CMS overturns its rule on advance patient notice

In a sudden and welcome move, the Centers for Medicare and Medicaid Service (CMS) has not merely relaxed its rule on informing patients of their rights in advance of surgery; it has overturned it.

On October 7, 2011, Health and Human Services Secretary Kathleen Sebelius signed off on revocation of the condition for coverage (CFC) for ambulatory surgery centers (ASC) that required ASCs to notify patients of their rights in writing prior to the day of surgery. Effective December 23, 2011, ASCs may revert to notification and scheduling policies in effect before November 18, 2008, when the first version of the patient rights rule was published.

The new 42 CFR Part 416 under 416.50 eliminates proposed section (h) and modifies section (a) to allow ASCs to inform patients of their rights “prior to the start of the surgical procedure.”

These rights include information about physicians’ financial interests in the ASC and grievance procedures.

Everyone’s happy

The news was welcomed by employees, patients and physicians at BayCare Ambulatory Surgery in Largo, Florida, says director Nancy Burden, MS, RN, CAPA, CPAN.

“From our perspective,” she says, “this is a very positive change. Quite frankly, patients have been confused as to why this notification had to come before the day of surgery.” Employees will benefit from reduced work to get notifications in the mail, she added, and physicians have told her they are pleased with the elimination of the rule, which they had believed unnecessary.

Rikki Knight, BS, MHA, RN, clinical director of Lakeview Surgery Center in West Des Moines, Iowa, expresses a similar view. “This is great news,” she says, “for the surgery center industry to have Medicare listen and then reverse what we all know was sometimes impossible to get accomplished.”

The Ambulatory Surgery Center Association (ASCA), which has lobbied against the rule, welcomed the CMS announcement.

“Elimination of the prior-day notification requirement in ASCs has been a top priority for ASCA this year,” executive director William Prentice said. He noted that in a call announcing the change, CMS staff credited industry efforts to clarify the issue.

A short but eventful life

The advance notification rule emerged as part of an overhaul of the CFCs begun in 2007. At that time, ASC regulations had not changed since 1982, while the industry had grown and changed tremendously. Among the new rules CMS proposed was the requirement of prior-day notification.

ASCs immediately objected, citing a variety of reasons, from scheduling inconvenience to danger from treatment delay. The rule was finalized in November 2008 to take effect in January 2009, but regulators continued to modify it based on specific industry comments.
First, they agreed to an exception for emergency cases. The new provision (416.50(h)) allowed notification “immediately before the procedure” but only in writing and signed by the physician. The ASC also had to document the potential for harm if the exception were not invoked.

Among the ASC responses was the comment that some patients arrive at the ASC without a physician referral.

Others added that even in nonemergency cases, the notification rule meant some patients had to make additional visits to the ASC, or mail delays could force cancellation of procedures and result in scheduling problems.

In fact, ASCs say the rule led to a greater workload for employees who had to track patient notifications and adjust schedules more often than otherwise.

As Burden notes, “The inconvenience has been more on the employee end than the patient, making sure that the information is provided verbally and then either by email, regular mail, or having the patient get the document in the physician’s office.”

On the other hand, electronic communications have lessened that burden, but only when patients have computer access and knowledge, she adds.

ASCs and industry groups also warned that the rule made ASCs less competitive in attracting patients compared with hospital outpatient departments.

CMS agreed with the objections, and decided to eliminate 416.50(h). It then amended 416.50(a) to remove the requirement for prior-day notification.

As the CMS announcement explains, “Since publishing the ASC patient rights proposed rule on April 23, 2010, we have learned that a number of ASCs routinely perform surgeries on the same day they receive physician referrals from their patients. ASCs that routinely serve same-day patients would like to continue doing so, whether the service is being performed on an emergency or non-emergency basis. Because we believe scheduling decisions should be between the patient and the ASC, rather than dictated by CMS, we are finalizing a different policy than we proposed.”

Specifically, CMS is turning the clock back to, as the announcement states, “allow ASCs to continue providing services based on the criteria determined by applicable ASC patient scheduling standards and policies that were in effect prior to implementing the patient rights final rule published on November 18, 2008.”

**Saves time and money**

Depending on the ASC structure, physicians and staff apparently have been able to adapt to the prior-notification rule, despite the inconvenience. They have avoided unnecessary patient travel or rescheduled cases by working closely with physician offices to be sure paperwork was in order.

“We have never had to cancel a surgery due to this rule at our facility,” Knight says. “I think many surgery centers immediately put a plan into action to meet the rule so they would not lose cases.” Even without the rule, she adds, “surgery centers will continue to work hard as always, getting information out to the patients ahead of time.”

The change also will have a financial benefit, she notes: The new system will reduce postage costs and paper work, both for the ASCs and for physicians who no longer need to explain why a particular procedure should be performed today rather than tomorrow.

—Paula DeJohn
Reference