
THE PITFALLS OF CERTIFYING HOME HEALTH CARE

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INTRODUCTION

Oberheiden & McMurrey is a healthcare law defense firm with significant experience in the areas of regulatory compliance, corporate structuring, litigation, government investigations, and criminal defense. Among our attorneys are the former Chief Health Care Fraud Coordinator at the U.S. Attorney's Office, former senior Department of Justice trial attorneys, former lead prosecutors of the elite Medicare Fraud Strike Force, and other talented attorneys with years of relevant experience and education from the country's best schools such as Harvard Law School and Yale Law School. Clients from across the United States call us when their reputation or livelihood are under attack.

We recognize the importance of each matter and we dedicate our fullest attention to each client. All clients of Oberheiden & McMurrey are represented by senior attorneys only. We are available for free and confidential consultations.

HOME HEALTH COMPLIANCE

Over the last several years, Medicare has paid tens of billions of dollars to home health agencies across the country. Based on studies and investigations conducted by federal government agencies like the Office of Inspector General, the home health industry is particularly vulnerable to fraud, waste, and abuse. As a result, home health care remains a highly-regulated and heavily-investigated industry. Given this climate of investigation, it is absolutely critical for business owners and medical providers in the home healthcare industry to be familiar with the governing rules and regulatory expectations. A centerpiece of that compliance effort is to strictly follow certification and re-certification criteria, which are subject of this brief article.

HOME HEALTH CRITERIA

Pursuant to the Social Security Act, Medicare covers certain home health services for eligible patients. To be eligible for Medicare home health services, a patient must have Medicare Part A and/or Part B and must:

- Be confined to the home (i.e., “homebound”);
- Need skilled services;
- Be under the care of a physician;
- Receive services under a plan of care established by and reviewed by a physician; and
- Have had a face-to-face encounter with a physician or allowed non-physician practitioner.

Social Security Act, section 1814(a)(2)(C), 1835(a)(2)(A). (42 U.S.C. §§ 1395f, 1395n.) Only a Medicare-participating Home Health Agency (HHA) may provide the care.

THE CRITERIA EXPLAINED

Medicare pays for patients to get certain home health care services if they meet particular eligibility criteria. Unfortunately for patients and providers alike, each of the criterion for eligibility is somewhat nuanced and requires further explanation. Below is a more detailed description of each of the conditions that must be met in order for home health services to be covered:

(1) Confined to the Home

To qualify as “confined to the home,” a patient must have a condition that makes leaving his home medically contraindicated or requires the aid of supportive devices such as crutches, canes, wheelchairs, walkers, the use of special transportation, or the assistance of another person to leave the residence.

Alternatively, a person may be “confined to the home” if a normal inability to leave home exists *and* leaving home requires a considerable and taxing effort. A patient may be considered homebound if absences from the home are infrequent, for periods of relatively short duration, for the need to receive health care treatment, for religious services, to attend adult daycare programs, or for other unique or infrequent events such as a funeral, wedding, or other special occasion trip.

(2) Skilled Services Needed

Eligibility requires that a person need one of the following: (1) skilled nursing care on an intermittent basis (fewer than 7 days each week or less than 8 hours each day for periods of 21 days or less, with extensions in exceptional circumstances when the need for additional care is finite and predictable); (2) physical therapy; (3) speech language pathology services; or (4) continuing occupational therapy services.

(3) Under a Physician’s Care

The patient must be under the care of a physician to qualify for Medicare home health services. According to the applicable federal regulations, a “physician” is a doctor of medicine, doctor of osteopathy, or a doctor of podiatric medicine (consistent with treatment functions permissible under state law). The physician must be enrolled as a Medicare provider.

(4) Plan of Care

The patient must receive home health services under a plan of care established and periodically reviewed by a physician. The plan of care may not be established and reviewed by any physician who

who has a financial relationship with the home health agency unless specific exceptions apply. 42 C.F.R. § 424.22(d)(1). Financial relationship means (1) a direct or indirect ownership interest in any entity that furnishes designated health services or (2) a direct or indirect compensation arrangement with an entity that furnishes designated health services. 42 C.F.R. § 411.354.

(5) Face-to-Face Encounter

As a condition for payment of Medicare funds, a physician must certify the patient's eligibility for home health services pursuant to 42 C.F.R. § 424.22(a)(1). The certifying physician must certify that the patient meets the above-referenced eligibility requirements and must certify that a face-to-face encounter (1) occurred no more than 90 days prior to the home health start of care date or within 30 days of the start date of the home health care, (2) was related to the primary reason for the home health services, and (3) was performed by a physician or an allowed non-physician practitioner. 42 C.F.R. § 424.22(a)(1).

The face-to-face encounter can be performed by the certifying physician, the physician who cared for the patient in an acute or post-acute care facility (from which the patient was directly admitted to home health), a nurse practitioner or a clinical nurse specialist who is working in collaboration with the certifying physician or the acute/post-acute care physician, or a certified nurse midwife or physician assistant under the supervision of the certifying physician or the acute/post-acute care physician. *Id.* The documentation of the face-to-face patient encounter must be a separate and distinct section of, or an addendum to, the certification, and must be clearly titled, dated, and signed by the certifying physician. *Id.* § 424.22(a)(1)(v). If the certifying physician does not perform the face-to-face encounter himself, the non-physician practitioner or the physician who cared for the patient in an acute or post-acute facility performing the face-to-face encounter must communicate the clinical findings of that face-to-face patient encounter to such certifying physician. *Id.* § 424.22(a)(1)(v)(A). The physician can document the encounter and certify based on the information provided by the non-physician practitioner. The face-to-face patient encounter may also occur through telehealth (in compliance with other requirements of the Act pertaining to Medicare telehealth services). *Id.* § 424.22(a)(1)(v)(C).

Documentation in the certifying physician's medical records and/or the acute or post-acute care facility's medical records (if the patient was directly admitted to home health) shall be used as the basis for certification of home health eligibility. 42 C.F.R. § 424.22(c).

¹ As with the plan of care, the face-to-face encounter cannot be performed by any physician or allowed non-physician provider who has a financial relationship with the home health agency. 42 C.F.R. § 424.22(d)(2).

Documentation in the certifying physician's medical records and/or the acute or post-acute care facility's medical records (if the patient was directly admitted to home health) shall be used as the basis for certification of home health eligibility. 42 C.F.R. § 424.22(c). Information from the home health agency can be incorporated into the certifying physician's and/or the acute or post-acute care facility's medical record for the patient. Information from the home health agency record must be corroborated by other medical record entries and align with the time period in which services were rendered. The certifying physician must review and sign off on anything incorporated into the patient's medical record that is used to support the certification of patient eligibility. The certifying physician's and/or the acute or post-acute care facility's medical record for the patient must contain the actual clinical note for the face-to-face encounter visit that demonstrates the encounter occurred within the required time frame, was related to the primary reason for the home health services, and was performed by an allowed provider type.

(6) Recertification

Recertification is required at least every 60 days when there is a need for continuous home health care after an initial 60-day episode. 42 C.F.R. § 424.22(b)(1). The recertification must be signed and dated by the physician who reviews the plan of care, indicate the continuing need for skilled services, and estimate how much longer the skilled services will be required. Id. § 424.22(b)(2). Recertification does not carry a separate face-to-face requirement.

OUR EXPERIENCE

Oberheiden & McMurrey has successfully represented clients throughout the United States who were under investigation by the Department of Justice (DOJ), the Department of Defense (DOD), the Federal Bureau of Investigation (FBI), Drug Enforcement Administration (DEA), the Office of Inspector General (OIG), the Medicaid Fraud Control Unit (MFCU), or the Internal Revenue Service (IRS). Our clients benefit from the combined experience that our team of former federal healthcare prosecutors, former leaders of the Medicare Fraud Strike Force, and experienced defense attorneys brings to the table. We routinely advise healthcare clients in False Claims Act, Stark Law, Anti-Kickback, Medicare, Medicaid, Tricare, and DOL investigations. The following are some of our most recent outcomes in federal healthcare investigations:

- Healthcare Fraud Investigation by the Department of Justice and the U.S. Attorney's Office
Result: No civil or criminal liability.
- Healthcare Fraud Investigation by the Office of Inspector General, the Department of Justice, and the Department of Health and Human Services
Result: No civil or criminal liability.
- Healthcare Fraud Investigation by the Department of Health and Human Services and the Office of Inspector General
Result: No civil or criminal liability.
- Healthcare Fraud Investigation by the Department of Defense
Result: No civil or criminal liability.
- Healthcare Fraud Investigation by the Office of Inspector General (OIG)
Result: No civil or criminal liability.
- Healthcare Fraud Investigation by the Department of Health and Human Services
Result: No civil or criminal liability.
- Healthcare Fraud Investigation by the Office of Inspector General (OIG)
Result: No civil or criminal liability.

If you have questions about home health or hospice care or if you are a target of a government investigation, you should call us to speak with one of our attorneys directly. Calls are free and confidential.

EXPERIENCED ATTORNEYS ASSISTING HOME HEALTH AGENCIES

DR. NICK OBERHEIDEN

Dr. Nick Oberheiden is the managing principal of the Oberheiden Law Group. Nick has successfully represented healthcare executives, business owners, public officials, physicians, and lawyers in civil and criminal healthcare fraud investigations. In addition to his healthcare defense practice, Dr. Oberheiden leads internal investigations, implements corporate compliance programs, and teaches U.S. criminal law and federal litigation in the United States and abroad.

QUESTIONS?

Healthcare fraud is investigated by the Office of Inspector General (OIG), the Department for Health and Human Services (HHS), the Department of Justice (DOJ), and the Federal Bureau of Investigation (FBI). The former Department of Justice healthcare prosecutors and experienced attorneys of the Oberheiden Law Group advise business owners, healthcare executives, and medical providers across the United States on regulatory compliance. We are ready to do the same for you.

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