Weekly Auditing and Compliance Tip

National Alliance of Medical Auditing Specialists | 877-418-5564 | namas.co | namas@namas.co

June 16, 2017

Auditing Incident-To Services

To effectively audit incident-to services under Medicare, the auditor must first have an operational understanding of the rule. Unfortunately, this is not as easy as it sounds. Auditors must also understand that the incident-to rule is a Medicare only rule. This is one area where the maxim "if you are right with Medicare, you are right for all other payers" is not applicable. For that reason, auditing incident-to services for payers other than Medicare will require research and analysis of the contracts and medical policies of each payer to determine if such reporting is permissible and where so, what requirements are applicable. As a result, this article is applicable to Medicare claims only.

Beginning with the statutory authority for the rule, we know that that Medicare provides coverage for "services and supplies (including drugs and biologicals which are not usually self-administered by the patient) furnished as incidental to a physician's professional service, of kinds which are commonly furnished in physicians' offices and are commonly either rendered without charge or included in the physicians' bills." 42 U.S.C. §1395x(s). Physician is defined as "(1) a doctor of medicine or osteopathy ..., (2) a doctor of dental surgery or of dental medicine..., (3) a doctor of podiatric medicine ..., (4) a doctor of optometry...,

or (5) a chiropractor ....", Id at. §1395x(r). The regulations provide the elements of the rule and these elements therefore become the basis for how auditors should evaluate compliance with the rule as follows:

(b) Medicare Part B pays for services and supplies incident to the service of a physician (or other practitioner).

(1) Services and supplies must be furnished in a noninstitutional setting to noninstitutional patients.

(2) **Services and supplies must be an integral, though incidental, part of the service of a physician (or other practitioner) in the course of diagnosis or treatment of an injury or illness**.

(3) Services and supplies must be commonly furnished without charge or included in the bill of a physician (or other practitioner).

(4) Services and supplies must be of a type that are commonly furnished in the office or clinic of a physician(or other practitioner).

(5) In general, services and supplies must be furnished under the **direct supervision of the physician (or other practitioner).** Designated care management services can be furnished under general supervision of the physician (or other practitioner) when these services or supplies are provided incident to the services of a physician (or other practitioner). The physician (or other practitioner) supervising the auxiliary personnel need not be the same physician (or other practitioner) who is treating the patient more broadly. However, only the supervising physician (or other practitioner) may bill Medicare for incident to services.

(6) Services and supplies must be furnished by the physician, practitioner with an incident to benefit, or auxiliary personnel.

(7) **Services and supplies must be furnished in accordance with applicable State law.**

(8) A physician (or other practitioner) may be an **employee or an independent contractor.**

(9) Claims for drugs payable administered by a physician as defined in section 1861(r) of the Social Security Act to refill an implanted item of DME may only be paid under Part B to the physician as a drug incident to a physician's service under section 1861(s)(2)(A). These drugs are not payable to a pharmacy/supplier as DME under section 1861(s)(6) of the Act.

(c) Limitations.

(1) Drugs and biologicals are also subject to the limitations specified in § 410.29.

(2) **Physical therapy, occupational therapy and speech-language pathology services provided incident to a physician's professional services are subject to the provisions established in §410.59(a)(3)(iii), § 410.60(a)(3)(iii), and § 410.62(a)(3)(ii).**

42 C.F.R. § 410.26 (emphasis added)

While the regulation has changed recently to extend the scope of the rule beyond physicians (contrary to the statutory rule), this issue is beyond the scope of this article. Instead, we will focus on the bolded elements in the rule, which create the areas of greatest confusion (from an operational perspective). For this reason, these are the areas of the rule where most violations occur and each is addressed as follows.

I. Service Legally Performed?

Legal performance of a service is always a fundamental issue that should never be overlooked; however, analysis under the incident-to rule creates some special problems given the breadth of the definition of who qualifies as "auxiliary personnel." As indicated as subsection (7) of the regulation (above), the "[s]ervices and supplies must be furnished in accordance with state law." A review of the federal register publication of the final rule reveals that "auxiliary personnel" could be any person acting under the supervision of a physician (or presumably a licensed non-physician practitioner). In the official comments, CMS stated that it expressly chose the term "any individual" when defining "auxiliary personnel"..."[s]o that the physician (or other practitioner), under his or her discretion and license, may use the service of anyone ranging from another physician to a medical assistant." Federal Register, Vol. 66, No. 212, pp 55267-55268 (November 1, 2001). CMS stated further

Our 2-Day E&M BootCamps are scheduled as follows:

June 28 & 29: Austin, TX
July 5, 6, & 7: LIVE Online
July 11 & 12: East Lansing, MI
July 26 & 27: Nashville, TN
August 8 & 9: Charleston, SC
August 17 & 18: Boston, MA
And more!

Click Here to Learn More & View Our E&M Auditing BootCamp schedule

Weekly Tip Sponsor

Miscoe Health Law, LLC concentrates on providing representation to small and mid-sized physician practices that need legal assistance associated with post payment audits.

Click the logo above to learn more about Miscoe Health Law

Membership Benefit Spotlight

Here, each week we will highlight one of the many benefits of a NAMAS membership

Pharmacy Discounts

NAMAS members have the opportunity to save on prescriptions at various pharmacies!

To learn more about this member benefit and receive your prescription savings card, please email namas@namas.co

NAMAS Calendar of Events

that it was "...impossible to exhaustively list all incident-to services and those specific auxiliary personnel who may perform each service.". Ibid. In essence, CMS is deferring who is permitted to perform services incident-to a physician to the various state licensure boards.

As a result, an auditor must identify the person that performed the service, and validate that the person that performed the service is either licensed (and credentialed) in his or her own right to perform the service or is legally permitted to perform the service as a delegatee of the physician or other qualified practitioner that ordered the service. Where the person that performed the service cannot bill under their own name, auditors need to ensure, through analysis of the particular state licensure rules, that the ordering/supervising provider is permitted to delegate actual performance of the service. Where such delegation is not permitted, the performing person is not an "auxiliary person" as defined in the rule and incident-to billing is not permitted.

Analysis under this element is especially problematic where services incident to the professional service of a non-physician practitioner is considered. Licensure rules for mid-levels do not commonly provide delegation authority that would permit them to supervise performance of medical services performed by (for example) and unlicensed assistant.

TIP: Start your incident-to analysis with a review of the licensure rules for each type of ordering/supervising provider.

II. Employment Relationship
Another key component to determining whether the performing person qualifies as "auxiliary personnel" under the rule is the analysis of the employment relationship of both the ordering provider and the performer. If the practice is a group practice, both the ordering provider and the auxiliary person need to be employed (in some manner) by the practice. A W-2, 1099, or leased employment relationship will suffice. In a single provider practice, the person performing services that will be billed incident-to must be employed by the physician/provider.

I have recently seen a contract where a diagnostic test company was providing a technician that it

Click the image above to view our monthly calendar

NAMAS is proud to offer the following webinars in June

We Had a HIPAA Breach: Now What?
Speaker: Kelly Ogle
June 20, 2017
2pm EST

This webinar is FREE for NAMAS Platinum, Gold, and Silver/Basic members who have selected our Compliance webinar series. This webinar is also available for purchase for $49.99.
Click here to purchase

Hands On: Auditing ER Services
Speaker: Stephanie Allard
June 27, 2017
2pm EST
This webinar is FREE for NAMAS Platinum members
This webinar is also available for purchase for $49.99
Click here to purchase

namas 9TH ANNUAL AUDITING & COMPLIANCE conference 2017

Do You Want More Insight Into Incident-To Services?

employed to the physician practice to assist with the provision of allergy testing services. The technician's work associated with performing the testing was to be billed incident-to the practice physician who ostensibly ordered and supervised the allergy testing. Ignoring the obvious anti-kickback issues, the technical component of the service would not be billable under the ordering/supervising physician in this case since the technician had no employment relationship with the practice. Absent the employment relationship, the technician does not meet the definition of auxiliary personnel under the rule and incident to billing would not be permitted.

TIP: Make sure, at the start of your audit, that you understand the employment relationship between each provider and each performer of billed services.

III. Integral although Incidental?
This element is often at the center of any incident-to violation. As described further in the Medicare Benefit Policy Manual ("MBPM"), IOM Pub 100-2, Ch. 15, §60, and assuming the person performing the service is a licensed non-physician practitioner ("NPP"), to demonstrate compliance with this element of the rule, the physician must initiate and remain actively involved in the course of care for the problem being addressed at a subsequent visit by the NPP acting as auxiliary personnel. As such, the incident-to rule is condition or diagnosis centric, not patient centric. For this reason, auditors must look at each condition being addressed at subsequent encounters by auxiliary personnel and find the initial encounter where each of those conditions was evaluated and verify that a physician performed the examination, rendered the diagnosis, and developed the plan of care. Essentially, the auditor must determine that the course of care being implemented by auxiliary personnel at a subsequent visit was a product of the physician's decision-making.

TIP: It is important for an auditor to trace the service performed by auxiliary personnel back to the plan of care established by the physician. To make this easier and to ensure the practice is compliant with the rule, it is helpful if auxiliary personnel reference by date, the physician's plan of care that they are following.

In addition to the initiation requirement, the auditor must also determine that the physician is

NAMAS will be hosting an Incident-to SMACKDOWN at our 9th Annual Auditing & Compliance Conference

Listen to healthcare experts Nancy Beckley, Shannon DeConda, David Glaser, Scott Kraft, Robert Liles and Michael Miscoe battle out their thoughts on Incident-to Services!

You won't want to miss this OR any of our other sessions - secure YOUR spot at conference with just a $50 deposit!

Conference Information
Pre-Conference: Tuesday, December 5
Conference: Wednesday, December 6 - Friday, December 8
Venue: Lowes Sapphire Falls Resort
Orlando, FL

Click Here to View the Conference Agenda

Learn from the best in the industry, network with your peers and visit with our hand picked group of industry relevant exhibitors all in the gorgeous Caribbean inspired backdrop of the Loews Sapphire Falls Resort

Conference Pricing - Available Through June 30, 2017
NAMAS Member
Conference Only: $1095
Pre-Conference & Conference: $1295

Non Member
Conference Only: $1195
Pre-Conference & Conference: $1495

Plus, Don't Miss Your Opportunity to Be a Conference VIP!

This year, we are proud to offer a limited number of VIP package add-ons available to all attendees at the nominal rate of $129. Add on the VIP experience to your conference registration today!

As a Conference VIP, you'll receive:

- A VIP registration line for faster check-in

remaining "actively involved" in the patient's treatment. Unfortunately, how often (if at all) the physician must personally perform a service is an issue that can only be resolved by looking at the state licensure rules. These vary from state to state and just as was the case above where you must research state licensure rules to determine whether delegation authority exists for the service at issue, you must also research these rules to determine the method and frequency of physician on-going involvement.

TIP: Auditors evaluating incident-to services must be familiar with the licensure rules that are applicable to each person involved in the provision of services that will be billed under the incident-to rule.

CONCLUSION
The above are but just some of the more common problems that you are likely to identify when auditing incident-to services. There are additional nuance issues that space limitations preclude addressing in this article. One final important point to remember is that when auditing incident-to services on Medicare claims, identification of problems usually means that a disclosure and refund are necessary. As such, an exceptional understanding of the rule and practice with its application in a variety of scenarios is necessary to avoid missing an error or declaring an error incorrectly.

This Week's Tip Written by:

Michael D. Miscoe, Esq. Michael Miscoe is the founding partner of Miscoe Health Law, LLC. Mr. Miscoe is the President-elect of the National Advisory Board of the AAPC, is also a member of the Legal Advisory Board, and is chair of the Legal Ethics Committee.

- A VIP branded name badge to wear during conference sessions
- Registration to our EXCLUSIVE VIP Brunch & Session occurring the morning of Wednesday, December 6 before general session begins. This exclusive training will be presented by Frank Cohen
- Admission to our VIP ONLY EVENT - occurring the evening of Thursday, December 7. Enjoy a relaxing evening of entertainment, dancing, food and networking in the Caribbean inspired Sapphire Falls Resort
- Bonus NAMAS Swag
- Additional $500 in NAMAS Bucks! Use NAMAS Bucks to bid on a variety of prizes available in our exhibit hall

And, as a special added bonus, all VIP attendees will receive a book of printed handouts for all NAMAS pre-conference & conference sessions. As a VIP, there's no need to print handouts before you arrive! Your book will be waiting for you upon your arrival!

There are only a limited number of VIP packages available to be issued on a first come, first served basis**.** Add on the VIP experience to your conference registration today!

Register Now

Sample what a NAMAS membership can offer you with our FREE 1-month LITE trial membership

Stay Up to Date With NAMAS News & Announcements

Follow us on social media and always be in the know!

Register for our 1-month free trial LITE membership and experience a sample of what a NAMAS membership has to offer - NO Credit Card Information Needed!

During your trial, you'll receive access to weekly webinars for a chance to earn up to 4CEUs, weekly auditing and compliance tips, and even an online sample of BCAdvantage magazine!

Click the image above to get your 1-month free trial membership today!

Complimentary Tip of the Week

Our weekly auditing & compliance tip emails are available to anyone who could benefit from this information.
If you know someone who would like to receive these emails, invite them to sign.

Click the image above to be added to our email list!