

American Taxpayer Relief Act of 2012 Increases Medicare Overpayment Recovery Period to Five Years

In This Issue:

- Medicare Overpayment
- Overpayment Recovery
- Without Fault
- Reopening
- Good Cause
- Document Retention Policy

With the enactment of the American Taxpayer Relief Act of 2012 (ATRA)¹ (*i.e.*, the “fiscal cliff” bill), the federal government has significantly expanded its ability to recover Medicare overpayments from health care providers and suppliers. Congress characterized the change from a three-year recovery period to a five-year recovery period as “Removing Obstacles to Collection of Overpayments.”² But the immediate effect is that the 2008 and 2009 years—previously closed to routine overpayment collections—are now at risk. Prospectively, the burden on all health care providers and suppliers will increase as they must devote resources to preserve and defend five years of Medicare payments.

Please feel free to reach us at the phone number or email address to the left if you have questions about this change to the Medicare overpayment recovery period or for assistance in challenging Medicare recoupments.

Recovery Period for Overpayments. Under the Medicare statute, overpayments are defined as “any funds that a person receives or retains under [Medicare or Medicaid]...to which the person, after applicable reconciliation, is not entitled under such title.”³ As a general rule, where a provider receives an overpayment and fails to appropriately return the funds, Medicare is entitled to recover the overpayment amount.⁴ However, recognizing potential barriers to recovery, the law limits the time frame within which Medicare can initiate overpayment recovery. Prior to the ATRA, the Medicare statute and regulations instructed that when an overpayment was discovered beyond the third calendar year following the calendar year in which notice of payment was sent, the overpaid provider was to be considered without fault, absent evidence to the contrary.⁵ When a provider is considered without fault, Medicare will not recover the overpayment.

In calculating the three calendar year period, month and day are disregarded, as only the year of notice of payment and the year overpayment discovery are relevant. For example, in the case of a payment notice sent on December 1, 2009 and an overpayment discovery on January 1, 2013, the years 2009 and 2013 would be the only relevant temporal factors. In this example, absent other evidence of provider fault, the provider would be considered without fault for the overpayment. These rules thereby created, in effect, a three year statute of limitations for overpayment recovery.

www.HealyLawDC.com

*A health law firm in
the nation's capital*

Jason M. Healy
1667 K Street, NW
Suite 1050
Washington, DC 20006

(202) 706-7926
(888) 503-1585 fax

jhealy@healylawdc.com

As indicated above, two exceptions to the three calendar year statute of limitations existed under this regime. First, if Medicare learns that the provider was at fault within four years after the initial determination, a claim can be reopened for good cause and the overpayment recouped. Second, regardless of both the three and four-year rules, any determination involving fraud or similar fault can be reopened upon discovery of the fraud.

Impact of New Five-Year Overpayment Recovery Period. Under section 638 of the ATRA, the Medicare overpayment recovery period has been increased from three years to five years. The most immediate change for Medicare providers and suppliers is that the 2008 and 2009 years are now at risk for overpayment recoupment. In addition, the ongoing burden on providers and suppliers to manage their financial risk has increased substantially. There is now a lack of payment finality for five years of Medicare payments, instead of three. Although the intent may have been to give Medicare more flexibility in rooting out erroneous payments, the result is a significant expansion in the ability of Medicare contractors to recoup routine Medicare payments for subjective reasons (*e.g.*, lack of medical necessity). However, until CMS amends its regulations and guidance, it remains unclear whether the four-year reopening rule will be changed or if it will remain a valid defense.

With more Medicare payments subject to recoupment, in-house legal departments and risk managers should anticipate higher rates of appeal to challenge overpayment determinations. For claims that are four or five years old, this may prove particularly challenging as medical records are less likely to be in good order and caregivers' memories wane. This will make it more difficult to present accurate testimony at Administrative Law Judge hearings, for example, where many overpayment determinations are reversed. Also, it may be more difficult to demonstrate that a provider is without fault for older Medicare overpayments.

There are a variety of ways that providers and suppliers can better prepare for increased overpayment recovery as a result of this change in the law. First, document retention policies should require that patient medical records, billing documents, and other supporting materials are retained for at least five years. Second, caregivers and billing departments should be educated about this change and double their efforts to document the reasonableness and necessity of services and items provided to Medicare beneficiaries. Third, reimbursement departments should coordinate with utilization review and in-house legal departments to appeal and track overpayment determinations. Outside counsel can assist with such appeals.

¹ American Taxpayer Relief Act of 2012, Pub. L. No. 112-240, Jan. 2, 2013, 126 Stat 2313.

² Pub. L. No. 112-240 § 638.

³ Soc. Sec. Act § 1128J(d)(4)(B) as amended by Patient Protection and Affordable Care Act (PPACA) (P.L. 111-148) § 6402(a).

⁴ See Individual's liability for payments made to providers and other persons for items and services furnished the individual, 42 C.F.R. § 405.350.

⁵ See § 405.350(c).

About Us

The Law Offices of Jason M. Healy PLLC is a Washington, D.C. based law firm serving national and local clients. We focus primarily on legal issues affecting health care providers and welfare benefit plans. We help health care providers and their trade associations understand Medicare and Medicaid laws and regulations, and address compliance matters. We also represent health care providers in reimbursement audits, appeals, litigation, and transactions. We help sponsors of welfare benefit plans understand and comply with federal and state laws and prepare plan documents. Located in Washington, DC, just minutes from the Department of Health and Human Services, Congressional offices, and the White House, we are well positioned to provide legal support for advocacy efforts. Our Principal, Jason M. Healy, is a health care lawyer with over 14 years of experience with the array of legal issues facing health care providers.

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