” The Letter does not specify the benefits that would fall under this rubric, but includes as an example, fall prevention devices for individuals at risk high risk for falling and similar products that protect against injury resulting from falls. The Letter further states that services that diminish the impact of injuries and health conditions and reduce avoidable utilization can be included as supplemental benefits under certain circumstances, **“even if a significant purpose of the item is daily maintenance.”**

As further described in the Letter, “[u]nder the new interpretation, in order ... to be ‘primarily health

related’ ... [an item] must diagnose, prevent, or treat an illness or injury, compensate for physical impairments, act to ameliorate the functional/psychosocial impact of injuries or health conditions, or reduce avoidable emergency and healthcare utilization.” The intent is to provide plans with the flexibility to offer supplemental benefits that can enhance quality of life and improve health outcomes.

The service must, however, be medically appropriate, recommended by a licensed provider as part of a plan of care, and cannot include items or services that are solely to induce enrollment. The Letter also indicates that CMS will be issuing more detailed guidance in the future.

As noted, above, while not entirely clear, it is quite possible that MA plans will be permitted to cover personal care services under the revised standards for supplemental benefits. Indeed, in a press release issued by CMS announcing a draft of the Bid Letter for comment in early February, CMS described the proposal as allowing supplemental benefits to “include services that increase health and improve quality of life, *including coverage of non-skilled in-home supports*, portable wheel chair ramps and other assistive devices and modifications when patients need them.” (Emphasis supplied.) While neither the press release accompanying the Final Bid Letter nor the Letter, itself, includes any language specifically referencing these items, the broader language of the Final Letter can certainly be read to permit plans to offer personal care services under certain circumstances.

III. What Steps Should Your Personal Care Agency Take?

So what can a provider that wishes to offer these services, including personal care services, as part of an MA plan for 2019, do at this point? First, providers can be watchful for additional guidance from CMS that should be forthcoming. Second, they can begin to approach the MA plans that cover a significant number of MA subscribers in their service area to discuss both including these items or services as supplemental benefits in the plans’ upcoming bids to CMS for the 2019 year, and to discuss pricing. In doing so, providers should be prepared with data or other information demonstrating that offering the service will reduce costs without harming patients. For example, a provider that wished to offer personal home care services would attempt to prepare a cost benefit analysis showing that home visits reduce the incidence for hospital admissions or admissions to skilled nursing facilities. Additionally, if the MA plan is also a provider of Medicaid managed care services, the provider may also include in the analysis the cost/benefit of lowering admissions to the nursing facility long stay side of the equation. There are other permutations to the analysis, but the key is to begin discussions with the various plans, and to accumulate data that demonstrate both the short term and long-term cost and health benefits of the particular service.

Providers that wish to take advantage of this opportunity should also note that the Bipartisan Budget Act of 2018 expands supplemental benefits for chronically ill enrollees to also encompass benefits that are *not* primarily health related in certain circumstances beginning in 2020. This change recognizes the importance of certain social determinants to health status – something that some state Medicaid programs are beginning to recognize as well. However, this change only

Liles Parker PLLC

A National Health Care Law and Business Transactions Firm that Primarily defends Health Care Providers in Audits & Investigations

<https://www.lilesparker.com>

affects “chronically ill” beneficiaries and does not begin until 2020, whereas the expanded definition of supplemental benefits in the Bid Letter affects services provided to all MA beneficiaries and begins in 2019. Additionally, the Final Bid Letter notes that the expanded definition of supplemental benefits in that Letter requires that the benefit address specific illnesses and/or injuries, and reiterates that it will be issuing further guidance on both expansion options in the future.

We would also note that all MA plans are required to have compliance programs in place that meet the seven elements of an effective program. Under this program, they are also responsible for providing certain training for providers under their programs, as well as for the compliance of those providers. While Liles Parker attorneys, and in fact, virtually all knowledgeable health care attorneys, have long counseled their clients on the importance of establishing and maintaining effective compliance programs, and while some segments of the industry are required to maintain such programs by law, *any* entity that wishes to contract with MA plans to provide health care related services almost certainly will be required by the plan to maintain a compliance program. Thus, any entity that wishes to take advantage of the expanded coverage of services under the Final Bid Letter should be prepared to demonstrate that it has an effective compliance program.

With respect to providers of personal care services, there are a number of areas of vulnerability. One major such area is ensuring that aides actually perform the services for which a program is billed. Several years ago, there were a number of investigations and prosecutions where aides were alleged to have colluded with clients to defraud the Medicaid program by failing to provide the service for which the aides were paid, and paying the client a portion of the payments. There are mechanisms to monitor this type of activity; however, it is a major risk area for home care agencies and should be addressed in any compliance program.

IV. Conclusion:

In short, the Final Bid Letter for 2019 presents the possibility of expanding the services that certain MA plans will cover, including the possibility of covering personal care services. However, providers that wish to contract with MA plans for these services should be taking the actions described, above. Liles Parker attorneys have extensive experience in assisting clients throughout the health care industry, including home care and home health, in responding to new government and payor initiatives, including establishing and maintaining an effective compliance program.

Liles Parker PLLC

A National Health Care Law and Business Transactions Firm that Primarily defends Health Care Providers in Audits & Investigations

<https://www.lilesparker.com>



[Michael Cook, J.D.](#), is a Partner at the firm Liles Parker, Attorneys & Counselors at Law. Mr. Cook represents nursing home, assisted living, home health and personal care clients in regulatory matters. Anyone interested in discussing the material discussed in this article should feel free to contact Michael Cook at **202-298-8750** or mcook@lilesparker.com.