PUBLICATION

Protection from RAC Audits and Governmental Actions: Commercial Insurers Respond to the Risks

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Specialty auditors from Medicare and other federal programs are in the field auditing providers' claims and, often, making overpayment determinations. These auditors are charged with reviewing provider claims on a pre- or post-payment basis, often deciding years after the date of service that the claims were incomplete, inaccurate or simply not medically necessary.

When faced with an overpayment determination, providers may defend their claims through the administrative appeal process but the funds are due back to Medicare. Although providers can put off repaying overpayment through the first two levels of appeal, by appealing the denials the amount of the overpayment continues to accrue interest at federal rates that are currently more than 10 percent. Appeals are time and resource-consuming, particularly when attorneys or consultants, such as statisticians or clinicians, are needed to defend the claims.

With the recent increase in Medicare billing audit activity, many of our clients are concerned that an overpayment determination could be financially devastating. Recently Baker Donelson Shareholder Jonell B. Beeler sat down with Vincent R. Hau of McGriff, Seibels & Williams, Inc. to discuss new insurance coverage available for such events.

Beeler: Medicare audit activity has been around for many years. What led those in your industry to develop an insurance product to address audits?

Hau: The health care industry is exposed to a wide spectrum of risks that are addressed through insurance products. Addressing the risk of fines, penalties, defense and overpayments presents challenges as well as a unique opportunity for insurers to serve health care organizations. Experience demonstrates that unfavorable audits do financially devastate organizations; however, with an effective defense, unfavorable federal audits are substantially overturned approximately 67 percent of the time.

The frequency of audits and public nature of the outcomes has allowed insurers to analytically address the risk and develop insurance products to spread the risk. Health care organizations now have the ability to transfer the bulk of the financial risk to the insurance market.

Beeler: What protection can a health care organization expect with RAC audit insurance?

Hau: There are six products currently on the market that specifically address governmental billing recoupment and fraud and abuse actions and there are more in development. Each product varies in its coverage to some degree, but coverage typically applies as follows:

- Coverage is triggered by an event such as a governmental inquiry, a qui tam action or even self-reporting by the insured
- Policies tend to cover defense expenses, fines and penalties associated with the billing allegation

- Only one of the insurance programs on today's market extends to cover the actual overpayment, although in such cases the insured will pay a premium of more than 60 percent of the insurance limits.

Most policies also extend to provide fines, penalties and defense coverage for Health Insurance Portability and Accountability Act (HIPAA), Emergency Medical Treatment and Active Labor Act (EMTALA), the Stark Act and other governmental enforcement actions. Policies also cover shadow audits in preparation of a defense of the billing recoupment or fraudulent billing allegation. As such, the best label for this product is governmental action coverage.

Beeler: Can a provider use its own legal counsel or will the insurance dictate who counsel may be? What about consultants?

Hau: The insurers have differing positions on the use of legal counsel. All have an established panel of defense counsel. Positions on utilizing counsel of your choosing will involve pre-negotiating or having the desired counsel added to the panel. One insurer allows selection of counsel, but if the insured selects their own counsel, then there is 25 percent coinsurance, meaning the insured will pay two percent of the total claim.

Beeler: One of the many concerns health care providers have is that auditors look back at three or four years of claims. Does insurance cover these prior periods? The government auditors also utilize statistically-based extrapolations. Does insurance cover repayment demands of the overpayment amounts determined based on extrapolations?

Hau: The insurers providing this coverage have differing approaches to the look-back issue. The most aggressive insurers provide unlimited prior acts coverage while others provide no prior acts coverage. This is often a function of the underwriting process. A health care provider with frequent or repeated overbilling allegations is likely to have restricted or no prior acts coverage.

Underwriters do understand that many health care providers have experienced governmental inquiries and actions related to overbillings. Some underwriters even view such activity as a positive as it heightens organizational concern and results in tight internal controls to manage the fraud and abuse allegation risk.

Beeler: Does the insurer have Risk Abatement counseling available? What steps do insurers recommend for providers to avoid liability?

Hau: Insurers have been hesitant in providing risk management services related to billing practices due to the fear of being drawn into lawsuits. However, some underwriters require an initial audit of practices prior to providing insurance coverage and will identify weaknesses in a provider's billing program. With increasing competition as new insurers enter this market, risk management offerings are expanding.

Beeler: Is the coverage affordable? What is the basis for cost — is it per unit or dollar-for-dollar? Is it expensive?

Hau: "Expensive" is relative. We offered coverage to a home health provider with $200 million in revenue last year providing a $3 million limit for a premium of $85,000. They declined to purchase the coverage. They contacted us this year wanting to purchase coverage after several audits were initiated. Unfortunately, that is comparable to buying property coverage on a burning building.

An individual physician can purchase $1 million of coverage for less than $1,200. We recently quoted a hospital system with $1.1 billion of revenue a $5 million policy for $135,000. The premium is variable depending on the underwriting, but based on the number of providers purchasing the coverage, premiums must be considered reasonable.

Ultimately, compared to the cost of managing an extensive audit and the potential for fines and penalties, the premiums are very reasonable. The insurance market can provide limits as high as $20 million and deductibles as low as $1,000.

Conclusion

Given the constantly changing landscape of Medicare and Medicaid billing programs and the intensity of governmental scrutiny on billing practices, health care providers should consider managing this risk with insurance. Insurers providing governmental action coverage are well versed in managing these claims and possess a depth of resources and talent to help their clients successfully defend their organizations.