

# LEGAL

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# Health Plan Audits: What Every Physician Should Know

By Patrick J. Haddad, JD, Member of Kerr, Russell and Weber, PLC, MSMS Legal Counsel

## Overpayment Audits

Payors typically regard a physician's failure to comply with technical coding, billing and documentation rules as resulting in an overpayment. For example, if a physician billed an office visit at CPT Code 99204 (comprehensive history/examination with moderate complexity medical decision making), but the physician's clinical chart evidences an expanded problem focused history/examination with straight forward medical decision making, the payor will conclude that the claim is payable under CPT Code 99202, which reimburses at a lesser rate. The payor will assert that it overpaid the physician and is owed a refund for that claim.

By the use of statistical extrapolation, some payors will apply the overpayment resulting from the claims manually audited to all claims paid to the physician over the entire audit period. A relatively nominal overpayment on the manually audited claims can escalate to a repayment demand exceeding tens of thousands of dollars over the entire audit period. Claims involving disputes over medical necessity are typically excluded from statistical extrapolation. This means that repayment is required only for those claims for which medical necessity has in fact been found lacking.

## **Overpayment Audits Typically Do Not Involve Fraud**

Physicians who have been selected for audit should not feel that they have been accused of fraud simply because a payor intends to audit them. The question in most audits is whether the payor has paid the physician the correct amount, not whether fraud has been committed. Physicians can be selected for audit by various means. Some physicians are selected randomly while others are selected by profiling or other means. Whistleblowers, such as disgruntled employees, can also trigger audits.

In some circumstances, overpayment audits can trigger separate civil and criminal fraud investigations. This underscores the need for physicians to work proactively with knowledgeable legal counsel from the outset.

## **Physicians Have Rights**

Physicians are often surprised to learn that payors unilaterally establish the procedural rules for audits, and that these rules are often legally enforceable. It is not uncommon for payors to attempt to use time deadlines and other procedures to their advantage. Physicians need to know their rights and responsibilities before the audit process begins.

The legal rights that physicians have may vary from payor to payor and are largely contractual in nature. Unless there is a legal or contractual basis for a payor to conduct an audit, physicians may dispute the payor's ability to do so. Physicians have the right to representation by legal counsel and to retain their own consultants. Physicians are entitled to know why they are being audited and have the right to be informed of the audit results, including the claims audited, the findings and the basis for the findings. Physicians may challenge the use of statistical sampling methodologies which are not authorized by law or by contract. Physicians have the right to challenge the audit findings and the validity of any permissible statistical sampling methodology.

Any decision by a payor disputing medical necessity or involving conclusions based on information documented in the medical chart should be made on behalf of the payor by a physician in active practice in the same specialty, not by other practitioners who lack the education, training, and experience of physicians.

Some payors may be required by contractual agreement to provide an informal managerial-level conference which, among other things, must include a method for resolving a dispute promptly, informally and in good faith. Depending on the payor, physicians may also have the right to challenge the audit findings through review by governmental agencies and the courts.

Physicians have the right to be free from threats and coercive tactics which have been used by some payors to broker settlements through fear and intimidation, rather than on the merits.

## **How Physicians Can Protect Themselves**

The most proactive approach physicians can take is to become educated on the relevant legal and technical rules before being selected for an audit and have compliance assessed on an on-going basis. This way, physicians will have assurance that everything possible to minimize the risk of an adverse audit result was done beforehand.

At the very least, physicians should consult a knowledgeable health care attorney when initially selected for audit, not after the payor completes its audit and asserts its repayment demand. Physicians do not need to spend thousands of dollars to have an experienced attorney educate them on the audit process and legal rights and responsibilities. Also, if the auditors review records on-site, physicians will want to know ahead of time how to prepare and what to expect. Physicians should, for example, keep notes on information which is communicated to the auditors and questions the auditors ask.

Physicians need their own team of experts to level the playing field. Most audits present not only legal issues, but technical billing, coding and documentation issues. Sometimes, clinical issues are presented. Experienced legal counsel can recommend a consultant who is best equipped to advise on the technical issues. The attorney, not the physician, should directly engage the consultant. This approach allows the attorney to coordinate the investigation and utilize the attorney/client and work product privileges which, in appropriate circumstances, may be applied to shield from disclosure of confidential communications.

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**120 West Saginaw St., East Lansing, MI 48823 » P: 517 / 337.1351 » E: [msms@msms.org](mailto:msms@msms.org)**