



LASHLY & BAER, P.C.
ATTORNEYS AT LAW

MISSOURI

714 Locust Street
St. Louis, MO 63101-1699
TEL: 314 621.2939
FAX: 314 621.6844
www.lashlybaer.com

ILLINOIS

20 East Main Street
Belleville, IL 62220-1602
TEL: 618 233.5587
By Appointment Only

Face To Face Encounters **Change Home Health Services**

By [Stuart J. Vogelsmeier, J.D.](#)

Introduction: Home health agencies have long been obligated to obtain certain physician certifications prior to providing home health services (“HHS”). However, the Affordable Care Act (Health Care Reform) added a new requirement that is effective in 2011 that the certifying physician “Must document that the physician [or as described below a non-physician practitioner] had a face to face encounter with the patient within a reasonable time frame.” CMS regulations have provided more guidance regarding the requirements of the “face to face” encounter, and home health agencies and physicians should taken note.

Analysis: By regulation, CMS stated that the certifying physician must document (a) that the condition for which the patient was being treated in the face to face encounter is related to the primary reason the patient requires HHS; and (b) why the clinical findings of such face to face encounter support findings that the patient is homebound and in need of either intermittent skilled nursing services or therapies. The documentation of the face to face encounter must also show, by including the date of the face to face encounter, that it occurred **“no more than thirty days prior to the home health start of care date or within two weeks of the start of the home health care.”**

The physician’s documentation must be on the HHS certification form, but as a separate and distinct section of the certification or an addendum to the certification. It must be clearly titled, dated and signed by the certifying physician. In addition to the documentation that accompanies the certification, the physician’s practice medical record must also document the occurrence of the face to face encounter with information that is “consistent” and “supportive” of the physician’s documentation in the HHS certification.

If the face to face encounter occurred within 30 days of the start of care but the condition for which the patient was being treated at the time of the encounter was not related to the “primary reason” the patient requires HHS or if the face to face did not occur within the 30 days prior to the start of HHS, then the certifying physician (or as discussed below the non-physician practitioner) must have a face to face encounter with the patient within two weeks of the start of HHS. In other words, if a patient’s condition changes significantly between the time of the face to face encounter and the start of HHS and the “primary reason” the patient needs HHS is unrelated to the patient’s condition at the time of the original face to face encounter, another face to face encounter is required within two weeks of the start of HHS. In the comments to the regulations CMS said the face to face encounter had to be “incident to” the HHS involved. The

regulations state that there has to be “clinical correlation” between the face to face encounter and the “associated” HHS.

Although the documentation and certification obligations discussed above are imposed on certifying physicians, the actual face to face encounter may be performed (a) by tele-health; or (b) by a nurse practitioner or clinical nurse specialist working in collaboration with the physician, a CRNA or a physician assistant under the supervision of a physician (each referred to hereafter as “non-physician practitioner”). The non-physician practitioner conducting the required face to face encounter must document their clinical findings and communicate them to the certifying physician who then utilizes those clinical findings to complete the documentation on the HHS certification and the requirements of the face to face encounter documentation (i.e., that the clinical findings support why the patient is homebound and in need of either intermittent skilled nursing care or therapy services and that the condition for which the patient was being treated in the face to face encounter was related (clinical correlation) to the primary reason the patient requires HHS. Clearly, the non-physician practitioner’s clinical findings need to be attached to or included in the physician’s office record for the patient as part of the office record’s “supportive” documentation of the face to face encounter and HHS certification.

While the Affordable Care Act permits non-physician practitioners to perform the face to face encounter, they may not be employees of the HHA. Thus, nurse practitioners working in collaboration with certifying physicians to perform the face to face encounters cannot be employees of the HHA. There may be alternatives to employing those nurse practitioners, and we recommend that the non-physician practitioner’s relationship comply with the Stark exceptions and Anti-Kickback safe harbors for employees and personal service contracts. Among other things, this means written contracts establishing a fixed compensation that does not vary based on the value or volume of HHS referrals resulting from their face to face encounters.

+++++

Stuart J. Vogelsmeier is a partner with the St. Louis law firm of Lashly & Baer, P.C. Mr. Vogelsmeier regularly counsels health care providers on issues such as Stark Law and Anti-Kickback Law compliance, corporate structure, employment agreements, joint ventures, adding ancillary services to practices, and asset protection. He can be contacted at (314) 436-8349 or at sjvogels@lashlybaer.com. The firm’s website is www.lashlybaer.com. Mr. Vogelsmeier would like to thank his partner, Richard D. Watters, who provided analysis for this article.

This article is for informational and educational purposes only. Hospitals, home health agencies, individual physicians and other providers should contact their advisors for assistance.