

HEALTHCARE LAW ALERT

To Participate or Not to Participate: The Question Physicians are Currently Pondering in Light of Potential 21% Medicare Pay Cut

by Kim Licata and Steve Shaber

Every year, physicians may ponder whether or not they want to participate in Medicare and be subject to all the rules and regulations (and reimbursement limitations) that come with being a participating provider. This year, more physicians are taking a serious look at their participation status with the continued threat of a 21.2% drop in the Medicare physician conversion factor. President Obama's signing of the Temporary Extension Act of 2010 on March 2nd delays the reduction until March 31, 2010, with a longer extension being debated (but not resolved) by lawmakers. In the meantime, what's a physician to do?

When considering contracting with Medicare, physicians have three options which govern their participation status for an entire calendar year.

- **Participating (PAR):** Physician signs a participation agreement with Medicare agreeing to take assignment on all Medicare claims as payment in full for all covered services. PAR physicians are paid **100%** of the Medicare fee schedule amount for covered services.
- **Non-Participating (Non-PAR):** Physicians can either accept assignment for Medicare patients or pursue payment from patients on unassigned claims. On assigned claims, non-PAR physicians are paid **95%** of the Medicare fee schedule amount for covered services. However, on unassigned claims, non-PAR physicians may collect up to **109.25%** of the Medicare fee schedule amount, assuming their patient pays.
- **Private Contracting/Opting Out:** This third option permits physicians to privately contract in writing with all patients to provide health care services outside the Medicare reimbursement system. The amount agreed upon by the physician and patient might bear little relation to the Medicare fee schedule amounts. By law, this private contract between a physician and a patient must contain certain provisions.

Generally, each year, physicians have the opportunity to assess which of the above categories they prefer to be. This year, a physician wanting to change his or her current status with Medicare must notify their



contractor in a signed letter (or affidavit if opting out) received or postmarked on or before March 17, 2010. When a physician elects to opt out and pursue private contracts with patients, the opt-out is effective back to January 1st of the year in which the physician notifies the contractor of the opt-out. Physicians who decide to opt-out, but later are not sure that they have done the "right" thing, have 90 days after the effective date of the first-opt-out affidavit to **revoke** the opt-out and return to the Medicare program as if no opt-out had ever occurred.

When facing a large cut in reimbursement for covered services under Medicare, physicians might quickly think that opting out of Medicare is a good fix, but is opting out for everyone? Not necessarily. The decision to opt-out or participate in the Medicare program should be based on a physician's total practice and experience. For example, a physician may wish to consider the following (but certainly not limit the consideration to these factors):

1. Is the physician under any obligation to be a PAR physician?

Where might a physician find such an obligation? In a hospital contract, a health plan contract, the governing documents for a physician practice, employment and/or independent contractor agreements, professional services agreements, clinic rules and bylaws, among others. It is conceivable that these same documents could contain an obligation to opt-out as well. Either way, physicians should review (perhaps with the aid of legal counsel) all the agreements, bylaws, and rules applicable to their practice when considering their status under Medicare.



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2. What is the financial impact of opting-out/changing status?

This isn't merely about 100%, 95%, or 109.25% or more (if you opt-out) of the Medicare fee schedule amount or a hypothetical fee collected for services in the abstract. This is the point at which a physician must carefully consider the patient mix, expenses, and reimbursement profile of his or her practice. Opting-out may cause some existing patients who are Medicare beneficiaries to leave a practice, which may not matter if the practice loses money on its Medicare patients. Opting-out may save overhead costs, or may add administrative burdens to a practice with its need for individualized physician-patient contracts. For other practices, loss of Medicare patients and/or reimbursement could put the practice under water and cost a physician too much guaranteed revenue. It really depends on the practice, so take a hard look at your total practice.

3. Will opting-out affect a physician's or practice's reputation in the community?

Patients and their family members may have very positive or negative feelings about the Medicare program. A physician may not know the existence of these feelings until deciding to change his or her status. Be prepared for anything!

4. Will opting-out affect the marketing of a physician or a practice?

5. Is opting-out consistent with your personal practice philosophy?

6. Will opting-out increase your job satisfaction or decrease it?

As with any big decision, the key to finding a successful answer is doing your homework and researching the facts. Get educated, reliable, and trustworthy advice from your business counselors and consultants to make the best possible decision.

If a physician wants to become non-participating, but accept assignment from Medicare on some claims, a physician must notify the Medicare carrier in writing of this decision by the participation date. On assigned claims, Medicare will pay the non-PAR physician 80% of 95% of the Medicare fee schedule for the service. For unassigned claims, Medicare pays the patient for the services provided and the physician must seek full payment from the patient (up to the limiting charge).

Once a physician has determined, based on an analysis of these factors, that opting-out is the way to go, this is briefly the process a physician must utilize.

- **First**, a physician must notify patients, colleagues, and others of the decision to opt-out. Notify your patients in a clear and concise signed letter. As is frequently the case with physician-patient interaction, having good open lines of communication is essential. Many

patients do not understand Medicare, let alone what it means to opt-out. It is important to emphasize how your patients can continue to see you as their physician.

- **Second**, a physician must file an affidavit with Medicare carriers who have jurisdiction over his or her claims of the decision to opt-out. A physician must file such an affidavit every two years to maintain the opt-out status.
- **Third**, a physician must privately contract with patients to whom he or she will continue to provide care. Remember Medicare requires that this contract contain certain statements. To be sure this step is done correctly, consider having your template agreement reviewed by your attorney.
- **Fourth**, a physician should establish necessary office policies and procedures to properly handle the contracting and billing of Medicare patients now that the physician has opted out of Medicare. Give staff a script to explain your decision to opt-out to patients and colleagues.

The American Medical Association has several templates on its website for opting out, as well as a useful summary of the options for physicians participation (or non-participation) in Medicare. These resources can be found under the topic of "Medicare Participation Options" at <http://www.ama-assn.org/ama1/pub/upload/mm/399/med-par-options.pdf>. Likewise, the Association of American Physicians and Surgeons, Inc. maintains resources on its website at <http://www.aapsonline.org/medicare/optout.htm>. The professional societies and associations affiliated with many specialties of medicine may also provide additional resources for their members on opting out and useful templates.

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