

Update on Observation Status

By Cindy S. Alvear, Esquire
October, 2015

Previously we have written about the recent trend in hospital care of Medicare beneficiaries who spent one or two nights in the hospital finding out after the fact that they weren't really "admitted" to the hospital, but were instead under "Observation status". "Observation status" means that even though you are in a hospital bed, you are not considered a hospital inpatient. You may be receiving the same level and type of care as other hospital patients, but for purposes of Medicare payment, you are considered an outpatient. This can be a costly discovery because your status as either "inpatient" or "outpatient" affects how much you pay for hospital services and may also affect whether Medicare will cover care you need after your stay in a skilled nursing facility (SNF).

Hospitals began to trend toward taking more patients as outpatients because if a patient was admitted for certain conditions (for example, a heart attack, heart failure or pneumonia), discharged and then readmitted soon afterward for the same problem, the hospital could have been penalized in reduced reimbursement. Patients in observation status have not been formally admitted in the first place, so if they go home and return soon for further care involving specific ailments, the hospital can escape a likely financial penalty. Another monetary advantage for hospitals has been that they are not required to pay for prescription and over-the-counter medications that patients usually take at home but that are not part of their observation treatment. Patients may be billed for those medications. If patients are admitted, the hospital has to pay for the drugs.

Although it's counter-intuitive, it is possible that a person may spend a week or more in a hospital room and still not be considered an "inpatient." As a result, your treatment, and any ensuing stay in a nursing home, may cost you a lot more.

Fortunately, there is good news on the horizon. On August 6, 2015 [H.R. 876, Notice of Observation Treatment and Implication for Care Eligibility \(NOTICE\) Act](#), was signed in to law by President Obama and will go in to effect on August 6, 2016. So what will this new law accomplish?

The law will apply in situations where a Medicare beneficiary is receiving services as an outpatient for more than 24 hours. The Notice Act will require hospitals to give each individual who receives observation services as an outpatient for more than 24 hours an adequate oral and written notification within 36 hours after beginning to receive them. Over the next year, regulations will be developed to implement the law. The specific provisions of the federal law are summarized below:

- **Time required to provide notification.** The law allows for a maximum of 12 hours for the hospital to provide notification once the patient has been in observation status for 24 hours. Notification must be provided **prior to the patient's release from the hospital.**
- **Form of notification.** The law requires both oral and written communication. Both the content and the manner of documentation are yet to be determined by the Secretary of DHHS and will be communicated through the rulemaking process.
- **Detail of notification.** The notification must explain the patient's status as outpatient rather than inpatient. Hospital staff may be able to explain that the patient's condition does not meet current federal billing requirements for inpatient status rather than going into clinical detail. The notification also must explain the possible financial implications of the patient's observation status.
- **Signature requirement.** Hospitals must obtain a signature from either the patient or a person acting on a patient's behalf acknowledging receipt of the information. The purpose of the signature is to document the patient's acknowledgement of receipt of the notification, **not** their agreement with the decision of being placed in observation rather than inpatient status. In cases where the patient or person acting on the patient's behalf refuses to sign the notification, hospital staff can attest that the notification information was presented. This provision assumes notification will be provided while the patient is at the hospital.
- **Language flexibility.** The law requires that the notification be provided in "plain language," but specific wording will be determined by CMS.

Although the law will not rectify the potentially devastating financial consequences a family may face, or reverse the current trend of "observation status" determinations, at least patients and their families will be able to make informed decisions in a timely manner regarding the loved one's care.

We realize that this issue is only one of many that a family will face when a loved has increased care needs. Julian Gray Associates specializes in assisting families facing these challenges and more. Please contact our firm for a no obligation consultation to discuss your needs. We look forward to assisting you!