

Issue Brief

Hospital Observation Status Harms Beneficiaries' Access to Medicare's Skilled Nursing Benefit

Background

Over the last several years, hospitals increasingly have classified Medicare beneficiaries as “outpatients” receiving services under observation, rather than admit them as inpatients. Beneficiaries are called “outpatients” even though they may stay for many days and nights in hospital beds and receive medical and nursing care, diagnostic tests, treatments and medications, just as they would if they were inpatients. However, beneficiaries in observation status are denied access to Medicare’s skilled nursing facility (SNF) benefit because they do not have a 3-day qualifying inpatient hospital stay, and they are also responsible for the SNF charges should they choose to receive them.

Hospitals’ use of observation stays has increased sharply since 2006. According to the Medicare Payment Advisory Commission’s (MedPAC’s) *March 2014 Report to Congress*, “outpatient visits, many of which are observation stays, increased 28.5% between 2006 and 2012, with a simultaneous 12.6% decrease in inpatient stays over this same six-year time period.” Furthermore, MedPAC addressed hospitals’ increased use of observation status in its *June 2015 Report to Congress*. MedPAC recommended that Congress revise the SNF 3-inpatient-day hospital eligibility requirement to allow up to two outpatient observation days to count toward meeting the criterion.

A primary motivation for hospitals’ increasing use of observation status has been concern about the Centers for Medicare & Medicaid Services’ (CMS’) Recovery Auditor (RA) program. If the RA, or another Medicare reviewer, determines that a patient has been incorrectly classified as an inpatient, the hospital is denied reimbursement for most services provided to the patient, despite the fact that the services were medically necessary and coverable by Medicare. In addition, readmission penalties imposed against hospitals may increase the incentives for hospitals to label patients as outpatients. Patients who are called outpatients do not trigger any readmission penalty when they return to the hospital.

“2-Midnight” Policy

CMS’ *Two-Midnight Benchmark for Inpatient Hospital Admissions* policy, which was published in the *FY 2014 Inpatient Prospective Payment System Rule (IPPS)* in August 2013, set out new regulations for physicians to apply in making hospital inpatient admission decisions. The 2-Midnight Policy established time-based criteria for inpatient hospital status and authorized physicians to order inpatient status if they believe a patient is likely to be hospitalized for two or more midnights.

Ask Congress

To enact legislation that will count all hospital days spent under observation toward the Medicare 3-day stay requirement.

Key Facts

Hospitals’ increased use of classifying Medicare beneficiaries as outpatients denies access to the skilled nursing facility (SNF) benefit.

CMS’ 2-Midnight Benchmark for Inpatient Hospital Admissions and the *NOTICE Act* does not solve the problem of patients in observation status and their need to access their Medicare 100-day SNF benefit.

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Most recently, the U.S. Department of Health & Human Services' Office of Inspector General (HHS OIG) released a December 2016 report, noting that the 2-Midnight Policy led to limited access to skilled nursing care. According to the report, the policy increased the number of beneficiaries with hospital stays who did not qualify for Medicare SNF coverage.

It is important to note that a revision to the 2-Midnight Policy in 2015 allows physicians, on a case-by-case basis, to order inpatient status for patients who are likely to be hospitalized for only a single midnight. While the rule reflects CMS' concerns about long outpatient stays, hospitals are unlikely to change their practices when CMS provides no meaningful guidance on when an inpatient stay of fewer than two midnights is appropriate. Physician decisions about patient status continue to be reviewed by hospitals under the same standards as before: short inpatient decisions are prioritized for review by Quality Improvement Organizations (QIOs); and audits by RAs remain. An RA's determination that a patient has been incorrectly classified as an inpatient requires the hospital to return most of the Medicare reimbursement for the patient's stay, despite the fact that the services were medically necessary and coverable by Medicare.

Congressional Activity Background

Congress has taken steps to enact legislation that requires hospitals to inform beneficiaries when in observation status. *The Notice of Observation Treatment & Implication for Care Eligibility Act, or the **NOTICE Act** (Public Law 114-42)*, which became effective in August 2016, requires hospitals to provide written notification to patients who are classified under observation status for more than 24 hours.

However, the *NOTICE Act* and the CMS "2-Midnight Policy" do not solve the problem of SNF eligibility for beneficiaries in observation. ***The Improving Access to Medicare Coverage Act of 2019***, initially introduced during the 114th Congress, would help Medicare beneficiaries who are hospitalized in observation by requiring that time spent in observation be counted towards meeting the three-day prior inpatient stay.

NASL Asks Congress

- Enact bipartisan legislation, the ***Improving Access to Medicare Coverage Act of 2019***, when reintroduced during the 116th Congress. Original sponsors will include Senators Sherrod Brown (D-OH) and Susan Collins (R-ME) and Representative Joe Courtney (D-CT). Please consider co-sponsoring this important legislation.
- The legislation creates a full and permanent solution to solve the problem of SNF eligibility for beneficiaries receiving care under observation.