

Are You Covered?

Here Come the RAC Audits

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Few industries are subject to the frequency of regulatory change that those in healthcare have come to expect. The sheer size of the healthcare industry makes it an easy target for legislative action, requiring constant vigilance and a proactive mindset.



One of the most recent challenges facing healthcare providers is the threat of audits by Recovery Audit Contractors (RACs), private contractors who attempt to identify Medicare overpayments (and to a much lesser extent, underpayments) to providers. These contractors receive between 9 and 12 percent of all improper payments identified (the amount dependent on the location of their operation). The risk to providers is the possibility of having to repay substantial sums of money to the government and other regulatory actions stemming from the discovery of improper billing practices. As is frequently the case with emerging regulatory risks, insurance coverage generally fails to effectively mitigate the risk. Therefore, now is the time to prepare yourself and your practice for the risks posed by RACs.

Background

Rising healthcare costs have been a major problem for individuals, employers and all levels of government for many years. Healthcare providers have long been targeted by the government to minimize the increase in healthcare costs. Preventing improper payments to providers is seen as a way to suppress growing medical costs and, now, as a supplemental way to fund proposed costly healthcare reform.

Results from the RAC pilot program indicate that the money involved is hardly inconsequential. The three-year RAC pilot program identified over \$1 billion in improper Medicare payments. RAC's success rate has led to the permanent RAC program currently being rolled out in all fifty states and Puerto Rico. The RAC program is divided into four geographic regions, and private contractors and subcontractors have been awarded specific regions. Nebraska, Iowa, South Dakota and Kansas all fall into RAC Region D. The primary contractor

for this region is HealthDataInsights, Inc., and PRG-Schultz, Inc. is the subcontractor.

RAC areas of focus

Some good news about RACs is that they are allowed to focus on some areas but they are not allowed to examine others; there are also limits to the number of records that can be audited for any given practice.

Most frequent areas of focus according to the Centers for Medicare & Medicaid Services (CMS)

- Payment for services that were *not medically necessary* (40 percent)
- Payment for claims that were *coded incorrectly* or were paid using an *outdated fee schedule* (35 percent)
- Payment for services in which *duplicate claims* were filed and payment was made for the same service (17 percent)
- Payment for services *without adequate documentation* to support the claim (8 percent)

What areas are not subject to RAC reviews?

- Services provided under any program other than Medicare
- Claims three years past their initial determination date
- Claims paid prior to October 1, 2007
- Claims already reviewed in some manner by Medicare

Limits on the volume of records RACs may audit

- Solo Practitioner
 - Limit = 10 medical records/45 days
- Partnership (2-5 individuals)
 - Limit = 20 medical records/45 days
- Group (6-15 individuals)
 - Limit = 30 medical records/45 days
- Large Group (16+ individuals)
 - Limit = 50 medical records/45 days

The RAC process

RACs conduct two levels of review: automated and complex. Automated reviews utilize large-scale data aggregation and analysis to identify services that are clearly not covered, are coded incorrectly, violate an existing Medicare policy or guideline or are clinically unbelievable issues. Complex reviews involve human review of medical records and are principally used when there is a high probability that a service is not covered or when there is no existing Medicare policy or guideline in place.

If the RAC identifies an overpayment on automated review, you will simply receive a letter seeking collection of the overpayment. Repayment occurs most frequently as either a cash payment or a reduction of future Medicare reimbursements. When a RAC initiates a complex review, you receive a letter requesting specific medical records. You then have 45 days to respond and, if you fail to do so, the claim is automatically considered improper and subject to repayment. You may request an extension by supplying facts establishing why the delay is necessary. Notably, RACs are not currently required to reimburse you for expenses associated with providing requested medical records.

Appealing an alleged improper payment – the long and winding road

There are very explicit deadlines, dollar amounts and steps that must be taken in order to successfully appeal a claim denied from a RAC audit. A full exploration of these requirements is beyond the scope of this article and we highly recommend that you direct these questions to your counsel.

The appeals process

- **First Level – Redetermination**
 - Must file your claim with the Medicare Administrative Contractor
- **Second Level – Reconsideration**
 - Filed with the Qualified Independent Consultant
 - This review is based on the record only, meaning precise documentation and record keeping is vitally important
- **Third Level – Hearing with an administrative law judge**
 - This was the most successful level for appeals during the demonstration project
 - Most hearings are conducted via teleconference
- **Fourth Level – Medicare Appeals Council**
 - Required to file an appeal with the Council within 60 days of denial by an administrative law judge
 - No in-person review available
- **Fifth Level – Federal District Court**
 - Same 60-day deadline to appeal as the fourth level

Preparing for RACs

The complex deadlines and procedures required to successfully navigate the risks posed by RACs necessitate a proactive approach. The first step each medical facility must take is to establish a process for dealing with RACs. A general

process should include, at a minimum, the following steps:

1. Establish a key group of stakeholders in a RAC committee
2. Identify one person to manage and track all incoming and outgoing RAC communications
3. Create a system of steps to track RAC inquiries or make use of available free tools. This should include processes to address:
 - a. The handling of all RAC requests, including a method to request extensions
 - b. How medical records will be copied, distributed and tracked
 - c. Who will follow up on responses submitted to the RAC and at what time
 - d. The RAC appeals process
4. Audit, inspect and correct to avoid improper billing in the first place:
 - a. Focus on common problem areas
 - i. Re-emphasize the vital importance of regular and detailed documentation
 - ii. Ensure unbundling has not or is not occurring
 - iii. Check that services billed were actually performed and were necessary
 - iv. Review codes to ensure high coding levels are justified
 - b. Consider hiring counsel to perform a limited audit
 - i. Any findings from internal reviews or reviews by external parties who are *not* counsel are usually *not* protected documents
 - c. Ensure your utilization review process is robust
 - d. Remember that RACs are not able to review claims already reviewed by appropriate Medicare personnel

It is equally important to educate physicians and other practitioners because these individuals will have the most direct impact on your ability to avoid RAC pitfalls. *For example, lack of needed documentation to show either that services were provided or to support a level of coding is one of the most common errors leading to a required reimbursement.*

RACs and your insurance coverage

As is the case with many emerging risks, insurance coverage for the hazards posed by RACs is lacking. The most significant risk to most practices is the forced reimbursement of previous payments. There are few, if any, policies that would cover this expense, and if a policy did cover such an expense, it could be prohibitively expensive for most healthcare entities and providers. Those who have considered “buying insurance”

have ultimately concluded that those same dollars are better spent on prevention.

Some medical professional liability policies have responded to this exposure by offering limited coverage often called Medicare/Medicaid Defense Coverage. Other carriers, including syndicates of Lloyd’s of London, have developed stand-alone products, but the details reveal that at this point in time, the insurance industry is not responding to this exposure with full coverage.

Expenses and costs associated with RAC audits

- Reimbursements to Medicare
- Legal fees
 - Fulfilling document requests
 - Appeals
 - Internal auditing
 - Expert witnesses
- Fines and penalties, including Corrective Action Plans and Corporate Integrity Agreements, which may stem from major violations discovered during RAC audits

As noted, the most likely expenses to be covered by insurance are legal expenses stemming from an appeal of an alleged improper claim. However, it is by no means certain that a policy would cover this expense and the outcome will vary depending on many factors, most importantly the underlying cause of the alleged error. Some directors and officers liability policies have also offered limited coverage but, to date, most of the coverage provided has been purely catastrophic by design, with retentions/deductibles in excess of \$100,000.

Conclusion

Currently most, if not all, healthcare facilities have no coverage for this exposure. Ultimately, the financial exposures posed by RACs are not easily addressed through the purchase of insurance. Instead, these exposures require a proactive approach aimed at reducing the number of errors that could lead to RAC reimbursements, successfully tracking and appealing alleged improper payments and educating providers and staff on documentation, coding and record-keeping. It is likely that the insurance industry will respond with products to address this risk after loss data is developed and can be analyzed and underwritten. In the meantime, you should focus your resources on prevention, and educate your staff on this significant risk to your business.