



Health Law Insights

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FEDERAL UPDATE

CMS Publishes Final Rule on Part D and Medicare Advantage Rule

The Centers for Medicare & Medicaid Services (CMS) has issued the final version of a rule regarding Medicare Advantage and Medicare prescription drug programs that will impose a number of new requirements on providers. The rule will save a purported \$1.6 billion over ten years and aims to curb fraud and abuse. Upcoming requirements include new disclosures of pricing methods, price concession transparency, and new rules mandating record disclosure to CMS. Furthermore, CMS will now have the capacity to take action against physicians it deems to have exhibited an abusive pattern of prescribing, those who represent a potential harm to Medicare beneficiaries, or those who have not satisfied other Medicare requirements.

Proposed Rule to Extend Certified Electronic Health Record Technology Implementation Deadline

CMS has proposed a rule that would allow eligible participants in the Medicare and Medicaid Electronic Health Care Record (EHR) Incentive Programs an additional year to update from the 2011 Edition to the 2014 Edition. Industry concern was cited as motivating the proposed move to extend the deadline, as health care providers struggled to implement the required technology in time. Eligible parties would be permitted to use the 2011 Edition criteria, the 2014 Edition criteria, or a combination of both for a full EHR reporting period if delays in the availability of the 2014 Edition affect their implementation timeline. CMS noted, however, that the 2014 Edition Certified Electronic Health Record Technology criteria would be required for the 2015 reporting period, pending further rulemaking.

Supreme Court Denies Review in Caregiver Case

The United States Supreme Court denied review on June 9 of a Fifth Circuit decision regarding whether or not group home caregivers qualified as employees or independent contractors. Were such caregivers to be classified as employees, they would then be entitled to obtain overtime pay under the Fair Labor Standards Act (FLSA). Review was sought on the basis of a perceived circuit split between the Fifth and Eleventh Circuits whereby each circuit came to the opposite conclusion as to whether such caregivers were entitled to overtime pay.

The Fifth Circuit case, *Chapman v. A.S.U.I. Healthcare and Development Center*, held that despite signed employment documents indicating the contrary, the caregivers were in fact employees entitled to overtime pay. Furthermore, the Fifth Circuit held that the companions' services exemption was not applicable to the case as the two employees of A.S.U.I. did not work in private homes for the purposes of the FLSA. However, the Eleventh Circuit held the opposite in *Buckner v. Florida Habilitation Network, Inc.*, and ruled that such caregivers were not employees but independent contractors and, as such, were not entitled to overtime pay.

CMS Reveals Plan to Introduce Rating System for Certain Providers

CMS plans to institute a five-star rating system available on Medicare.gov for hospitals, home health agencies, and dialysis providers. The rating system is meant to supplement websites already in existence to help consumers compare providers based on services and quality of care. Currently, the rating system is available for Medicare Advantage plans and nursing homes, with plans to expand it to physicians. CMS expects that the rating system will come into effect later this year and into early 2015.

CMS Allows 'Incident-To Basis' Billing for Pharmacist Services

CMS has moved to allow medical practices to bill Medicare for in-house pharmacist services. Practices may now bill for services of a pharmacist in the same manner as a physician would for services incident to the diagnosis or treatment of a patient, according to CMS Administrator Marilyn Tavenner, ending a period of ambiguity on the legality of the practice.

STATE UPDATE

New Jersey Legislature Proposes Bill to Expand Post-Hospitalization Caregiver Rights

The New Jersey Assembly Health and Senior Services Committee has moved forward a bill aimed at expanding the rights of certain types of caregivers. Under the bill, hospitals would be required to disclose vital post-hospitalization treatment information to patient-designated caregivers, who are often family, friends, or other members of the community. If passed, hospitals would be obligated to consult with designated caregivers in a timely fashion and issue a discharge plan outlining the patient's needs, as well as provide caregivers with training and instruction in necessary tasks. The Legislature cited the increased involvement of patients' family and friends in post-hospitalization care as a reason for needing to create such rights.

Court Upholds Recalculation of Excess Medicaid Payments Denial

A New Jersey appeals court has upheld an administrative decision calling for a licensed nursing facility to reimburse the U.S. Department of Health and Human Services for excess Medicaid payments. The ruling denied the facility the right to benefit from mistakes revealed by a facility audit that resulted in over \$650,000 in overpayments. The court admitted that, despite the fact that the state could benefit from such mistakes in payment calculations by recouping the overpayments, medical providers could not.

Proposed New Jersey Rule Offers Temporary License to Out-of-State Nurses

A proposed rule would permit the New Jersey Board of Nursing to issue temporary courtesy licenses to spouses of active duty Armed Forces members who are stationed in New Jersey. Spouses would be able to apply based on their licensure in another state, provided that their existing license was not subject to sanction or investigation. Additionally, spouses must have practiced as a nurse for two of the last five years and submit to a criminal background check. The temporary courtesy license would allow the nurse to practice in New Jersey for one year, with an additional year available on Board approval.

Aid in Dying Bill Moves Forward in New Jersey

A bill that would empower physicians to prescribe life-ending medications to terminally ill patients has passed through the New Jersey Assembly's Health and Senior Services Committee. The bill would allow terminally ill patients eighteen years or older with a life expectancy of less than six months to self-administer life-ending drugs prescribed to them by their physicians. The bill would not require participation from hospitals or doctors and contains provisions requiring that a patient demonstrate mental capacity to make such a decision. The bill awaits a vote from the full Assembly.

New Jersey Court Issues Ruling on Kickback Suit

A New Jersey federal judge refused to dismiss a suit containing several violations of the federal False Claims Act in the area of physician kickbacks for referrals. The suit contains allegations that physicians were induced to refer lab work in exchange for free supplies and discounted lab testing rates. In denying the motion to dismiss, the court held that some of the complaints in the whistleblower suit could go forward; however, the overall number of claims was diminished by the ruling. It is unclear how many claims from the original suit will be allowed to continue.

Hospital Employee Who Refused Flu Vaccination Entitled to Unemployment Benefits

A registered nurse at a hospital who was terminated due to her refusal to submit to a mandatory flu vaccination was entitled to unemployment compensation, according to a New Jersey Superior Court judge. The hospital's policy allowed for exemptions from the policy on religious and medical grounds; however,

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the employee refused to participate on purely secular nonmedical grounds. The employee did agree to wear a facemask, as employees who cite religious or medical grounds for failing to participate in the policy are allowed to do by the hospital. The court ruled that such refusal was not misconduct for the purposes of the New Jersey unemployment compensation law, and therefore, the dismissed employee was entitled to unemployment benefits. The court cited First Amendment grounds for reversing the decision to deny the compensation, stating that the hospital's religious exemption "discriminates against an employee's right to refuse to be vaccinated based only upon purely secular reasons."

New Jersey Supreme Court Upholds Whistleblower Nurse Ruling

The New Jersey Supreme Court issued a 5-1 ruling upholding a state appeals court decision regarding a nurse who publicly accused his employer of improper patient care. The suit was filed under the Conscientious Employee Protection Act by a nurse claiming that his firing came as a result of his publicizing of alleged improper patient care in violation of the American Nursing Association's Code of Ethics for Nurses (ANA Code). However, the Court held that the ANA Code applies only to nurses and not the management of facilities in which nurses work. Therefore, the plaintiff failed to establish a claim of retaliation, and his dismissal for violating HIPAA and an employee confidentiality agreement was in accordance with the law.

President of New Jersey Medical Imaging Company Arrested Under Suspicion of Fraud

The president of American Imaging Center was arrested along with his wife in connection with a Medicaid fraud investigation. Several of the company's imaging centers were raided by state authorities as part of the investigation. The president had previously pleaded guilty and was sentenced in 1999 to six years in prison as part of an earlier Medicaid fraud scheme wherein he accepted kickbacks in exchange for fraudulently sending blood samples for unnecessary tests. Upon his release, his petition to be reinstated as a Medicaid provider was approved by the Division of Medical Assistance and Health Services. It is unclear as yet what he has been charged with as a result of the current investigation.

New Jersey Bill Proposes Moratorium on Transfer of Developmental Center Residents

The New Jersey Assembly has passed a bill to impose a moratorium on moving developmentally disabled citizens to group homes. The bill has come in response to the deaths of two former developmental center residents who passed away shortly after being moved from the centers to group homes. Two centers housing over 150 residents are scheduled to close this year in Totowa and Woodbridge, as part of a 2012 state plan to decrease state facilities of this kind. If signed into law, the bill would put a halt to moving current residents, pending an evaluation of residents already transferred. Additionally, the bill would stop developmentally disabled New Jersey citizens domiciled elsewhere from being transferred back into New Jersey without assurances that their care would be equivalent to that given elsewhere. Supporters of the bill cite concerns regarding the training of staff at group homes in caring for the displaced developmentally disabled residents. Members of the state Senate have yet to comment on whether they will vote on the bill.

HIPAA UPDATE

University of Cincinnati Medical Center Sued for Facebook Leak of Patient Diagnosis

A suit has been filed against the University of Cincinnati Medical Center related to an alleged leak of patient medical records by two employees. The plaintiff alleges that hospital staff exposed her confidential medical file, which indicated that she had a sexually transmitted disease, to members of the community. The file was then uploaded to Facebook and used to ridicule the plaintiff. The suit seeks relief based on common-law claims of unauthorized disclosure of medical records, as well as negligent employee supervision and hiring. A similar suit was recently filed against Walgreen Co., alleging a violation of HIPAA regulations, where a pharmacist wrongfully released records indicating the presence of sexually transmitted disease in a customer. The court there held that the leak was sufficiently within the scope of the employee's duties to warrant relief.

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