



# *E-Alliance Extra*

## **Missouri Alliance for Home Care**

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### **Court of Appeals Reverses Overtime Lawsuit Rulings: NAHC Advocacy Continues** (From NAHC)

The U.S. Court of Appeals for the District of Columbia issued its decision last week in the home care lawsuit challenging the validity of the Department of Labor rules that redefined the overtime compensation exemption affecting personal care aides. Earlier this year, the federal District Court invalidated the rule that excluded home care aide and live in domestic workers employed by home care companies, i.e. the 3rd party entity, and the additional rule that redefined “companionship services” in a way that made it inapplicable to home care workers. The Court of Appeals reversed the lower court’s decision on 3rd party employers and determined that, in doing so, the plaintiffs, NAHC and others, did not have standing to challenge the new definition of “companionship services.”

NAHC was joined in this lawsuit by the International Franchise Association and the Home Care Association of America. At this point, the coalition is considering all options for further litigation including review before the U.S. Supreme Court. NAHC had previously pursued a lawsuit successfully concerning the overtime exemption to the Supreme Court. However, in those appeals, the focus was on defending the then-existing exemption while the current matter challenges the validity of the rule that replaced that exemption.

NAHC has 52 days to ask the Court of Appeals to rehear the case with the full slate of judges in that court. This is known as “en banc” review. Thereafter, NAHC would have 90 days to seek review before the U.S. Supreme Court through what is known as a Petition for Certiorari. Supreme Court review is discretionary with the court. Alternatively, NAHC could seek Supreme Court review and bypass the Court of Appeals en banc rehearing. A request for a stay of the court’s ruling is likely necessary as well to avoid the rules taking affect during further appeal. If no further review is sought, the rules would go into affect in 52 days.

Legislative action is an additional remedy that the coalition is considering. However, even if Congress reinstated the former rules with legislation, the President, who has publicly supported the changes, can veto it. Finally, the primary payers of the affected services, state Medicaid program, will likely need to institute changes in payment rates to cover any new costs. That is a difficult

proposition for a number of reasons, but earlier plans by states to limit working hours to avoid overtime were met with opposition from workers and beneficiaries alike.

NAHC has been joined in its advocacy on this issue by numerous other stakeholders including representatives of persons with disabilities. These allies have already reached out to express their plan to continue support.

The lawsuit is Home Care Association of America, et al v. Weil, et al, Case Number 15-5018. The decision can be [accessed here](#).

### **ICD-10 Guidance Impacts 2015 Home Health Grouper (From NAHC)**

The National Association for Home Care & Hospice (NAHC) has recently learned that the organizations responsible for the official International Classification for Disease (ICD)-10 coding guidance has issued clarification that would require home health agencies to indicate an “A” (initial encounter) in the 7<sup>th</sup> character for some ICD-10 codes. An “A” in the 7<sup>th</sup> character should be used for any encounter where the patient is still receiving active treatment for the clinical condition, including home health. While in many cases this would not apply to home health, there are times where it could, such as antibiotic treatment for a post-op infection.

Until now both home health coding experts and CMS have understood that an “A”- initial encounter” would never be appropriate as the 7<sup>th</sup> character for a home health diagnosis since the patient would have always been seen initially in another setting. However, the definition of initial encounter in the ICD-10 coding guidelines is broader than many realized.

In the ICD-10-CM Official Guidelines for Coding and Reporting, the following language is used to help coders determine when an “A” should be used in the 7<sup>th</sup> character:

“While the patient may be seen by a new or different provider over the course of treatment for an injury, assignment of the 7th character is based on whether the patient is undergoing active treatment and not whether the provider is seeing the patient for the first time.”

“For complication codes, active treatment refers to treatment for the condition described by the code, even though it may be related to an earlier precipitating problem. For example, code T84.50XA, Infection and inflammatory reaction due to unspecified internal joint prosthesis, initial encounter, is used when active

treatment is provided for the infection, even though the condition relates to the prosthetic device, implant or graft that was placed at a previous encounter.”

The main concern for home health providers with this new guidance is that the 2015 Grouper, effective for claims spanning October 1– December 31 2015, does not allow for case mix and non-routine supply (NRS) points for any ICD-10 code with an “A” in the 7<sup>th</sup> character.

The potential magnitude of the problem could be larger than what CMS anticipates. Claims with a diagnosis for wound dehiscence, post-op infection of surgical wound, or non-healing of a surgical wound could be impacted.

NAHC is currently waiting for confirmation from CMS as to how this issue will be addressed. It appears that claims will need to be adjusted since it is unlikely that the Grouper can be updated so close to the ICD-10 implementation date.

MAHC will continue to monitor and communicate to members additional information as it becomes available.

### **Hospice Payment Reform** (From NAHC)

Change Request (CR) 9201 has been posted by CMS. This is the CR that was referenced in last week's CMS Open Door Forum, but not posted until now. It provides instructions to the MACs for the implementation of the hospice payment reform (two routine home care rates and the service intensity add-on payments). The effective date of these changes is January 1, 2015. The link to the CR is:

<https://www.cms.gov/Regulations-and-Guidance/Guidance/Transmittals/Downloads/R3326CP.pdf>

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