FAL Briefing Memo

November 2021

Federal Agencies

- On November 4, CMS issued a rule requiring health care facilities staff to be fully vaccinated against COVID-19 by January 4, 2022. The CMS rule applies to Medicare and Medicaid-certified provider and suppliers in facilities that are regulated under the Medicare health and safety standards known as Conditions of Participation, Conditions for Coverage, or Requirements. Since outpatient private practices are not governed by such regulations, the CMS mandate does not apply to them. Under the CMS rule, individuals who provide services 100% remotely, such as fully remote telehealth or payroll services, are not subject to the vaccination requirements. Certain allergies, recognized medical conditions, or religious beliefs, observances, or practices may provide grounds for exemption. For full details of the CMS vaccination rule, please see our story and practice advisory published on our website.

- On November 4, the Occupational Safety and Health Administration (OSHA) issued a rule requiring employers with 100 or more employees to get their employees vaccinated by January 4, 2022 or require unvaccinated employees to produce a negative test on at least a weekly basis. Covered employers must develop, implement, and enforce a mandatory COVID-19 vaccination policy, with an exception for employers that instead adopt a policy requiring employees to either get vaccinated or elect to undergo regular COVID-19 testing and wear a face covering at work in lieu of vaccination. For details of exceptions and dates of implementation, visit the OSHA website for more details. The United States Court of Appeals for the Fifth Circuit has since frozen this rule, citing "grave statutory and constitutional issues." OSHA responded that it was confident in its legal authority for the rule and plans to defend it. We will be monitoring developments.

- On November 2, CMS released the CY 2022 Home Health Prospective Payment final rule. Like the proposed rule CMS maintained the hold-steady position on no adjustments to PDGM in 2022. However, CMS warned that if the PDGM doesn't stabilize next year, more drastic corrective action may be needed in 2023. There's at least one major difference in the rule worth noting: The final version ups the proposed payment increase from 1.8% to 2.6% for home health agencies that have submitted required quality performance data. For HHAs that didn't submit sufficient (or any) data, rates would increase by only 0.6%. Other finalized changes, consistent with the proposed rule, include a full-scale adoption of a model value-based purchasing system being used in nine states. Read APTA's full review HERE.

- On November 2, CMS issued the CY 2022 Medicare Physician Fee Schedule final rule, which moves ahead with cuts to payment to nearly three dozen health care disciplines, including physical therapy, and implements a payment differential for services furnished by a PTA or occupational therapy assistant. Among the few bright spots from CMS: increases to payment for some codes (albeit not enough to offset the cuts), more flexibility around use of the CQ modifier that indicates services delivered by a PTA, a somewhat more flexible approach to what qualifies as "direct supervision" of PTAs in a PT private practice, and acceptance of remote therapeutic monitoring/treatment management codes submitted by PTs — a reversal of CMS' position in the proposed rule. Read APTA's full review HERE.

- On November 2, CMS issued its CY 2022 Hospital Outpatient Prospective Payment System (OPPS) and Ambulatory Surgical Center (ASC) Payment System final rule. The rule includes a 2.0% increase to payment rates for hospitals and ASCs for 2022, and reiterates CMS' intention to require greater health equity quality reporting at some point in the future — but not next year. The final rule also ratchets up monetary penalties for certain hospitals that do not comply with the hospital transparency final rule that became effective Jan. 1, 2021. The rule also halted the phased elimination of the "inpatient-only" list — procedures that CMS will pay for only when provided in the inpatient setting. Lastly, CMS finalized a requirement that beginning in the CY 2022 reporting period/FY 2024 payment determination and subsequent years, these facilities would be required to report COVID-19 vaccinations of their personnel. CMS finalized similar measures in the inpatient, IRF and SNF settings earlier this year.

Capitol Hill

- On November 4, the Allied Health Workforce Diversity Act (H.R. 3320) passed unanimously out the House Energy & Commerce Subcommittee on Health. It now awaits action by the full Energy & Commerce Committee

- On November 4, a Senate companion bill to H.R. 2168, the Expanded Telehealth Access Act, was introduced in the U.S. Senate by Senators Daines (R-MT), Smith (D-MN), Moran (R-KS), and Rosen (D-NV). S. 3193 would make permanent the ability of physical therapists, and physical therapist assistants (as well as occupational therapists, audiologists, and speech-language pathologists) to continue to provide and bill for therapy services delivered via telehealth to Medicare beneficiaries after the Public Health Emergency is declared over. Read the article that appeared in *The Hill* newspaper HERE.

- On October 20, a Senate companion bill to H.R. 3173, the Improving Seniors' Timely Access to Care Act (S. 3018), which addresses prior authorization under Medicare Advantage, was introduced in the U.S. Senate by Senators Roger Marshall, M.D. (R-KS), Krysten Sinema (D-AZ), and John Thune (R-SD) The bipartisan APTA-supported legislation would help improve efficiency, transparency, and accountability of the prior authorization process in Medicare Advantage plans.

- On October 8 the Stabilizing Medicare Access to Rehabilitation and Therapy Act, or SMART Act (H.R. 5536), was introduced by Reps. Bobby Rush (D-IL) and Jason Smith (R-MO) in the U.S. House. (Read the press release issued from Rep. Bobby Rush's office.) If signed into law the APTA-supported legislation would delay implementation of

the payment differential until Jan. 1, 2023 and provide an exemption to the differential for rural and underserved areas. The proposed legislation would also institute a change long-advocated by APTA: allowing for general supervision of PTAs in outpatient settings under Medicare Part B. Along with APTA, the legislation has been endorsed by a number of other provider and patient groups, which expressed their gratitude in a recent letter of support to the bill's sponsors.