"Should Auld Acquaintance Be Forgot" - Performant to Initiate Home Health, Hospice, and DME Audits in 2017

H. Carol Saul and Lanchi N. Bombalier

The final quarter of 2016 ended with the Centers for Medicare & Medicaid Services (CMS) announcing Performant Recovery, Inc. (Performant) as the new national Recovery Audit Contractor (RAC) to focus solely on Home Health, Hospice, and Durable Medical Equipment (HHH/DME) claims. The announcement signals an end to a reprieve enjoyed by these providers due to a bid dispute that began in 2015. While the role of National Contractor for HHH/DME is new to the Recovery Audit Program, Performant is no newcomer to being a RAC, having previously served as the general Recovery Auditor for Region A for six northeastern states.

The Statement of Work for the HHH/DME RAC currently limits Performant to post-payment reviews for a three-year lookback period to identify improper payments and, similar to other RACs, Performant is required to obtain CMS approval for all topics or issues for review and post a listing of the CMS-approved topics on a website for provider access. Although the RAC audits may begin as early as January 2017, Performant's RAC website is in the process of being updated and is slated to be ready in early January. Also, according to a Performant representative, the RAC is still going through the CMS review approval process for HHH/DME topics for review, so it is possible that RAC audits may not be initiated until closer to the end of the first quarter of 2017.

While serving as the general RAC for Region A, Performant identified several home health and hospice issues for complex medical review:

- Skilled nursing length of stay for home health agency (in 2012)
- No skilled services for home health agency (in 2012)
- Manual medical review of outpatient therapy claims above the $3,700 threshold for home health agency (in 2013)
- Extensive length of stay for hospice (in 2013)

In recent years, the Recovery Audit Program has been at the center of controversy and active litigation regarding the backlog of appeals at the Office of Medicare Hearings and Appeals, which oversees Administrative Law Judge hearings. The HHH/DME RAC Statement of Work notably establishes several guidelines and standards to incentivize the RAC to manage the volume and quality of RAC denials, both from a financial and a resource standpoint. The following are some examples of requirements outlined in the HHH/DME Statement of Work issued in November 2016:

- Minimum requirements for "accuracy" of RAC decisions - the RAC must maintain an accuracy rate of at least 95% and for each percentage point above 95%, the RAC earns a 0.2% contingency fee increase from the base contingency fee. While the new CMS methodology for setting Additional Documentation Requests (ADRs) based upon provider compliance applies – meaning, providers with low denial rates have lower ADR limits and providers with high denial rates have higher ADR limits - CMS may also institute a progressive reduction in the RAC's own ADR limits for the failure of the RAC to maintain an accuracy rate of 95%.
- At the first level of appeal (i.e., Redetermination review), the expectation is that the overturn rate will be less than 10% for each fiscal year, counting only those instances where the RAC made an incorrect claim decision and the overturn was not due to the provider submitting new or additional documentation or similar issues. For each percentage point below 10%, the RAC earns a 0.1% contingency fee increase.

- For Administrative Law Judge appeals, the RAC must participate as a "party" in a minimum of 50% of cases, which would allow the RAC to call and cross-examine witnesses, object to issues, and be subject to discovery requests, among other things. In a minimum of 50% of the remaining cases that reach that level of appeal, the RAC must participate as a "participant," which limits the RAC in most instances to filing position papers or providing testimony to clarify factual or policy issues, but does not allow the RAC to call or cross-examine witnesses.

Although the Recovery Audit Program historically has been grounded in identifying improper payments and not investigating fraud or abuse, CMS has also established an expectation for the RACs to communicate and collaborate closely with other Medicare contractors, including the Zone Program Integrity Contractors (ZPICs). The HHH/DME Statement of Work provides that the RAC is to schedule regular meetings (i.e., at a minimum quarterly and ideally, monthly) with ZPICs to discuss potential referrals and trends in the applicable jurisdictions.

With the advent of the new HHH/DME RAC in 2017 and increased collaboration among Medicare audit contractors, home health and hospice providers must prepare for increased scrutiny. Now that Medicare auditors, including RACs, have ample access to claims data to analyze and compare coding, billing, and utilization patterns, all providers, even those without a history of survey or compliance issues, are at risk of being targeted for review. It is more important now than ever for providers to ensure that self-audit programs and related compliance protocols and systems are up-to-date and in place and that systems are in place to manage and fully and timely respond to any ADRs.

Authors and Contributors

H. Carol Saul
Partner, Atlanta Office
404.873.8694
carol.saul@agg.com

Lanchi N. Bombalier
Partner, Atlanta Office
404.873.8520
lanchi.bombalier@agg.com

not *if*, but *how*.®

About Arnall Golden Gregory LLP

Arnall Golden Gregory, a law firm with more than 150 attorneys in Atlanta and Washington, DC, employs a "business sensibility" approach, developing a deep understanding of each client's industry and situation in order to find a customized, cost-sensitive solution, and then continuing to help them stay one step ahead. Selected for The National Law Journal's prestigious 2013 Midsize Hot List, the firm offers corporate, litigation and regulatory services for numerous industries, including healthcare, life sciences, global logistics and transportation, real estate, food distribution, financial services, franchising, consumer products and services, information services, energy and manufacturing. AGG subscribes to the belief "not if, but how.®" Visit www.agg.com.

Atlanta Office
171 17th Street, NW
Suite 2100
Atlanta, GA 30363

Washington, DC Office
1775 Pennsylvania Avenue, NW
Suite 1000
Washington, DC 20006

To subscribe to future alerts, insights and newsletters: **http://www.agg.com/subscribe/**