Published on *The National Law Review* https://natlawreview.com

Change Attempts to Curtail Use of Advanced Imaging

Article By:

Eric Zimmerman

Paul W. Radensky, M.D.

Tucked away in the recently enacted **Medicare legislation** is a little-noticed provision that should be drawing more attention. While this legislative change implements a seemingly benign new requirement applicable only to physicians ordering advanced **diagnostic imaging services**, it will likely set the stage for new controls on the use of a wide variety of services perceived to be over-utilized and driving up Medicare costs, including, for example, radiation therapy and clinical laboratory services.

The provision, found in section 218 of the **Protecting Access to Medicare Act of 2014** (PAMA), begins a process that eventually will require physicians ordering certain imaging services to consult appropriate use criteria applicable to the imaging modality. Specifically, beginning January 1, 2017, in order to be paid by Medicare for advanced diagnostic imaging services (defined to include magnetic resonance, computed tomography, nuclear medicine and positron emission tomography imaging services) under the Physician Fee Schedule, Outpatient Prospective Payment System or Ambulatory Surgery Center payment system, furnishing professionals and entities (including hospitals) must certify that professionals ordering advanced diagnostic imaging services consulted appropriate use criteria applicable to the imaging modality. Furnishing professionals and entities will be required to specify on the claim which qualified clinical decision support mechanism was used to consult the appropriate use criteria, and whether the service ordered adheres to those criteria. At least initially, it will not be required that the imaging service furnished actually adheres to the use criteria, just that the use criteria were consulted. However, compliance with use criteria is a likely next step.

The appropriate use criteria must be defined by the Secretary (through the Centers for Medicare & Medicaid Services) by November 15, 2015, in consultation with physicians, practitioners and other relevant stakeholders. These criteria must be developed or endorsed by national professional medical specialty societies or provider-led entities, and must be evidence based, to the extent feasible.

The Secretary must specify by April 1, 2016, the different qualified clinical decision support mechanisms that ordering professionals can consult. These support mechanisms may be modules in certified electronic health record technology, private sector mechanisms that may include clinical

support mechanisms available from medical specialty organizations, or mechanisms established by the Secretary. They must meet the following criteria in order to be qualified:

- Make available the appropriate use criteria and supporting documentation
- Determine the extent to which the ordered imaging service meets the appropriate use criteria
- Create documentation to demonstrate consultation by the ordering physician
- Maintain the latest appropriate use criteria with timely updates should changes occur
- Meet privacy and security standards

These consultation requirements will not apply to inpatient services, emergency services as defined under the Emergency Medical Treatment and Active Labor Act, or services ordered by professionals who meet the hardship criteria (as deemed on a case-by-case basis).

Annually, using two years of data, the Secretary must identify no more than 5 percent of ordering professionals who are outlier ordering professionals based on their low adherence to the specified applicable use criteria. Beginning January 1, 2020, prior authorization will be required for applicable imaging services that are ordered by outlier ordering professionals.

The legislative change, once implemented, will put physicians and entities (including hospitals) furnishing advanced imaging services in the position of having to confirm that the ordering physician consulted the appropriate use criteria. Similar Medicare programs, such as requirements that withhold payment from durable medical equipment suppliers if the ordering physician did not adequately document certain medical necessity requirements in the patient's medical record, place the actual supplier of the service—in this case the imaging provider—in the unenviable position of having to manage and confirm the ordering physician's compliance.

This legislative change is the latest in a parade of recent legislative changes designed to manage utilization of and Medicare expenditures for diagnostic imaging. And more change is looming over the horizon. In 2011, the Medicare Payment Advisory Committee (MedPAC) recommended that high-use practitioners participate in a prior notification and authorization program for advanced diagnostic imaging. MedPAC also recommended reduced payments to account for efficiencies where multiple imaging services are provided to the same patient in a single session by the same practitioner. President Obama, through his budget proposals, also has waded into these waters, recommending the use of radiology benefit managers in Medicare to slow the growth of imaging costs.

As is often the case with legislative changes to Medicare, new programs with limited scope can blossom into larger programs and signal the likelihood of broader application in the not-so-distant future. In this case, section 218 begins a process of requiring ordering physicians to "consult" with appropriate use criteria. It is not hard to imagine Congress extending that requirement to compliance with appropriate use criteria once the mechanisms are established, tested and proven.

Similarly, the legislation begins to introduce the controversial concept of prior authorization into Medicare. While initially applicable to a small group of doctors (5 percent of ordering professionals who are "outliers"), this proverbial camel's nose under the tent sets the stage for expanded application to a wider group of high-utilizers in the future.

Those providing services other than advanced imaging also should watch this provision closely. While the legislative change is initially applicable only to advanced imaging services, PAMA requires the U.S. Government Accountability Office to issue a report by September 2015 on whether a similar appropriate use consultation or compliance requirement could be applied to other services covered by Medicare, and specifically calls out radiation therapy and clinical diagnostic laboratory services. Any student of Congress will tell you that study requests such as this are signals for future legislative action. When Congress requests a study, it already knows the answer and is looking to justify its next move.

National Law Review, Volume IV, Number 118