

# PUBLICATION

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## Congress Enacts "Provider-Based" Surprise [Ober|Kaler]

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**Hospitals have long tried to expand their footprints by developing, or in many instances acquiring, physician practices and other medical operations to provide services beyond the immediate vicinity of the hospital's campus. The hospitals have seen many advantages in doing this, including expanding the hospital's name recognition with patients and potential patients, providing "hospital-level" services across a wider geographic area, cementing relationships with a broader group of physicians, and, of course, obtaining "hospital-level" reimbursement.**

Federal regulators, however, have repeatedly questioned whether these off-campus sites, in fact, furnished enhanced care, whether they were sufficiently integrated with the hospital's main operations to be considered part of a hospital, and whether sites warranted the greater reimbursement they received. Giving voice to those concerns, CMS (then HCFA) in April 2000 promulgated its now well-known provider-based rule, which it then amended in 2001 and 2002. The rule, found at 42 C.F.R. § 413.65, places a number of conditions on when a hospital may claim an off-campus location as part of the hospital's operations in order to receive enhanced reimbursement under the Hospital Outpatient Prospective Payment System (HOPPS).

Notwithstanding the provider-based rule and its limitations, the growth of off-campus provider-based locations has continued and, indeed, increased. This, in turn, has led federal regulators in CMS and the OIG, MedPAC, and others again to express concerns that these off-site locations are paid as hospital sites even though they may do little to provide patient care that goes beyond that which is furnished by free-standing, non-hospital-based operations. According to the regulators, and many others in the public, if services furnished in a non-hospital location—a location such as a freestanding imaging center, radiation therapy center, physician office, ambulatory surgery center, or one of many other non-hospital medical operations — can be provided at a lower rate, there is little to justify why the same types of services furnished in off-campus operations of a hospital warrant higher payments.

Congress has now acted on those concerns. Included in the [Bipartisan Budget Act of 2015, Pub. Law 114-74 \(Nov. 2, 2015\), at Section 603](#), is a new amendment to the Medicare statute providing special payment treatment of off-campus outpatient departments of a provider. Under the new law, effective January 1, 2017, HOPPS payments to hospitals will not be available for the vast majority of services furnished by "new" off-campus outpatient departments of a provider. Excepted from this ban are items and services furnished by a dedicated emergency department as defined in 42 C.F.R. § 489.24(b). Also excepted from this ban are off-campus departments of a provider that were billing Medicare under the HOPPS system prior to November 2, 2015.

Under the new law, items and services furnished at off-campus locations that fail to meet the requirements for HOPPS reimbursement will be reimbursed in accordance with the otherwise applicable payment systems, as long as the requirements for reimbursement under those systems are met.

The statute specifies each hospital will be required to provide the Secretary with such information as the Secretary deems necessary to implement the provision. Further, there will be no administrative or judicial review of (1) the determination of the particular items and services subject to the new rule, (2) the payment

systems that will be applied in the absence of HOPPS, and (3), significantly, "the determination of whether a department of a provider" satisfies the definition of off-campus provider set forth in the statute.

## **Ober|Kaler's Comments**

The effect of the new legislation will be profound. In recent years, hospitals have moved aggressively to expand their footprints beyond their current campuses, with the result being that many hospitals now have a number of "hospital-based" operations that are situated miles away from those hospitals' main campuses. These existing operations will be allowed to continue, but new operations that were not billing as provider-based prior to November 2, 2015 will, effective January 1, 2017, no longer qualify for enhanced HOPPS reimbursement.