

Hospice Insights: The Law and Beyond



Episode 13: Are You Ready for October 1, 2020? Honing in on CMS's Impending Election Statement and Election Statement Addendum Requirements

June 10, 2020

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| Meg Pekarske | <p>Hello! Welcome to Hospice Insights: The Law and Beyond, where we connect you to what matters in the ever-changing world of hospice and palliative care. “Are You Ready for October 1, 2020? Honing in on CMS’s Impending Election Statement and Election Statement Addendum Requirements.” Last year confusion and consternation ensued when CMS finalized new requirements for the hospice election statement and an addendum with patient’s specific information about the hospice’s coverage responsibilities. Those requirements are set to become effective as early as October 1, 2020. In this episode hospice and palliative care attorneys Meg Pekarske, Bryan Nowicki and Andrew Brenton break down these requirements and discuss their implications for hospices. Among other things the attorneys address the controversial position CMS has taken in characterizing the addendum as a condition of payment for hospice care.</p> <p>Bryan, I’m turning the reins over to you for today’s podcast episode, so you are taking charge of this episode, so facilitate away.</p> |
| Bryan Nowicki | <p>Well thank you, Meg, for allowing me to take the floor here. I appreciate your trust and faith in me to facilitate – these waters here so. But yeah it’s always great to talk with you, Meg, and Andrew about hot topics and new things, and you know we’ve been dealing with Covid for so long, it’s kind of nice to get back to some other issues that have been out there for a while but they’re going to be coming back around to us rather soon and so that’s what we’re going to talk about today. And what we’re going to start with – we need to get some orientation to the issue because as Meg mentioned, this is something that began brewing last year and we</p> |



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first took a look at it and it has to do with the election statement and the election statement addendum and we kind of want to get back up to speed on what that is, what are the elements. After we do that we're going to really zero in on this idea that these new requirements are a condition of payment and how that could be enforced by CMS and its contractors; some of the questions and concerns we have about that kind of enforcement. So Andrew can you, can you get us up to speed about how this began last year and why we're talking about it now in particular?

Andrew Brenton

Absolutely yes, thank you, Bryan. So as you mentioned, you know this, these were at the time proposals related to the election statement, you know what needs to be in there as well as this new addendum, CMS proposed some new requirements related to those last year as part of its wage index rule. Then all of these, as we'll get into in a second here, they all kind of get at the hospice providing additional information to patients and their families about, you know what exactly it is that a hospice is covering during that patient's stay at the hospice. These were proposed last April when the rule was finalized in August or September of last year. CMS decided to move forward with these new requirements but they delayed the implementation of these new requirements for one year. So these requirements, which again we'll get into in a second here, these now apply for hospice elections beginning on or after October 1st 2020. And that is why we're dealing with them now, because when CMS put out its proposed wage index rule for fiscal year 2021 a couple of months ago, CMS indicated that they were moving ahead with these requirements and that they would in fact be – or they would in fact go into effect October 1, 2020.

Bryan Nowicki

What is the new election requirement, Andrew? What's new with the election?

Andrew Brenton

So there are about three or four new pieces that need to be included in the election statement and again this all sort of gets at, you know, what it is that the hospice is going to be covering for that patient. So for example the addendum, which we'll get into in a second here but elections, elective statements need to include, beginning on that date, a notice for the patient that they have a right to receive this other document called an election statement addendum if there are conditions, item services that the hospice has determined to be unrelated to the patient's terminal illness and related conditions and therefore would not be covered by the hospice. There's also new required content in the election statement about information on patient's cost sharing for hospice services, information about this beneficiary and family-centered care, QIO, you know if a patient disagrees essentially with the hospice's covered determination, they can contact this QIO and they have the right to what's called immediately advocacy in the rule. Those are kind of the high level changes to the election statement itself as opposed to the



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addendum to the election statement.

Meg Pekarske

Just to jump in here, I think that one thing that CMS did indicate early on is that it would revise its sample election form. So a couple of years ago CMS came up with a sample election form, no one's required to use it, but I think initially when these regulations came out because you are dealing with the election, you know is a foundational document, getting inside into how CMS would implement this would be important and so helpfully I think CMS did end this rule – make revisions to the sample election form which I know commenters will be commenting about revisions they'd like to see that form but that is helpful so you're not necessarily exactly shooting in the dark here as to how CMS would implement this. And there could be more movement for people to just adopt the CMS election form.

I think many people over the years have honed their own election form and again this is a side note, I won't go down this road too far but I think over time just like how we can be hoarders and have paper for 10 years, we just keep adding things to the election form and suddenly it's like five pages long and it has a lot of things in it that are not legally required and so this might be a good time where people take a hard look at their election form and say, you know, this document should just be what is needed to meet the legal requirements, and you don't necessarily want to use your election form for other things. And so I just wanted to make people aware that CMS is going to be updating its election form to address the requirements that Andrew just pointed out and we have provided comments on revisions that we think would be helpful for the hospice industry on those points.

Bryan Nowicki

So Andrew, can you take us through the election statement addendum and kind of trace where that began and where it is now?

Andrew Brenton

Absolutely. So yeah this new requirement to provide an election statement addendum, that too was first proposed last spring, finalized last fall, and again CMS indicated in its proposed rule that came out a couple of months ago that they would be preceding with finalizing these requirements. So, you know, what are these requirements? Essentially if a patient, if a non-hospice provider of that patient or if a Medicare contractor, if they request to see essentially the conditions, item services that are unrelated to the patient's terminal illness and related conditions, that hospice has to provide that list which is the addendum within a certain period of time. There are many other requirements that a proper election statement addendum must meet.

For example, it has to have the patient's name and the hospice medical record ID. It has to list the patient's terminal illness, the patient's related conditions. It has to provide a list of those conditions that the patient has when they're admitted to hospice or upon a plan of care update that the



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hospice has determined is not covered because it's unrelated to the terminal illness and related conditions. There are several other requirements. There are actually nine such requirements. We won't necessarily go through all of those, but an additional important requirement is that the patient actually has to sign and date the addendum when it's presented to the patient by the hospice. And in terms of sort of the timelines for when the addendum has to be issued, if it's requested at the time of election, the hospice has five days from the date of the election to provide the addendum. If it's requested after election, the hospice has 72 hours from the request to provide that. So some fairly narrow timeframes there, although I will mention in passing that CMS originally had proposed even stricter, even shorter timeframes than the five days and the 72 hours. You can be thankful for CMS to be reasonable.

Meg Pekarske

Exactly. And I'm having heart palpitations as you're saying all this stuff because you know all I'm thinking in my head is, wow, there's a lot of things that can trip people up here, and I think we've discussed lots of variance of all of the different trip up because – and I think the foreshadowing and where that comes from is you know a couple of years ago CMS added the attending physician, like I acknowledge I have the right to choose an attending physician.

I choose Wachter Fox or whoever as my attending physician. We have seen a pretty large uptick in denials, whether it be on the certification side, so it's not saying the election itself is wrong, but like that the certification didn't match or somehow you didn't identify the physician with sufficient specificity, and like well there's not an NPI number but the law doesn't require an NPI number. And so I think that's where my trepidation comes from is that when you're dealing with the election form, that can implicate everything you've ever billed and so when we start talking about these things, Bryan, you know I get really concerned and I may seem like I am overexaggerating, but unfortunately you and I and Andrew see sort of the things that arrive.

Bryan Nowicki

And I think just a couple of things to emphasize that you said, Meg, was this whole attending physician item, that was adding one element to an election statement and just look at all the complications and unintended consequences that arose from that, not only with just the election but as you said it affects the government's analysis and how hospices complete other documents and there becomes more room for inconsistency. So one tweak to an election effects far beyond just that election statement, and now as Andrew described, there's going to be changes to the election and then a nine point election addendum that's going to implicate when compared with other documents, you know how good are those other documents, which is a document to be trusted, and it raises all of those kinds of complications.



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Potential contradictions that all need to be managed. Andrew, as you were describing that election statement addendum, this is all – the information is in different categories but it's all very patient-specific. There needs to be an assessment of that particular patient in order to complete the addendum for that patient. You just can't have a stack of addenda that you're going to be passing out to patients when they ask for it. It's going to require some work to get this done right?

Andrew Brenton

Absolutely. And another required element of the addendum which I didn't even mention earlier, but it gets exactly at that point, Bryan, is the addendum has to have a clinical explanation in language that a patient could understand as to why the items that are not covered by the hospice because they're considered unrelated, why they in fact are not needed for pain and symptom management. So that's exactly right. In addition to, you know clinicians are going to have to go through the patient's records, kind of figure out okay what conditions do they have, you know we don't consider these to be covered for these reason, they're unrelated etc., and then have to compose a clinical explanation as to how they are making that conclusion. So exactly...this will be patient-specific and also you know potentially burdensome to complete.

Meg Pekarske

And I think that hospices were doing these things they just didn't memorialize it in this way, and I think that requiring it to be memorialized in a particular way is what concerns me, because you know what is a sufficient clinical rationale, right? I mean it's like we could spin out on all of this stuff, like well could the patient really understand that and you know it just is – you know folks have been doing these things for a while since relatedness has been top of mind for quite a few years now, but I think it's, there's a subjectivity element to this and so I think that's my concern is, well this explanation wasn't clear enough and you know back some years ago we saw election denials for not including some magic language, palliative rather than curative in describing what hospice is. Well that, those words are not required to be used as concept, and we dealt with denials even though these election forms had been used for years and years and years to no one had a problem with it until suddenly you know some reviewer had a different perspective.

I mean we ultimately won that issue, but it's that kind of subjectivity that I'm very concerned about, Bryan. And I mean again, I won't go into a two-hour podcast here, but you know the other concern I have is you know is this is really getting at the intended effect, which is I think that this addendum clearly focuses on conditions that are unrelated to the terminal illness. But there are other conditions that people have that we're saying this is related but you want a treatment that's not medically necessary for the palliative pain and symptom management or palliative management of those symptoms, and we're not going to cover that. This, based on the terms of the regulations, do not seem to cover this. So could patients even be confused, because this addendum is supposed to inform



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me, but it only informs me if some certain aspect of this and then I might get another piece of paper about this other thing, and it's actually the things that are related but not deemed medically necessary for palliation and symptom management that would – they would have financial liability for causing things that are unrelated, they have not waived their Medicare coverage for, so I think that there's sort of that confusion if pulling on the thread you had there, Bryan, about this is a patient centered document. It's like, is this going to make sense to the patient in the terms of what my financial responsibility is, because it's only talking about certain aspects of what may not be covered.

Bryan Nowicki

And documentation requirements are what they are, hospices deal with them all the time, but when they're connected with payment, they'll take on a whole new level of seriousness. And I know a year ago, Andrew, when CMS came out with this, this idea, these new requirements, they were pretty clear that they would consider these to be conditions of payment. The new requirements relating to the election statement and the addendum. Has that changed at all since a year ago, or is that still what the expectation is that these will be conditions of payment?

Andrew Brenton

Unfortunately that still is the expectation. CMS in the proposed rule, and again that came out a couple of months ago, they're sticking to that position. They do consider these new requirements to be a condition for payment. So yes that's definitely concerning to say the least. There's also, as I'm sure we'll get into here, there's some confusion also as to how CMS is going to be applying this idea that the addendum is a condition of payment. In fact in last year's final rule, which again is the rule where CMS finalized these requirements, CMS told the hospice industry that they would be talking to the max to kind of flesh out what exactly it means for the addendum to be a condition of payment. CMS has not done that as far as we are aware despite committing to do so. So yes, there is confusion about how this is going to be applied, but yes, CMS has indicated that they are going to be moving forward with this conception of the addendum as a condition of payment.

Bryan Nowicki

So we're left now with these being described as conditions of payment and really no guidance beyond that, although I suppose there is an expected effort between CMS and the max to get some additional guidelines or something out there to guide us so we're left with just this is a condition of payment. So we have nine different requirements on an addendum. Do you have to meet all nine of them to satisfy the condition of payment? If you mess up on any one of them, are you sunk? What kind of thoughts do you have about how best to manage or view these as a condition of payment or some of the problems that arise?

Meg Pekarske

Well and maybe I'll jump in here. I mean Andrew and I have spent a lot of time talking about this, and I mean I think you have to prepare for the worst in terms of these various aspects just like other things we're used



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to where we have a lot of technical requirements. I think hospice, almost more than any other industry, has a lot of technical requirements and I dotting and T crossing type things because I sort of – what I'm very, very concerned about is your clinical decision making can be absolutely right, right like no question because you know they're not questioning the actual relatedness to termination.

So all of that could be right, but I have a wrong medical record number or I don't have proof that this was returned or I sent it on day 6 instead of day 5. Like are all of those things ultimately going to impact payment, and again, how would you even quantify that payment? Is that everything you ever bill from there on out? Is there any way you can cure this? Like there's just, there are a lot of things that are, you know, very troubling. At the end of the day, we're dealing with dying patients who, you know adding a bunch more paperwork, because it talks about that this needs to be signed. It's not just I give it to you; it's an offer acceptance kind of thing, even though they're not, by signing it not saying I agree with you, there is back and forth that needs to happen which I think can be very, very burdensome in....

Bryan Nowicki

In some respects is based upon things outside the hospice's control, like the patient signature. If the patient for whatever reason doesn't return a signed one, now that could affect the hospice, but is it really fair to affect the hospice. That just doesn't make a lot of sense but...

Andrew Brenton

And I absolutely agree with that. I'll add that CMS has not explicitly addressed this very issue. What happens when a patient requests the addendum, the hospice provides the addendum appropriately and within the required timeframe, but then the patient just doesn't sign? It's very unclear how that's going to affect payment under CMS's conception that this is a condition of payment. And it's not like CMS hasn't kind of issued guidance on patient refusal to sign required documents before; in fact for notices of Medicare non-coverage, there's actual provision in one of CMS's internet online manuals or internet-only manuals that if the beneficiary refuses to sign, the NOMC, the provider should annotate the notice to that effect and indicate the date of refusal. So clearly CMS is aware of sort of an analogous issue to this in the past and they've addressed it so. Yeah just to underscore, one sort of confusing point about this whole idea of the addendum is a condition of payment.

Bryan Nowicki

And let's go back to something that you alluded to, Meg, and that is, you know, how do you quantify something like this? Usually in the world of just election statements without addendum, a material problem with an election statement could jeopardize every dollar you received in payment for that patient cause it's one of the, one of the initiating documents. The election statement addendum by definition comes after the election, and it could be months after the election, but is there a sense that if you don't do the election statement addendum correctly that that can somehow



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retroactively implicate the original election and call into question all the money you received, or is it only on a going forward basis, you didn't fill out the election addendum correctly in March and therefore just March forward might be in jeopardy. Do we have any insight into what CMS's approach will be?

Meg Pekarske

Unfortunately not. I mean I feel like that in and of itself is why there shouldn't be a condition of payment, right. It's not attached to an event, right. Like a certification has a timeline, you know, it just, it just doesn't make sense that a post-hoc activity, so the election needs to be done, it needs to be – there needs to be effective date, it can't be a retro effective date, but this document can somehow implicate retroactively this, the volatility of this document, which if we're getting into the patient wants to elect this benefit and it just doesn't, it doesn't make a lot of sense to me, and it feels redundant too, because as I mentioned earlier, we have to do these things in a different way, but we are doing these things and to elevate this to a condition of payment as opposed to just a survey issue, I don't know why that wasn't sufficient to address the concern.

It feels very punitive and unnecessary and I think ultimately potentially arbitrary too, because then are different max going to have different viewpoints, and oh we can say these kinds of elements, these kinds of problems with the addendum don't impact payment but these others do. You start spiraling into, well what does the law really mean, right? And so yeah I just – we don't have any indication as I said preparing for the worse. Like we got to take this incredibly seriously. I think you've got to have a lot of compliance infrastructure, real time auditing going on.

Now this is and how many things, I mean I think CMS's response to that is you're supposed to be covering virtually everything, and this is supposed to be rarer so this isn't even going to be a thing for most patients, and you know it also could – you could run into problems because in the rare event it is, you need to generate one of the things. You might forget to do that too, right, because it's just like so rare, and so anyway I don't know why for a rare problem you need to create an election element. Because remember, this isn't an element on the election form as well. So a content element to the election form in addition to the addendum, so if you do this one thing wrong you know that there's – so there's sort of two condition of payments that appear. Both the content element of the election itself and then the addendum. So when you add up all of those new, new things that could trip us up, it's like 11 things or 12 things, right so.

Bryan Nowicki

And I want to bring this to a conclusion by addressing a couple of points. One is we've been working on ways to address this uncertainty, like what kinds of arguments or what kinds of theories are we exploring to try to push back on this, because I expect we're going to have clients and there'll be hospices who get denials based on this, and they're going to



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need somebody in their corner with some ideas about how to push back. So what kind of arguments are we thinking about, and then second, given this uncertainty, what's the practical advice we would give to hospices about how to best operate in this situation where there is a lot of uncertainty? Meg, you had referenced making sure you have real time auditing and so on, but we can get into more specifics. But what kinds of arguments do we see out there that we're trying to develop to help hospices in the future?

Meg Pekarske

Yes, I think as we were coming up with our comments to the rule, we were really trying to think about okay, how do I work backwards from a legal perspective and say I understand CMS's authority to create this as a condition of payment? So when we're doing coverage analysis and say those alleged failure impact payment, we first go to the statute which is what Congress has codified, passed the law, said this is how the law works.

So interestingly, the election section is actually in a different section than the rest of the coverage requirements. It took an act of Congress to add the face-to-face encounter as a condition of payment. They actually amended the statute to create that requirement. They have not amended the statute here. So we're a bit confused and troubled by how is this within the scope of authority from a statutory perspective for them to create a new condition of payment which when you talk about it and yet have all these elements; is it like 11 or 12 conditions of payment based on their language. Is that really within the scope of the authority prescribed by Congress? So there are some legalistic arguments from a statutory and regulatory construction standpoint which we have not yet fully developed. I've just been confused as to how we got to where we are, especially when you contrast it to how the face-to-face requirement was handled.

From a practical reality standpoint, I think it's been tuned. I would assume there's going to be guidance. I think as an industry there is pushback that this needs to be delayed further because of the pandemic that is going on right now. I think just the practical difficulties of rolling out such significant changes amid the challenges of today just seems unwarranted. But I think if this does come to be, I think taking a hard look at your forms and saying since CMS is coming out with its own forms. You might consider it is going to be the safest approach is going to be used to use CMS's forms.

For a government contractor to say you use the form that CMS said to use and it's somehow insufficient. I think people have a lot of attachments because your election form is now pages long. It's like this interim document that has been developed over time, but now might be a time to think about do I just move to the government's sample election form is not required but is not the safest course. Again, stay tuned on that



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because I think there is some real challenges with their forms right now. We will have to see if they're amenable to make some changes because I think in certain places they went beyond what the law requires. I would not want to bind us to things that actually are not requirements.

So that's one consideration, and then two is the EMR vendor piece of this. So Bryan, you talked about these are individual decision-making and what not. I mean you need to get this figured out with your EMR vendor, which is another reason why discussion of delay because this is not just you pulling out a piece of paper. Everyone is not an EMR these days and this needs to be spit out through there. They need to develop, I know nothing about IT, but programming around that. So that is a challenge and I think I would be talking to your EMR vendor right now about what is it that you are doing. Are you going to be ready to go, and making sure you understand exactly what is going to spit out from there and that it meets the requirements. So you probably want to do your own independent review because the indemnification provisions in EMR software agreements is often times not very favorable to providers. So if they were missing an element or something like that, you and your payment suffers. You are left holding the bag.

I want to just rely on your EMR vendor to say giving you legal advice on that. So we have that and then I just think if this does come to pass, really trying to workflow this with your staff who is going to do this. How are you going to follow-up? Are you going to deliver this at the time of the comprehensive assessment? You have to be thinking about those types of things about who is responsible for this. And then I would do real time auditing just like I think trying to do real time audits on election forms. So if there is a problem that you can correct that problem as soon as possible. We are not new to having to do this. I think some of your old favorites about how to build a good compliance program, about technical requirements. We are not reinventing the wheel here but I do think that this could be very significant to the industry.

Bryan Nowicki

Yeah and I think we began the podcast by talking about the controversial decision of CMS to call this a condition of payment. I think it is controversial in our view because we do see some practical and legal problems to those issues that we have described throughout this.

Meg, the advice you have given, the guidance about how to lay the groundwork for preparing to comply with a vague requirement, I think are all great ideas and until we get a little more guidance to be able to put a little more detail to all of that, it is kind of going back to first principles and how you develop a compliance system for this particular document. Do it sooner rather than later, because this is not something you want to invent on day one. On October 1, you want to have it ready and debugged and tested, given the potential significance of an election and problems with an election to overall payment. It is not something we



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| | want to leave until the last minute. |
| Meg Pekarske | Exactly right. |
| Bryan Nowicki | Great, well thanks, Meg. Thanks, Andrew, for all the information you provided about these new requirements as Meg had mentioned and as Andrew did as well. Stay tuned. We hope that CMS will get with the max and give us some more information, some good and reasonable information about how they are going to implement and enforce this requirement. Better yet maybe they will delay it for some time. |
| Meg Pekarske | I know, should this really be a condition of payment, come on. |
| Bryan Nowicki | If anyone from CMS is listening. |
| Meg Pekarske | Exactly. Exactly. |
| Bryan Nowicki | Then rethink what you are doing here and we would appreciate a citation that it was us who persuaded you not to go forward with this. |
| Meg Pekarske | Yeah exactly. |
| Bryan Nowicki | You know vague and unworkable requirements. But thank you both for talking about this timely topic. You can always go to our website. We have a Hospice Resource Center that will have more information about this including the actual documents that laid this out. That's H-U-S-C-H, B-L-A-C-K-W-E-L-L.com and find the Hospice Resource Center from there. |
| Meg Pekarske | Well that is it for today's episode of Hospice Insights. So long and thank you for joining the conversation. To subscribe to our podcasts, visit our website at huschblackwell.com or sign up wherever you get your podcasts. Until next time, may the wind be at your back. |

