Leased Employees May Qualify for "Incident to Coverage"

Dec 01 1996

Practice Area: Health Law

In October 1996, HCFA revised its guidelines to clarify who may be considered a nonphysician employee for purposes of the "incident to" provision under § 1861(s)(2)(A) of the Social Security Act. Specifically, the term "employee" now includes part-time, full-time, and *leased employees* of the supervising physician. This change provides partial relief from a complex and frustrating billing problem with regard to the provision of ancillary services and other nonphysician services provided in a physician clinic.

The Medicare program covers services provided by nonphysician employees that are rendered "incident to" a physician's professional service. To qualify for "incident to" coverage, the services or the supplies must be: (1) an integral, although incidental, part of the physician's personal professional service; (2) commonly rendered without charge or included in the physician's bill; (3) of a type commonly furnished in physicians' offices or clinics; (4) furnished under the physician's direct personal supervision; and (5) furnished by the physician or by an individual who qualifies as an employee of the physician.

Nonphysician personnel who may qualify for incident to coverage include auxiliary personnel such as nurses, psychologists, technicians, therapists, and other aides. Nonphysician practitioners who are separately licensed, such as certified nurse midwives, clinical psychologists, clinical social workers, physician assistants and nurse practitioners, may also qualify for incident to coverage.

Historically, HCFA has strictly interpreted the term "employee." To be considered an employee for "incident to" coverage, the physician and the nonphysician personnel must have had a W-2 relationship.

Recently, HCFA and the regional offices have given the Medicare carriers discretion to determine whether an employer-employee relationship existed when a physician or clinic leased nonphysician employees. HCFA instructed the carriers to use the common law control test referred to in § 210(j)(2) of the Social Security Act. Region V has stated that HCFA has generally held that the right to hire and fire is a key factor in determining the validity of an employer-employee relationship. However, Region V acknowledged that the right to hire and fire is only one factor that the carrier must consider and that a valid employment relationship may be found if other factors indicate a degree of control which will protect the interests of Medicare beneficiaries.

Under HCFA guidelines that were released in October, to be considered an employee, "the nonphysician performing an incident to service may be a part-time, full-time, or *leased employee* of the supervising physician, physician group practice, or of the legal entity that employs the physician who provides direct personal supervision."

HCFA defines a leased employee as a nonphysician working under a written employee leasing arrangement which provides that:

- The nonphysician, although employed by the leasing company, provides services as the leased employee of the physician or other entity; and
- The physician or other entity exercises control over all actions taken by the leased employee with regard to the rendering of medical services to the same extent as the physician or other entity would exercise such control if the leased employee were directly employed by the physician or other entity.

As with the physicians' personal professional service, the patient's financial liability for the incidental services is to the physician, physician group practice, or other legal entity. Therefore, the incidental service must represent an expense incurred by the physician, physician group practice, or other legal entity responsible for providing the professional services.

To satisfy the employment requirement, the nonphysician, leased or directly employed, must be considered an employee of the supervising physician or other entity under the common law control test of an employer-employee relationship as specified in the Social Security Act, its regulations and the Social Security Program Operations Manual.

Interpretive regulations provide that, in general, an individual is a common-law employee if the person (employer) for whom the individual works may tell the individual what to do and how, when, and where to do it. The person (employer) does not have to give these orders, but only needs the right to do so.

The regulations recognize that whether or not an individual is a common-law employee is not always clear. In this regard, several aspects of the job arrangement should be considered in determining whether an individual is an employee under the common-law rules. The regulations list the following factors as aspects of a job arrangement that may show employee status:

1. The physician may fire the nonphysician.
2. The physician furnishes the nonphysician with tools or equipment and a place to work.
3. The nonphysician receives training from the physician or is required to follow the physician's instructions.
4. The nonphysician must do the work himself or herself.
5. The nonphysician does not hire, supervise, or pay assistants (unless the nonphysician is employed as a manager or supervisor).
6. The physician sets the nonphysician's work hours, requires the nonphysician to work full-time, or restricts the nonphysician from doing work for others.
7. The physician pays the nonphysician's business or traveling expenses.
8. The nonphysician is paid by the hour, week or month.

The regulations list the following factors as aspects of a job arrangement that may show an employer-employee relationship does not exist:

1. The nonphysician makes a profit or suffers a loss.
2. The nonphysician is hired to complete a certain job and if the nonphysician quits before the job is completed the nonphysician may be liable for damages.
3. The nonphysician works for a number of physicians, a number of group practices, or a number of legal entities that employ physicians at the same time.
4. The nonphysician advertises to the general public that the nonphysician is available to perform services.
5. The nonphysician pays his or her own expenses and has his or her own equipment and work place.

An analysis of whether an employer-employee relationship exists will have to be made on a case by case basis. However, any contracts which establish a leased employee relationship should incorporate the factors listed in the regulations which indicate that an employer-employee relationship exists. Most importantly:

- The physician should have the right, duty and obligation to control and direct the nonphysician personnel whose services are billed as services provided incident to the physician's professional services, not only as to the result to be accomplished but also as to how the result is accomplished; and
- The physician should have the ability to dismiss any nonphysician personnel whose services do not meet the physician's standards.

Satisfaction of these standards could lead to other complications. For example, an arrangement that satisfies these criteria could transform the relationship into an employer-employee relationship for federal income tax purposes.
