

Publications

Health Care Alert: CMS Makes it More Difficult for Acquiring Entities to Evade Successor Liability

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In a recently published policy memorandum, the Centers for Medicare & Medicaid Services (CMS) provided guidance regarding the automatic assignment of Medicare Provider Agreements upon a change of ownership (CHOW). Under current regulations, Medicare agreements are automatically assigned unless rejected by the new owners. In cases of assignment, the new owner enjoys uninterrupted participation in the Medicare program, and unless there is a cause for concern about quality of care, there is no required survey as a result of the acquisition.

Although automatic assignment is beneficial from an operational standpoint, it also means that the purchaser is subject to the liabilities associated with the seller's Medicare agreement, including the return of any prior overpayments and any assessed civil monetary penalties (CMP). For this reason, some new owners choose to reject assignment of the existing Medicare agreement. When this happens, the purchaser must apply for a new Medicare agreement. For providers and suppliers subject to certification, the new owner must satisfy all Medicare participation requirements, including an unannounced survey by the applicable State Survey Agency (SSA) or Accreditation Organization (AO). The time involved in applying for a new agreement and completing the survey process necessarily means that there will be a lapse in Medicare payments.

CMS recognizes that automatic assignment is an important tool to protect the Medicare Trust Funds by providing the continued ability to recover outstanding overpayments and CMPs. This tool is undermined if SSAs and AOs shorten the timeframes for surveying initial applicants or deviate from policies regarding unannounced surveys. In such circumstances, a new owner may be encouraged to reject assignment and avoid successor liability because the lapse in Medicare payments may not be significant. Given its obligation to protect the Medicare Trust Funds, CMS published a new policy memorandum to strengthen the requirements that SSAs and AOs must follow when new owners reject assignment.

The policy memorandum explained several key requirements, including:

- The initial survey cannot be conducted until:
 - The acquisition is complete, the facility is under new ownership and is fully operational and providing services to patients; and
 - the applicable Medicare Administrative Contractor recommended approval of the new owner's enrollment application.
- The initial survey must be a full, standard survey and be unannounced.
 - Given the lead time it takes to schedule and prepare for a full survey, initial surveys that take place shortly after the acquisition date may suggest discussions and planning with the new owner, undermining the requirement that the survey be unannounced.
 - Surveys that take place close to the acquisition date could warrant closer review by CMS Regional Offices. For SSAs, initial surveys are the lowest workload priority.
- SSAs must demonstrate that they can complete all higher priority surveys, such as complaint investigations and recertifications, first. The initial surveys should be completed in addition to and not instead of the higher priority workload.

The policy memorandum also contains guidance regarding CHOW situations in which a hospital acquires an existing hospital and treats the acquired hospital as a provider-based location. CMS clarified that if the acquiring hospital rejects the seller's Medicare agreement, it must complete a process analogous to an initial application for Medicare enrollment. There are also interesting scenarios presented in the policy memorandum regarding the effective date of Medicare billing privileges after rejecting automatic assignment.

If you have questions regarding the policy memorandum, please contact your Vorys attorney.