Using the 835 for Overpayment Recovery (Takebacks)

The Washington State Business & Transaction workgroup has been exploring possible ways for the 835 Remittance Advice transaction to be used for overpayment recovery in a manner that is consistent with RCW 48.43.600. The specific intent is for health plans to be able to use the 835 transaction as both a notification to providers about takebacks AND to takeback previous payments made to a provider, either in a sequential manner or simultaneously.

RCW 48.43.600 (http://apps.leg.wa.gov/rcw/default.aspx?cite=48.43.600) outlines health plan requirements related to overpayment recovery. Working in conjunction with the Office of the Insurance Commissioner (OIC), the Business & Transaction workgroup has discovered the following:

1. This RCW applies ***ONLY*** to providers and ***NOT*** to hospitals

   RCW 48.43.600 (http://apps.leg.wa.gov/rcw/default.aspx?cite=48.43.600) only applies to those takebacks related to claims where the tax id of the billing provider on that claim is for a provider organizations as provider is defined in RCW 48.43.005 (23) (http://app.leg.wa.gov/rcw/default.aspx?cite=48.43.005).

   RCW 48.43.600 does not apply when that tax id is for a hospital as hospital is defined in RCW 48.43.005 (22) (http://app.leg.wa.gov/rcw/default.aspx?cite=48.43.005).

   There is no RCW or WAC regulating overpayment recovery from hospitals.

2. ***Notification*** to the provider can be in any auditable form including an 835 transaction, ***not just in writing***.

   Notification to a provider about an impending takeback by a health plan can be in any form that is auditable, e.g. in writing, email, 835 transaction, etc. Notification in a non-paper method can occur as a standard practice. As such, two 835 transactions at least 30 days apart can be used to first notify a provider of an upcoming takeback and then to takeback the payment.

3. Providers and health plans may mutually agree to use the 835 transaction for ***simultaneous notification and takeback***.

   In order for the 835 transaction to be used to simultaneously notify the provider about takebacks and takeback those payments (in the same 835), the health plan and provider must affirmatively agree to that usage in a negotiated provider contract. A health plan may not mandate this process by including it in its sample contract form

that it files with the Commissioner for approval.

In those situations when a simultaneous notification and takeback occurs, any contested takeback must be refunded to the provider immediately. The immediate return of a contested refund is a legal requirement and must be included in the contract - it cannot be negotiated away via a contract.

4. Other “plain language” requirements of RCW 48.43.600 apply in all circumstances and cannot be negotiated away.

   They include:

   - A takeback must be made with 24 months of the original payment.
   - The takeback request must include the reason why the health plan is entitled to the takeback.
   - A health plan cannot request that a contested takeback be paid before six months has gone by since the request was made. Providers can voluntarily return the takeback sooner.
   - If a provider doesn’t contest a takeback within 30 days, the takeback is considered final and providers must pay (unless it’s been negotiated via contract that notification and takeback are occurring simultaneously and thus the takeback would have already occurred)

"The following memo provides clarifying guidance from the Office of the Insurance Commissioner that may be helpful in understanding the legal requirements surrounding takebacks."

STATE OF WASHINGTON

MIKE KREIDLER
STATE INSURANCE COMMISSIONER

Phone: (360) 725-7000
www.insurance.wa.gov

OFFICE OF
INSURANCE COMMISSIONER

December 15, 2015

TO: Jim Freeburg

FROM: Darryl Colman

SUBJECT: Overpayment Takebacks

Background

In settling claims, issuers may determine that providers have been overpaid for a particular treatment. The incorrect payment may be due to an error or due to incorrect or incomplete information regarding the treatment of an enrollee. The resulting financial transaction from the provider to an issuer is called a "takeback."

Increasingly, providers and issuers are using an electronic transaction to process takebacks. The particular transaction is known as a HIPAA-mandated provider remittance advice 835 transaction. This electronic transaction allows for immediate and automatic processing of claims overpayments and the information available in the electronic transaction enables efficient processing and patient accounting by providers. When this automated recovery process is interrupted with the requirement for paper or electronic pre-notification, time delays and complexities lead to significant burden for the providers.

Currently, issuers send paper notices indicating an overpayment recovery is necessary, but the paper notices rarely, if ever, make it to the appropriate department in the providers' office for processing. This creates an additional administrative burden for the providers and issuers.

Providers who use electronic transactions would like issuers to have the option of electronically recovering the overpayment without either a prior paper or electronic

notification. In essence, the electronic transaction would serve as the notification. Current HIPAA mandated technology not only allows this streamlined exchange but encourages its use. An electronic transaction would still allow providers to appeal the overpayment recovery. Both issuers and carriers have inquired whether this process complies with RCW 48.43.600(1).

Specific questions

You asked whether potentially simultaneous electronic notification and refund processing between providers and carriers, also known as the "takeback" process, which is apparently mutually desired by many carriers and providers, is permissible under the Insurance Code. RCW 48.43.600(1) provides that:

> "Except in the case of fraud, or as provided in subsections (2) and (3) of this section, a carrier may not: (a) Request a refund from a health care provider of a payment previously made to satisfy a claim unless it does so in writing to the provider within twenty-four months after the date that the payment was made; or (b) request that a contested refund be paid any sooner than six months after receipt of the request. Any such request must specify why the carrier believes the provider owes the refund. If a provider fails to contest the request in writing to the carrier within thirty days of its receipt, the request is deemed accepted and the refund must be paid."

You asked the following specific questions:

1) **Must notification of a payment recovery occur prior to the electronic takeback transaction, or can it occur simultaneously**?

RCW 48.43.600(1) does not specifically require the request notification, which must give the reason why the carrier believes the provider owes the refund, to be given prior to an uncontested refund being processed. However, if the refund request is contested, the six month waiting period in RCW 48.43.600(1)(b) is required before payment may be processed. The provider has a 30-day period to contest the refund request. The clear intent of the statute is to give providers adequate opportunity to contest refunds requested by the carrier. However, RCW 48.43.600 does not prohibit providers and carriers from making agreements to streamline the process of refunds, so long as they otherwise comply with the statute.

Thus, providers and carriers may enter into agreements to make uncontested refunds through the process of simultaneous takebacks and notifications. This may include a contract that assumes that a refund request is deemed uncontested until the provider notifies the carrier otherwise, so long as such agreements provide that the takeback will be returned to the provider and the normal contested refund

procedure be followed, if the provider ultimately contests a given takeback. *See* RCW 48.43.600(4).

This is because the statutory requirements for the six-month waiting period and 30-day contest period disappear if the provider agrees that the refund is uncontested. RCW 48.43.600(1). Such an agreement should specify that a refund request is initially deemed uncontested to allow for the simultaneous notification and takeback. Additionally, such an agreement would have to be strictly voluntary, as it would violate the public policy of this statute for a provider to be pressured into entering into such an agreement.

Moreover, to avoid conflicting with the six-month waiting period found in RCW 48.43.600(1)(b), the agreement would have to provide that when any participating provider contests a "takeback," the takeback would be immediately returned to the provider and then the ordinary six-month period would have to apply. Because the statute's plain language cannot be altered by contract, a carrier acts illegally when it retains or fails to return money representing a contested refund request before six months have passed, regardless of whether the parties have entered into a voluntary system of electronic takebacks. RCW 48.43.600(1)(b).

2) **If notification must occur prior to the takeback, is there a minimum amount of time for the notification to occur prior to the takeback**?

The carrier must always communicate to the provider notice that includes the specific reason(s) that the carrier feels it is entitled to a particular refund. RCW 48.43.600(1). The statute does not provide any minimum length of time by which a notification must precede an uncontested refund or takeback. However, unless the provider and the carrier have previously agreed otherwise, the carrier may not process a refund until the provider responds, because without the provider's consent, a request is not "uncontested" until the thirty days have passed. *Id*. Absent an agreement as laid out above, the notification of the reasons for the refund would have to be communicated, and the thirty days to contest such request would have to pass without objection from the provider, prior to processing any refund. *Id*.

You followed up my responses to your initial questions, above, as follows:

1) Are carriers required to automatically refund a contested takeback if it is a claim that has been retroactively denied because the enrollee was not actually covered?

A carrier must refund automatically any contested takeback, regardless of the reason. The specific example provided is when an employer is slow to tell the carrier than an individual is no longer an employee of the company, and thus ineligible for coverage, even though it was originally determined that the individual was covered. In these cases, the patient is responsible for the costs of services rendered. The situation as described appears to fall within the language of RCW

48.43.600(1), and there is not any exception in the statute. A carrier may not request payment of any contested refund, which would include any "takeback," before six months have passed. RCW 48.43.600(1)(b). Again, a carrier acts illegally when it retains or fails to return money representing a contested refund request before six months have passed, and that the ultimate burden for proving the right to refund or "takeback" is on the carrier, not the provider.

2) **What might constitute a voluntary agreement to allow such streamlining to occur? Must it occur in a formal contract**? **For example, a carrier would like to send an email to all providers allowing them to opt-out of paper notices. Would that suffice?**

The OIC does not currently prescribe a specific form of the agreement. However, given the public policy of RCW 48.43.600(1) to protect providers and provide an orderly process for refunds, any agreement as discussed above must be opt-in, rather than providers having to opt-out. The contract may not contradict the express requirements of the statute in any way. The OIC would be justified in requiring the parties to establish that such an agreement was specifically negotiated and understood by the parties. The more formal the agreement is, the more likely it will be upheld. The carriers should not rely on sending a mass email to the providers asking them to opt-out of the statutory scheme.