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"Never Events": Payor-Provider Contracting Implications

Recently, public and private health care payors have been restricting reimbursements around "never events" – serious, preventable, adverse events that take place when a patient is under the supervision of a health care provider and result in death, loss of a body part, disability or injury. The definition of a "never event," determination of when a "never event" occurs and impact on reimbursement or cost shifting vary by payor. In addition, negotiating "never events" provisions poses a number of questions for both payors and providers.

Definition of a "Never Event"

Private payors create their lists of "never events" from at least two sources. The first is the National Quality Forum (NQF), which identified a list of events that it determined should never happen in a medical setting. The Leapfrog Group, a consortium of health care purchasers who have agreed to base their purchase of health care on principles that encourage quality improvement among providers, has used NQF's list in its "never events" policy. The second source is the Centers for Medicare & Medicaid Services (CMS), which no longer reimburses providers for certain Hospital-Acquired Conditions (HAC) and has created a different, though somewhat overlapping, list of "never events" within the HAC framework.

NQF defines "never events" as serious, preventable and of concern to both the public and health care providers. To determine which adverse events would be categorized as "never events," NQF chose events that are "clearly identifiable and measurable, and of a nature such that the risk of occurrence is significantly influenced by the policies and procedures of the healthcare organization." NQF identified 28 "never events," which can be divided into six categories:

- i. Surgical events, such as surgery on the wrong body part or wrong patient;
- ii. Product- or device-related events, such as death or disability, associated with contaminated drugs or devices;

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- iii. Patient protection events, such as patient suicide within a health care facility or the discharge of an infant to the wrong person;
- iv. Care management events, such as patient death or serious disability associated with a medication error;
- v. Environmental events, such as patient death or disability associated with a burn or fall within a health care facility; and
- vi. Criminal events, such as abduction of a patient.

As of October 1, 2008 CMS discontinued reimbursing hospitals for higher rates for inpatient stays that were the result of select HAC. CMS selected HAC as "never events" based on the following criteria:

- i. Cases having a high cost, high volume or both;
- ii. Cases resulting in a higher payment in the presence of the secondary diagnosis; and
- iii. Conditions that could reasonably have been prevented through the application of evidence-based guidelines.

CMS identifies specific HAC by requiring hospitals to report which conditions are Present on Admission (POA) and the severity of such conditions at the time of admission. CMS will reimburse for neither new conditions that appear nor conditions that increase in severity during an inpatient stay. In addition, CMS has recently proposed national coverage determinations that will prevent payment to all providers for certain "never events": wrong surgical or other invasive procedures performed on a patient and surgical or other invasive procedures performed on the wrong body part or the wrong patient.

Private payors run the gamut regarding which errors they consider "never events" and the impact of such events on reimbursement. Some payors have adopted some or all of CMS' "never events," some have adopted some or all of NQF's "never events" and many have used a combination of the two.

How Payors Are Implementing "Never Events" Policies

As in defining a "never event," private payors are implementing "never events" policies based on an approach used by The Leapfrog Group, CMS' approach or a combination of the two.

The Leapfrog Group encourages providers, when a "never event" occurs, to report the event, apologize to the patient, undertake a root cause analysis, and plan improvements in hospitals' systems and processes based on the analysis. The Leapfrog Group also suggests that the provider waive all costs associated with the "never event." In contrast to waiving all costs related to the

event, CMS requires that the provider waive the additional costs that would not have existed but for the event.

Some payors have adopted The Leapfrog Group's approach directly, requiring that the provider waive all costs associated with the "never event." Others have gone further, requiring that the provider not seek compensation from the payor or from the patient or those acting on the patient's behalf. Still others limit reimbursement based on the costs of treating the specific HAC, as is done under CMS' policy.

Negotiating a "Never Events" Provision

Beyond the question of which "never events" to incorporate into an agreement, some issues to consider when drafting or negotiating a "never events" provision include:

- To whom does the "never events" policy apply? Only hospitals? Ambulatory surgery centers? Other providers?
- For what care will the payor refuse to reimburse? Will the payor pay the costs of the original treatment or no costs associated with the event?
- How do the payor and provider determine which costs are associated with the event? How will disputes arising from this question be resolved?
- Will the payor reimburse for follow-up care necessary due to the event? Will the payor reimburse another provider for such follow-up care?
- Will there be extenuating circumstances under which a provider could bill for a "never event"?
- If a procedure involves multiple payors and an event occurs that is considered a "never event" in the agreement with only one of the payors, may the provider bill the other payor?

Because "never events" policies are relatively new, parties are still discovering new issues created by such policies. If you have further questions regarding "never events," please contact your principal Squire Sanders lawyer or one of the individuals listed in this alert.

The contents of this update are not intended to serve as legal advice related to individual situations or as legal opinions concerning such situations. Counsel should be consulted for legal planning and advice.

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