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New Overpayment Provision in Fiscal Law May Cause Providers to Jump Off the Cliff

Attorneys may need secret decoder rings to translate the overpayment return provision in the American Taxpayer Relief Act of 2012, but that might not even be enough.

Sec. 638 of the so-called "fiscal-cliff" law has a provision on "removing obstacles to collection of overpayments" that gives Medicare contractors more time — five years instead of three years — to recover overpayments under Sec. 1870 of the Social Security Act *(RMC 1/7/13, p. 1)*.

That sounds simple, but the interplay between the new provision and Medicare's 48-month period for reopening paid claims is gumming up the works. "It makes your hair hurt," says Minneapolis attorney David Glaser, with Fredrikson & Byron.

After a period of time, CMS essentially gives providers a pass on overpayments based on the "staleness" of the claim. Section 1870 of the Social Security Act allows for limited waivers of recovery when a provider was "without fault" in causing the overpayment and recovery would be "against equity and good conscience," says San Francisco attorney Judy Waltz, with Foley & Lardner LLP. Because of the new fiscal-cliff law, the hospital will be considered liable for repayment of an erroneously paid claim five years following the year in which payment was made, not three, even if the hospital was without fault in causing the overpayment.

"It's a little change that potentially has a big effect," says Washington, D.C., attorney Robert Roth, with Hooper, Lundy & Bookman. "It could lead to a change in the reopening regulations. Right now, providers figure once there is a violation, four years is arguably as far back as it would go, in the absence of an allegation of fraud." That's because CMS regulations (42 CFR Sec. 405.980) and related manual provisions allow Medicare administrative contractors to reopen claims for only up to 48 months (unless "there is reliable evidence...that the initial determination was procured by fraud or similar fault").

Medicare contractors, qualified independent contractors, administrative law judges and providers may reopen claims. According to chapter 34 of the Medicare Claims Processing Manual, "a contractor may reopen and revise its initial determination or redetermination on its own motion" within one year for any reason and within four years "for good cause" (e.g., new and material evidence has come to light). The manual also states that providers can ask contractors to reopen claims along the same lines. There's no time limit in cases of fraud or clerical errors.

So which overpayment standard governs? And when providers identify errors and refund Medicare overpayments under the 60-day repayment mandate, should they abide by the fiscal-cliff law or the 48-month standard, at least until CMS finalizes a regulation on the 60-day rule?

Lots of Dates, Lots of Confusion

"I used to tell people the easy one is 48 months and the hard one is three years after the year you received payment" before the fiscal-cliff law changed it to five years, Glaser says. "It was legally defensible and more favorable" to go with 48 months because of the hassle in figuring out the latter. Depending on when the overpayment determination is made, Sec. 1870 could stretch to four years under the old law and six years under the new law, he says.

Here's why: the pre-fiscal-cliff statute limited recoupment to "three years after the year in which payment was made." Suppose Medicare paid the provider on Jan. 1, 2010. The first "year following the year" of payment is 2011, and the "third year" is 2013, which means the recovery can be done anytime through Dec. 31, 2013, Glaser says. "Functionally, that is four years," he says.

But if payment were made on July 1, 2010, recovery can still occur any time until Dec. 31, 2013, because the first year is 2011, the second is 2012, and the third year is 2013, he says. That's three years and six months.

The recoupment deadline drops to three years when payment was made on Dec. 31, 2010, because the first year is 2011, the second year is 2012 and the third is 2013.

What a difference a day makes. "A payment received January 1 can be recouped for four years, and one received December 31 can be recouped for three," Glaser says. "To convert this to the new statute, just add two years to each example."

Now Glaser is trying to figure out whether there is a way to still use the 48 months. "It isn't clear."

The grab bag of recoupment and "without fault" timelines — there are more, including the cost-report reopening deadlines — leave providers in limbo, says Washington, D.C., attorney Linda Baumann, with Arent Fox. Even before the fiscal-cliff law, providers sometimes struggled to determine the appropriate look-back period when returning overpayments. But now it feels different. "Be prepared for the government to ask for the five-year look-back period," she says. The five-year period may also be formalized when the 60-day repayment rules are finalized, Baumann says, because she thinks CMS's ambivalence about proposing a 10-year period was evident between the lines of the proposed rule's preamble. Meanwhile, providers should cling to the notion that repayments already in the works (e.g., sent to MACs or the HHS Office of Inspector General) probably escape the new five-year provision of the fiscal-cliff law and fall under the three-year version, Baumann says.

There are really two fundamental questions presented by the fiscal-cliff provision, Glaser says. What does the change in the law mean if there are no changes to the reopening rules? And will the revision in the law be followed by a change in the regulations? "The first question is a challenging legal puzzle. The second question may be the bigger question, but answering it requires a fortune teller," Glaser says. "One thing is clear: providers should complain to their members of Congress about the notion that there might be a six-year window to recover overpayments. The practical challenges to finding data that old are formidable. "

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