JW | Health e-Alert

An important health care law update from the law firm of Jackson Walker.

January 07, 2011

Resources

JW Health Care Practice Area

JW Health Care Attorneys

JW HealthBrief Newsletter

Contact JW

www.jw.com

Offices

Austin
100 Congress Avenue
Suite 1100
Austin, TX 78701

Dallas
901 Main Street
Suite 6000
Dallas, TX 75202

Fort Worth
777 Main Street
Suite 2100
Fort Worth, TX 76102

Houston
1401 McKinney Street
Suite 1900
Houston, TX 77010

San Angelo
301 W. Beauregard Avenue
Suite 200
San Angelo, TX 76903

San Antonio
112 E. Pecan Street
Suite 2400
San Antonio, TX 78205

HHSC Plans Adoption of RUG Review Waiver Rule in April 2011

By **Brandy Schnautz Mann**

On December 8, 2010, the Health and Human Services Commission ("HHSC") Council approved proposed rule 1 Texas Administrative Code § 371.216, which is scheduled to be published in a January 2011 edition of the *Texas Register.* This new rule will allow long-term care providers that receive payment from the Texas Medicaid program to request that HHSC waive the use of extrapolation in HHSC's calculation of Medicaid overpayments to nursing facilities. The rule is scheduled for adoption in April 2011.

The HHSC's Office of Inspector General ("HHSC-OIG") conducts periodic utilization reviews of nursing facilities' level of care assessments of Medicaid residents to ensure that payments for Medicaid-covered services are appropriate. In 2008, HHSC converted from the Texas Index for Level of Effort ("TILE") to the federal Resource Utilization Group ("RUG") classification system and provider payment methodology. One aspect of the RUG methodology allows HHSC-OIG, in calculating overpayments to a facility, to extrapolate error rates for the sample population to the entire population of RUG classification groups found to be in error.

Conceding that neither HHSC-OIG nor providers were experienced in the use of extrapolation methodology, HHSC-OIG adopted rules allowing for — in HHSC-OIG's own words — a "phased, multi-year, graduated approach for implementing extrapolation." This approach, according to HHSC-OIG, was "designed to allow nurse reviewers and providers to acquaint themselves with the effects of the extrapolation methodology."

Under this "graduated approach," during the first year of RUG utilization reviews (September 1, 2008, to August 31, 2009), HHSC-OIG would extrapolate to the population only when the error rate exceeded 25%. For reviews conducted between September 1, 2009, and February 28, 2010, extrapolation would apply when the error rate exceeded 20%. For reviews conducted between March 1, 2010, and August 31, 2010, extrapolation would apply when the error rate exceeded 15%.

Although HHSC-OIG scheduled utilization reviews to begin in September 2008, it did not actually begin reviews until over two years later — in November 2010. Due to this delay, the intended "phased, multi-year, graduated approach" for extrapolation expired before UR reviews ever began.

Instead of amending the rules to move the dates for phased-in extrapolation back in time to account for its delay, HHSC-OIG proposed § 371.216 to allow nursing facilities to apply to HHSC-OIG for a waiver of extrapolation by demonstrating "good cause" why extrapolation should not be applied. "Good cause" is not defined in the rule, but HHSC-OIG has indicated that it may include scenarios in which extrapolation would lead to results "that would threaten the financial stability of the provider."

The rule vests the OIG with "sole discretion to evaluate the provider's showing of good cause and to determine whether waiver of extrapolation is warranted," and the OIG's decision to grant, deny, or modify a request for waiver is not subject to administrative or judicial review.

Although the waiver rule — unlike the phased-in approach it replaces — puts the burden on providers to demonstrate good cause, it offers the benefit of permanency. As the rule currently reads, it is not set to be phased-out or expire. Providers will have to wait until at least April, however, to find out how accessible waivers prove to be.

Unfortunately, even if the waiver rule turns out to offer providers a better option in the long-term than the phased-in approach, the gap between the beginning of utilization reviews in November 2010 and the scheduled adoption of the waiver rule in April 2011, has left those providers currently undergoing utilization review with no obvious recourse to extrapolation. These providers were not allowed the intended benefit of the phase-in period; nor do they have a waiver rule in place. The ironic result is that the providers who are experiencing the very first utilization reviews are the ones left with no obvious remedy.

Providers that find themselves in this position should consider filing a formal appeal with HHSC regardless of whether the provider can demonstrate that the calculated error rate was incorrect. The filing of an appeal stops any recoupment efforts based on identified overpayments. Because appeals generally take several months to be scheduled, providers may be able to delay recoupment until the waiver rule becomes effective in April 2011, and then use the existence of the rule in settlement negotiations with HHSC.

Please contact **Carla J. Cox** at 512.236.2040 or **cjcox@jw.com** or **Brandy Schnautz Mann** at 512.236.2310 or **bmann@jw.com** for more information.

---

*If you wish to be added to this e-Alert listing, please **SIGN UP HERE**. If you wish to follow the JW Health Care group on Twitter, please **CLICK HERE**.*

JW | JACKSON WALKER L.L.P.