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Hospitals Face Tougher Fraud Scrutiny Amid Shift To E-Records

By **Rachel Slajda**

Law360, New York (September 25, 2012, 7:57 PM ET) -- The federal government's Monday warning to hospitals not to abuse their new electronic health records to charge Medicare higher rates serves as a shot across the bow, signaling providers will come under increasingly intense scrutiny over billing errors that are sometimes just honest mistakes, experts say.

In a letter to major hospital associations, Health and Human Services Secretary Kathleen Sebelius and Attorney General Eric Holder warned hospitals not to use electronic health records to cheat the system and bill Medicare at higher rates than is warranted.

"There are troubling indications that some providers are using this technology to game the system, possibly to obtain payments to which they are not entitled. False documentation of care is not just bad patient care; it's illegal," they said. "We will continue to escalate our efforts to prevent fraud and pursue it aggressively when it has occurred."

The letter is a warning to providers that extra scrutiny is forthcoming, adding to what providers see as an already harsh crackdown on fraud, according to Dianne Bourque, a member of Mintz Levin Cohn Ferris Glovsky & Popeo PC who represents providers.

"Here's what's going to happen. The bad providers won't be deterred, and the good ones are going to be extra terrified and be subject to scrutiny that's not necessarily warranted," Bourque told Law360.

Bourque said an assumption that billing mistakes are the result of fraud puts a heavy burden on providers.

"If you have an honest mistake, you have a lot more explaining to do than if there wasn't already the assumption of fraud," she said. "It adds a tremendous amount of pressure. The audits that go on, the contractors who are compensated based on their ability to identify 'fraud' or mistakes that you've made, it doesn't make it a nice environment to work in. It adds a lot of pressure and concern and it's tough, looking over your shoulder all the time."

She and others noted that the higher bills could be the result of myriad things other than fraud.

For example, the letter singles out "cloning," or copying and pasting information from one record into another, as a way providers could inflate bills. But cloning isn't inherently wrong, according to Paul DeMuro, a partner with Latham & Watkins LLP who focuses on health information technology — it's just rife with the potential for mistakes.

"Oftentimes copy-and-pastes are done quite carelessly. People don't look to see if it's the same thing, [and] maybe [the text they're copying] includes something that isn't the case. They haven't thought about it," he said. "You're going to have a lot of unintentional errors."

The administration letter came two days after a New York Times report that found some hospitals with e-records systems were billing at higher rates for emergency room visits than they had in the past. The Times reported that e-records make it easier for hospitals to clone and to upcode, or bill at a higher rate than is warranted.

Providers, including the American Hospital Association, argue that hospitals may be coding visits at a higher rate simply because electronic records do a better job of collecting information about the visits.

That's part of the allure of electronic records: They can collect more extensive, accurate information on a patient's conditions and treatments. Indeed, the reason the administration is pushing electronic records, via financial incentives and penalties, is that better data could improve care and slow spending growth.

But an unintended consequence might be higher costs for Medicare.

"There's a perfect innocent set of explanations for all this. You can impose a technical solution on a previously paper-bound process, and in the course of that, you're picking up a whole lot more information than you did otherwise," said Thomas Gustafson, a senior policy adviser with Arnold & Porter LLP and the former deputy director of the Center for Medicare Management, which set payment rates for providers.

Gustafson said that if an increase in information is found to be the widespread cause of higher billing, the Centers for Medicare and Medicaid Services could lower payment rates in the future to make up for the higher spending. CMS has taken such action before, he said, when changes meant to improve efficiency resulted in higher costs for the same services.

At the end of the day, experts said, the potential for higher bills and the increased scrutiny that brings will not deter the adoption of electronic health records. Sebelius and Holder seemed to agree.

"Used appropriately, electronic health records have the potential to save money and save lives," they said.

--Editing by Elizabeth Bowen and Lindsay Naylor.