EHR Incentive Payments Under HITECH Act

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The Health Information Technology for Economic and Clinical Health (HITECH) Act provides incentive payments through the Medicare and Medicaid programs to hospitals and certain individual health care providers that adopt and “meaningfully use” electronic health records (EHR) technology. The payments are available beginning in 2011, and an eligible professional (e.g., a physician) could receive up to $44,000 under Medicare, or $63,750 under Medicaid. The Centers for Medicare & Medicaid Services (CMS) issued the Standards & Certification Interim Final Rule (IFR) on December 30, 2009, which explains how the incentive payments will be calculated and paid to qualified recipients. Importantly, the IFR clarifies that the incentive payments may be assigned by an eligible professional to an employer or other entity which has a valid arrangement allowing the entity to bill for the services of the professional. Therefore, medical groups, medical practice foundations, community clinics and hospital outpatient departments which bill for their physicians’ services should be able to receive the EHR incentive payments, and should take appropriate steps to ensure receipt of these incentive payments.

Incentive Payments under Medicare and Medicaid

The HITECH Act allocates billions in federal funding to improve information technology in the health care industry, and a significant portion of that amount (approximately $17 billion) will be paid as incentive payments to induce health care providers who participate in Medicare and/or Medicaid to adopt EHR technology. Hospitals may receive incentive payments under both Medicare and Medicaid. However, individual providers must elect to receive either a Medicare or a Medicaid incentive payment, and have limited rights to change that election once made.

Under Medicare, “eligible professionals” include physicians, dentists, podiatrists, optometrists, and chiropractors. Hospital-based professionals who provide substantially all of their services in an inpatient or outpatient hospital setting, such as emergency physicians, anesthesiologists, hospitalists and pathologists, are not eligible to receive incentive payments. The amount of incentive payments that an eligible professional may receive is 75 percent of Medicare allowable charges for covered services provided by the eligible professional in a year, up to a maximum annual limit depending on when the eligible professional first adopts EHR. The incentive payments are available beginning in 2011 and will cease in 2017, and no payments will be made to eligible professionals who first adopt EHR in 2015 or later. Professionals who do not adopt EHR by 2015 will be penalized by a reduction in their Medicare fee schedule rates by one percent in 2015, two percent in 2016, three percent in 2017, and three to five percent in subsequent years.
Under Medicaid, “eligible professionals” include physicians, dentists, certified nurse-midwives, nurse practitioners, and physician assistants who lead rural health clinics or federally qualified health centers. An eligible professional’s patients must include at least 30 percent Medicaid patients (20 percent for pediatricians) in order to receive incentive payments under Medicaid. An eligible professional may receive 85 percent of the “net average allowable cost” incurred by the eligible professional in adopting EHR technology, up to a maximum annual limit. The maximum amount of incentive payments an eligible professional may receive under Medicaid is $63,750, paid over six years. The payments will cease in 2022, and, unlike Medicare, no penalties will be assessed for providers who do not adopt EHR.

Calculation and Payment of EHR Incentives

According to the IFR, Medicare fiscal intermediaries, carriers, and Medicare Administration Contractors (MACs) are responsible for calculating the amount of incentive payment payable to eligible professionals, disbursing the payments to eligible professionals or entities to which such payments have been reassigned, and resolving any payment issues. Eligible professionals or entities will receive a single consolidated payment during each calendar year. The payments will be made on a rolling basis, as soon as an eligible professional has demonstrated meaningful use of EHR technology for the applicable reporting period (which is 90 consecutive days during the first year of receiving incentive payments, and the entire calendar year for subsequent years), and the eligible professional’s Medicare allowable charges has reached the threshold amount for maximum incentive payment. If an eligible professional’s Medicare allowable charges, after taking into account claims submitted within two months after the end of the year, do not reach the threshold for maximum payment, the eligible professional will receive a reduced payment based on the actual amount of Medicare allowable charges.

The mechanism of payment under the Medicaid incentive program is similar to that under Medicare. Payments will be calculated and disbursed through the respective state Medicaid agencies or their contractors, and paid as a single consolidated payment on a rolling basis. Prior to payment under either program, the applicable distribution agency will be required to check whether payments have been made under the other program in order to avoid any double payment.

Reassignment of Incentive Payments

The IFR does not provide for automatic payment of the EHR incentive payments to an eligible professional’s medical group or other entity which bills for the professional’s services. Instead, the IFR provides that an eligible professional may reassign the right to receive the EHR incentive payment to any such entity pursuant to a contractual reassignment made in a manner consistent with general rules governing reassignment of Medicare and Medicaid payments. Therefore, a medical group, medical foundation, clinic or hospital seeking to receive EHR incentive payments will need to obtain reassignments of such payments from its affiliated professionals. While it is likely that the existing contracts among medical groups, medical foundations, clinics, hospitals and physicians already imply the obligation of the physicians to take appropriate action to facilitate the reassignment of the EHR incentive payments, it may be prudent to amend the relevant contractual arrangement to state the obligation expressly.
If you have any questions concerning these developing issues, please do not hesitate to contact any of the following Paul Hastings lawyers:

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1 “Net average allowable cost” means (i) the “average allowable cost,” which is the initial cost of acquiring the EHR technology and the subsequent cost of operating and maintaining the EHR technology, minus (ii) any payments received by the eligible professional from other sources, such as private-payor subsidies.

2 Pediatricians with a Medicaid patient volume of at least 20% but less than 30% may only receive 2/3 of the maximum amount (or $42,500), but if their Medicaid patient volume is 30% or higher, they are eligible to receive the full amount.