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"Incident to" Billing in Healthcare: Navigating Complex Requirements and Ensuring Compliance

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McDermott Will & Emery

“Incident to” Billing in Healthcare: Navigating Complex Requirements and Ensuring Compliance

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Outline

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- Basics of Medicare “Incident to” Services
- Special Considerations for Billing Non-Physician Practitioner (NPP) Services as “Incident to” Services
- Requirements for Billing Services “Incident to”
- Pros and Cons of NPP “Incident to” Billing
  - Advantages
  - Common Pitfalls
  - Potential Ramifications of Noncompliance
- Best Practices to Ensure Compliance
- How to Address Noncompliance
- Questions

“Incident to” Basics

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- Medicare “incident to” services are:
  - Services and supplies furnished incident to a physician’s or NPP’s services
    - Certain NPPs* (physician assistant, nurse practitioner, clinical nurse specialist, nurse midwife and clinical psychologist) may bill for services incident to their services
    - NPPs’ services also may be treated as incident to services
  - Generally furnished in the office setting
  - Billed as Part B services to the applicable Medicare Administrative Contractor (MAC)
  - Paid under the Medicare Physician Fee Schedule (MPFS)

* For ease of reference, and to avoid confusion with circumstances where NPP services are billed as incident to services, the physicians and NPPs who bill for incident to services are referred to as physicians.

“Incident to” Basics

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- Commercial payers may have their own requirements
  - Generally follow Medicare
  - May have different standards for how NPP services are billed
- Tricare follows Medicare rules
- Medicaid may or may not follow Medicare rules
- Note: Hospital outpatient services are also defined as services incident to a physician’s services, but that is a different concept (42 U.S.C. § 1395x(s)(2)(B))

Special Considerations for Billing NPP Services as "Incident to" Services

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- When services of a Medicare-enrolled NPP (including "incident to" services) are billed under the NPP's National Provider Identifier (NPI), the services are reimbursed at 85% of the MPFS
- If NPP services are furnished in a way that meet the "incident to" requirements described in the next section, the NPP services (like other "incident to" services) may be billed under the supervising physician's NPI and reimbursed at 100% of the MPFS
  - As if the physician supervising the provision of services *personally performed* the services

“Incident to” Requirements

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- Section 1861(s)(2)(A) of the Social Security Act
- 42 U.S.C. § 1395x(s)(2)(A)
- 42 C.F.R. § 410.26
  - 9 requirements discussed in detail on next slides
- Medicare Benefit Policy Manual, Publication 100-02, Chapter 15, Section 60
- 42 CFR 410.71, 410.73-77

“Incident to” Requirements

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1. Services and supplies must be furnished in a non-institutional setting to non-institutional patients
   - Services and supplies
     - Any service or supply (including drugs or biologicals that are not usually self-administered) that are included in Section 1861(s)(2)(A) of the Act and are *not* specifically listed in the Act as a separate benefit included in the Medicare program
       - “Incident to” requirements do not apply to services having their own benefit category (e.g., diagnostic tests)
     - Drugs and biologicals, PT, OT and speech pathology have additional rules

Hypothetical

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- Must a supervising physician be physically present when flu shots, EKGs, laboratory tests or x-rays are performed in an office in order to be billed as “incident to” services?
  - These services have their own statutory benefit categories and are subject to the rules applicable to their specific category
  - These are not “incident to” services
  - “Incident to” rules do not apply

“Incident to” Requirements

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- Non-institutional setting
  - Services cannot be billed “incident to” if rendered in a hospital, provider-based location or skilled nursing facility (SNF)
    - Services that would be “incident to” in an office setting are bundled with the hospital or SNF payment under Part A, and cannot be carved out and billed separately by a physician
  - Separate office suite within an institution
    - In institutions, including SNFs, the physician’s office must be confined to a separately identifiable part of the facility and cannot be construed to extend throughout the entire facility (See MLN Matters Number SE0441 (August 23, 2016))
  - Certain chemotherapy “incident to” services are excluded from the bundled SNF payments and may be separately billable to the MAC (See MLN Matters Number SE0441 (August 23, 2016))

“Incident to” Requirements

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2. Services and supplies must be an integral, though incidental, part of the physician’s services in the course of diagnosis or treatment of an injury or illness
   - Physician personally performs the initial service
     - Physician must have seen the patient for the problem or complaint for which the “incident to” service is provided
   - Subsequent services by physician
     - Frequency reflects physician is actively involved in managing the patient’s course of treatment

Hypothetical

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- Patient A visits Doctor X at Group Practice who diagnoses patient with diabetes on May 5th
- Patient A visits Group Practice on May 10th and sees a nurse practitioner (NP) with questions related to diabetes diagnosis
- May services performed by the NP be billed by Doctor X?
  - YES if all “incident to” requirements are satisfied

Hypothetical

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- Patient A subsequently visits Group Practice on July 10th and is seen by NP
- NP diagnoses patient with the flu
- May services performed by the NP be billed by Doctor X?
  - NO
  - While the patient is established, the patient's problem is new and Doctor X was not involved in the patient's diagnosis
  - If the NP is enrolled in Medicare, the services may be billed under the NP's NPI
    - Will be paid at 85% of the MPFS

“Incident to” Requirements

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3. Services and supplies must be commonly furnished without charge or included in the physician’s bill

- Expense to the physician or other legal entity that bills for the service
- Administration of a drug that would be covered if purchased by physician (even when purchased by patient)
- Application of an antibiotic ointment following a minor surgical procedure

“Incident to” Requirements

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4. Services and supplies must be of a type that are commonly furnished in a physician’s office or clinic

- Examples of services performed by auxiliary personnel (including NPPs) on an “incident to” basis include:
  - Taking blood pressure and temperatures
  - Giving injections
  - Changing dressings
  - Minor surgery
  - Setting casts or simple fractures
  - Activities that involve evaluation or treatment of a patient’s condition
- Services that are not considered medically appropriate to provide in the office setting would *not* be covered as “incident to”

“Incident to” Requirements

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- Examples of “incident to” supplies include:
  - Gauze, ointments and bandages
  - Drugs and biologicals that are not usually self-administered
- Supplies that a physician is not expected to have on hand in his/her office would *not* be covered as “incident to”

“Incident to” Requirements

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5. In general, services and supplies must be furnished under the physician’s direct supervision

- Requirement has historically caused confusion
- In 2016 MPFS Final Rule, CMS amended 410.26(b)(5) “consistent with previous preamble discussion and subregulatory guidance”
- Clarified that the physician who bills for “incident to” services must be the physician who directly supervises the auxiliary personnel who provide the “incident to” services
- Does not require that the supervising physician be the same individual as the physician who orders or refers the beneficiary for the services, or who initiates treatment
  - Solo practitioners must directly supervise the care
  - In physician groups, any physician member of the group may supervise

“Incident to” Requirements – Supervision

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- Under circumstances where the supervising physician is not the same as the referring, ordering, or treating physician, only the supervising physician may bill Medicare for the “incident to” service
- Supervising physician’s NPI is identified on the claim form and used to bill Medicare
- When the billing number of the physician is reported on the claim form, the physician is stating that he or she directly performed the service or supervised the auxiliary personnel performing the service consistent with the required level of supervision

“Incident to” Requirements – Supervision

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- Form CMS 1500
  - Physician who supervised the “incident to” service (if different from the ordering physician) is identified as the rendering physician
  - If the physician and NPP are part of a group practice, the group practice is identified as the billing entity
- No special modifier is required to indicate that the NPP furnished the services

“Incident to” Requirements – Supervision

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- Federal Ethics in Patient Referrals Act, 42 U.S.C § 1395nn (the “Stark Law”)
  - Group practice definition/In-Office Ancillary Services Exception
  - Group practice productivity credit for “incident to” services accrues to the physician whose services the “incident to” service is based (i.e., the initial treating physician), rather than the supervising physician

“Incident to” Requirements – Supervision

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- Direct supervision in the office setting means the physician must be present in the office suite and immediately available to furnish assistance and direction throughout the performance of the procedure
  - The physician does not need to be in the same room when the procedure is performed but must be present in the office suite
    - Office suite is limited to the dedicated area, or suite, designated by records of ownership, rent or other agreement with the owner, in which the supervising physician maintains his/her practice or provides services as part of a multi-specialty clinic
  - Immediately available means “without delay” to assist and take over the care as necessary
- Differs from “personal supervision” which means a physician must be in the room during the performance of the procedure

“Incident to” Requirements – Supervision

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- Designated care management services can be furnished under *general supervision* when provided “incident to”
  - Includes G0502, G0503, G0504, G0507, CPT code 99487 and CPT code 99489 with additional codes to be added through future rulemaking
  - “General supervision” means the procedure is furnished under the physician’s overall direction and control, but the physician's presence is not required during the performance of the procedure

“Incident to” Requirements – Supervision

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- Certain services rendered in patients’ homes may be billed “incident to”
  - In general, physician must be present in the patient’s home providing direct supervision
  - Exception for homebound patients in medically underserved areas where there are no available home health services and only for certain services
  - Exception when service is intermittent

Hypothetical

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- Doctor A diagnoses and initially treats patient
- NP conducts follow up visits with patient in Doctor A's clinic, but Doctor A is not in the building during any of NP's patient visits
- NP shares notes with Doctor A and consults Doctor A for treatment plan decisions. Can NP's services be billed "incident to"?
  - NO if Doctor A is the only physician in the clinic because Doctor A was not providing direct supervision
  - Services may be billed by NP at 85% of MPFS

“Incident to” Requirements

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6. Services and supplies must be furnished by the physician, practitioner with an incident to benefit, or auxiliary personnel

- “Practitioner with an incident to benefit” means a NPP who is authorized to receive payment for services incident to his or her own services
- Auxiliary personnel (including but not limited to a NPP) means an individual who is acting under the supervision of a physician, regardless of whether the individual is an employee, leased employee, or independent contractor of the physician or of the legal entity that employs or contracts with the physician
- Such individuals must not be excluded from any federally funded health care programs by the Office of Inspector General (OIG) or revoked by Medicare

“Incident to” Requirements

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7. Services and supplies must be furnished in accordance with applicable State law

- Physicians, NPPs and other auxiliary personnel must satisfy State license requirements
- Physicians, NPPs and other auxiliary personnel cannot hire and supervise professionals whose scope of practice is outside of the provider’s own scope of practice under State law or whose professional qualifications exceed those of the supervising provider
- Physicians, NPPs and other auxiliary personnel must satisfy State law supervision requirements

“Incident to” Requirements

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- Many states limit the number of physician assistants and NPs a physician may supervise
- Many states require certain physician involvement and/or require that the physician and NPP enter into written agreements documenting the supervisory arrangement
  - Some states require that the parties submit these agreements to the state
  - Some states have certain forms that must be utilized
- Some states require additional reporting

“Incident to” Requirements

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- Georgia physician assistant licensure laws prohibit a physician from supervising more than four and sometimes only two physician assistants at any time, depending on circumstances
  - O.C.G.A. 43-34-102
- Illinois physician assistant licensure laws prohibit a physician from supervising more than five full-time equivalent physician assistants
  - The number of supervised physician assistants must be reduced by the number of collaborative agreements the supervising physician maintains with nurse practitioners
  - 225 I.L.C.S. 95/7(a)

Hypothetical

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- Licensed physician evaluates and diagnoses patient and initiates treatment
- Auxiliary personnel conducts follow up visits, monitors and treats symptoms within the scope of his or her license while licensed physician is onsite
- Licensed physician periodically sees patient (every other visit or every third visit)
- Are auxiliary personnel's services provided "incident to" the physician's services?
    - YES if all "incident to" requirements satisfied

“Incident to” Requirements

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8. Auxiliary personnel or supervising physician may be an employee or an independent contractor

- Leased Employee
  - Non-physician working under a written leasing agreement that provides:
    - The nonphysician, employed by the leasing company, provides services as the leased employee of the physician or other entity and
    - The physician or other entity exercises control over all actions taken by the leased employee with regard to the rendering of medical services to the same extent as the physician or other entity would exercise such control if the leased employee were directly employed by the physician or other entity
- Independent Contractor
  - Individual (or the entity that hired such an individual) who performs part-time or full-time work for which the individual (or the entity that hired such an individual) receives an IRS-1099 form
- Part time or full time

“Incident to” Requirements

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- Supervising physician must have a relationship with the legal entity billing and receiving payment for services that satisfies the reassignment rules

Hypothetical

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- Treating physician Doctor X refers a patient to an anti-coagulation monitoring clinic (a physician group)
- Can Doctor X bill these services as “incident to”?
  - NO because the services are not being provided by an individual under Doctor X’s supervision

Hypothetical

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- Can supervising physician Doctor Y at the anti-coagulation monitoring clinic bill the services as “incident to” if Doctor Y directly supervises those services at the clinic?
  - NO because Doctor Y is not treating the patient for the underlying condition
  - BUT if Doctor Y receives a referral from Doctor X and Doctor Y performs an initial evaluation of the patient and then orders and supervises the services, Doctor Y may bill the services “incident to”

“Incident to” Requirements

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9. “Claims for drugs payable administered by a physician as defined in section 1861(r) of the Social Security Act to refill an implanted item of DME may only be paid under Part B to the physician as a drug incident to a physician's service under section 1861(s)(2)(A)”

- These drugs are not payable to a pharmacy/supplier as DME under section 1861(s)(6) of the Act

Advantages of Billing for NPP Services "Incident to" Physician's Services

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- Higher reimbursement
  - Receive 100% of MPFS for services rendered by NPP but billed by physician
  - Receive 85% of MPFS if billed by NPP
- Higher margins
  - NPPs generally receive lower compensation than physicians

Common Pitfalls of Billing for NPP Services "Incident to" Physician's Services

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- Failure to ensure all "incident to" requirements are met
  - Billing "incident to" for new patients
  - Billing "incident to" for established patients with new problems
  - Not satisfying supervision requirements
    - Violating State law requirements
    - Treating physician in solo practice not in office suite during service
    - No supervising physician in group practice in office suite during service
- Billing under NPI of treating physician rather than supervising physician
- Complications in accounting for NPP vs. physician services when determining physician compensation based on wRVUs or other productivity based compensation

Potential Ramifications of Noncompliance

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- OIG has expressed concern about the use of auxiliary personnel to perform “incident to” services
- Historically OIG Work Plans have included examining the qualifications of auxiliary personnel performing “incident to” services

Potential Ramifications of Noncompliance

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- OIG Work Plans cite to August 2009 report on Prevalence and Qualifications of Nonphysicians Who Performed Medicare Physician Services
  - "'Incident to' services may be vulnerable to overutilization and may put beneficiaries at risk of receiving services that do not meet professionally recognized standards of care"
  - "Unqualified non-physicians performed 21 percent of the services that physicians did not perform personally"
    - Non-physicians did not possess the necessary licenses or certifications, had no verifiable credentials, or lacked the training to perform the service

Potential Ramifications of Noncompliance

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- Refund obligations
  - 60 day rule, 42 U.S.C. § 1320a-7k(d)
  - Medicare Parts A and B health care providers and suppliers must report and return overpayments by the later of the date that is 60 days after the date an overpayment was “identified”, or the due date of any corresponding cost report, if applicable
- Penalties and fines
- Revocation of Medicare enrollment
  - Includes one to three year enrollment ban

Potential Ramifications of Noncompliance

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- Improper billing and failure to refund overpayments may result in False Claims Act (FCA) liability pursued by the Department of Justice (DOJ)
  - $10,957 to $21,916 per false claim and treble damages
  - Whistleblowers
  - *Universal Health Services v. United States ex rel. Escobar (2016)*
    - Only material noncompliance can trigger FCA liability
    - Material noncompliance will be determined on a fact-based, case-by-case determination

OIG Self-Disclosure Settlements

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- December 22, 2014: Mercer Osteopathic, Ltd. (Mercer) agreed to pay $49,598.10 for allegedly violating the Civil Monetary Penalties Law (Ohio)
  - OIG alleged Mercer improperly billed Medicare for patient visits under a physician's NPI when the services had been rendered by a nurse practitioner and did not comply with Medicare's "incident to" requirements

OIG Self-Disclosure Settlements

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- December 16, 2015: Sports & Orthopedic Rehabilitation, P.L.L.C. d/b/a STAR Spine and Sport (STAR) agreed to pay $19,095.50 for allegedly violating the Civil Monetary Penalties Law (Colorado)
  - OIG alleged STAR submitted claims to Medicare for items or services that were provided by a physician assistant for “incident-to” services using a STAR physician’s NPI during times when the physician was not supervising the physician assistant in accordance with Medicare guidelines

OIG Self-Disclosure Settlements

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- December 23, 2015: Bradshaw Medical Clinic, PC (Bradshaw), agreed to pay $24,637.76 for allegedly violating the Civil Monetary Penalties Law (Tennessee)
  - OIG alleged Bradshaw submitted claims to Federal health care programs for, among other issues, services provided “incident-to” a physician’s services when the services were not provided “incident-to” a physician’s services

OIG Self-Disclosure Settlements

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- June 20, 2016: Medical Plaza Family and Geriatric Physician, P.A. (Medical Plaza), agreed to pay $109,975.24 for allegedly violating the Civil Monetary Penalties Law (North Carolina)
  - OIG alleged Medical Plaza submitted claims to Medicare for payment under two physicians' NPI numbers for incident-to services provided to patients at Medical Plaza when the services had been provided by Medical Plaza's nurse practitioners

OIG Self-Disclosure Settlements

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- April 20, 2017: David Yoon, M.D., David Yoon, MD PA, and Primary Care Physicians, Inc., agreed to pay $379,085 for allegedly violating the Civil Monetary Penalties Law (Florida)
  - OIG alleged Dr. Yoon submitted false claims to Medicare for, among other issues, services rendered by non-physician providers as "incident to" when the "incident to" requirements under Medicare were not met

Nason Medical Centers (2015)

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- Dr. Baron S. Nason, Robert T. Hamilton and Nason Medical Settle Allegations of Fraud with USAO of the District of South Carolina for $1,021,778.26
- Among other allegations, the facility blatantly disregarded incident to billing requirements and submitted claims to Medicare and TRICARE for services provided by physician assistants as though the services were provided by physicians
  - Physician assistants treated first-time patients when no doctor initially saw or treated the patient
  - Physician assistants treated returning patients with new illnesses and no doctor initially saw or treated the patient
  - Physician assistants who provided services allegedly lacked state licenses
- Improperly collected the extra 15% of reimbursement

Jacksonville Center for Reproductive Medicine (2015)

McDermott Will & Emery

- Jacksonville-Based Fertility Clinic Settles False Claims Act Allegations with USAO of Middle District of Florida for $98,838.98
  - Among other allegations, the Center routinely misused the “incident to” provisions when it billed TRICARE for work performed by a physician assistant or nurse practitioner
  - In many instances, physician involvement was so minimal that the supervision requirements for billing “incident to” were not met

Southeast Orthopedic Specialists (2016)

McDermott Will & Emery

- Orthopedic Surgery Practice Settles False Claims Act Allegations with USAO of Middle District of Florida for $4,488,000
  - Among other allegations, Southeast Orthopedic Specialists knowingly billed for certain claims as “incident to” physician supervision when no physician was present or there was no verification of any physician being present

Lehigh Valley Pain Management (2016)

McDermott Will & Emery

- Doctors and Medical Facilities in Lehigh Valley Settle Healthcare Fraud Allegations with USAO of Eastern District of Pennsylvania for $690,441
  - Former employee whistleblower alleged that the defendants submitted claims to the federal government to receive reimbursement for services performed by non-physicians as “incident to” the services of supervising physicians when supervising physicians were away from the office or otherwise incapable of supervising
  - Resulted in false claims from July 1, 2007 through December 31, 2013
  - As part of the settlement agreement, defendants agreed to not submit claims to federal payors for any services performed by non-physician providers as incident to the physician’s provider number, regardless of whether the claims could properly be billed incident to the physician’s services, for the next 30 months

Best Practices to Ensure Compliance

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- Develop clear policies and procedures
- License checks
- Exclusion screenings
- Patient record should evidence compliance with “incident to” requirements
- Audit compliance
- Monitor regulatory developments

How to Address Noncompliance

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- Refund overpayments to MAC
  - Voluntary refund
  - Follow MAC process
  - No reduction in amount
  - No release of any kind
  - Six-year statute of limitations

How to Address Noncompliance

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- OIG Provider Self-Disclosure Protocol
  - Benchmark 1.5 multiplier
    - Claims calculation
      - All claims or statistical sample
  - Presumption of no Corporate Integrity Agreement (CIA)
  - Release of Civil Monetary Penalty Law and exclusion
  - Potentially reduce FCA exposure
  - Tolling of the 60-day period after submission
  - Six-year statute of limitations
  - Must involve settlements of more than $10,000
  - Referrals among agencies possible, DOJ could become involved
  - Updated guidelines

Hypothetical

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- Medical Group bills for the services of an employed NPP under Doctor A's name/NPI even when the NPP treats new patients or treats patients while neither Doctor A nor any other Medical Group physician is in the office
- Potential corrective actions:
  - Refund
    - 100% of collections or the 15% differential?
    - What if the NPP is not enrolled in Medicare?
  - Self-disclosure

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Thank You

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