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SCRIPTS

Legal updates for the health care community from Poyner Spruill LLP

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A Look *Behind* the OIG's Work Plan

By Steve Shaber

Each year the Office of Inspector General at the U.S. Department of Health and Human Services releases a work plan saying what it intends to focus on in its effort to detect fraud, abuse, and waste in federal health care spending. This year's plan came out on January 31, four months after it usually appears. It has a mix of old and new concerns, covering all types of providers. We will look at many of them, but first let's have some perspective.

The Vast Scope of American Health Care

We all know American health care is huge and employs vast numbers of people. But let's remind ourselves of some real numbers. According to the Kaiser Family Foundation, there were about 835,000 physicians in the U.S. at the end of 2012. The AFL-CIO reports there were 2,725,000 registered nurses in 2011. It is probably impossible to say who exactly is and is not a healthcare executive, but the American College of Healthcare Executives had 44,600 members in 2013.

The U.S. Bureau of Labor Statistics counts jobs, not people, and here are some of its latest numbers:

Dentists..... 146,000

Pharmacists 286,000

Pharmacy Techs..... 355,000

Nursing Assistants 1,534,000

Home Health Aides..... 875,000

The cost of American health care is, likewise, huge. For 2013, it was close to $3 trillion. Of this, more than half a trillion dollars was for Medicare, and more than a quarter of a trillion dollars was for Medicaid and the Children's Health Insurance Program (CHIP). These, of course, are programs of concern to the OIG. They are the reason for its work plan.

As I said in the first paragraph, the point of these numbers is to give some perspective to the work plan. So now, let's turn to what the OIG actually did recently, because the truth is that OIG is swamped by the size of its job, so it has to prioritize. And beceause the OIG prioritizes, providers can too, focusing their compliance efforts on the things that are demonstrably the most important ones to get right.

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Do You Need an Estate Plan?

By Westray Veasey

With the new federal estate and gift tax laws, and the repeal of North Carolina's estate and gift tax system, you do not need an estate plan, right? WRONG! It is true that the now "permanent" estate tax law provides for a much higher exemption than ever before: $5,340,000 for 2014, indexed for inflation. But there are still many non-estate tax planning issues that should be addressed in this time of increased exemption levels.

Did you know that if you die a resident of North Carolina without a will, not all of your assets will pass to your spouse, but, instead, some portion of your estate will pass to your children? Or that assets that pass to children under 18 years of age must be held in a court-supervised guardianship where application must be made to the court for distributions, and when that child turns 18, he or she will receive estate assets outright? Did you know that by North Carolina statute, instructions to the court on who you want to serve as the legal guardian for your minor children must be included in your will?

With an estate plan you can address:

1. Who will inherit your assets – without an estate plan, the state picks for you, and you may end up disinheriting an intended beneficiary.
2. Who should be your fiduciaries – guardians for your minor children, the executor for your estate, trustees who can manage and distribute assets to your surviving spouse and/or children without oversight from the court system.
3. Incapacity – designate attorneys-in-fact and health care agents to make health and financial decisions if you are incapacitated.
4. Creditor protection considerations – segregate liability-generating assets from other assets through liability-limiting entities, invest in creditor-exempt assets, and protect your heirs from spendthrift behavior, spouses, and creditors through trusts.
5. Planning with life insurance and retirement accounts – do you have the proper types and amounts of life insurance coverage? Who are the proper beneficiaries of these assets?
6. Your business interest – is there an agreement among co-owners providing for buy-outs upon certain events, and do you understand what it provides? Will the buy-out be unfunded or backed up with disability or life insurance and what are the income and estate tax implications of the buy-out ?
7. Special circumstances – do you have a child with special needs, a blended family with children from prior marriages, or liabilities to a former spouse?

Of course, if you DO have a taxable estate, there are even more reasons to develop a thoughtful estate plan, not only to address the issues above, but to try to mitigate your estate tax burden. Estate planning is not just for the very wealthy.

Westray Veasey advises individuals, fiduciaries, service providers, and closely held entities in the areas of estate and gift planning business succession, asset protection, income tax planning and estate and trust administration. She assists her clients in all aspects of formulating and implementing plans designed to protect and distribute their assets in a tax efficient manner. She may be reached at wveasey@poynerspruill.com or 919.783.2987.

New Child Abuse Reporting Law Gets Tough

By Steve Shaber

"Any person who has cause to suspect that any juvenile is abused, neglected, or dependent, . . . , or has died as the result of maltreatment, shall report the case of the juvenile to the director of the department of social services." NCGS 7B-301. That has been the law for a very long time. But up until December 1, 2013, there has not been any penalty for failing to follow it.

Now the law has teeth. Starting last December, any person or any institution that "knowingly or wantonly fails to report" a child who fits the statute is guilty of a Class 1 misdemeanor. So is any person or institution that "knowingly or wantonly prevents" another person from making the required report.

The risks to licensed providers from looking the other way when they suspect child abuse or neglect, dependency, or maltreatment causing death are now much more serious, because even a misdemeanor conviction can cost the provider a license, an appointment, a certification, or a job, not to mention time in jail.

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Same-Gender Marriage Implications for Employee Benefit Plans

By Kate Paradise

In the summer of 2013, the Supreme Court issued a decision in *U.S. v. Windsor*, striking down a key provision of the Defense of Marriage Act (DOMA) and eliminating the requirement that federal law recognize only marriages between a man and a woman. Since then, the IRS and Department of Labor (DOL) have been busy issuing guidance on how the Windsor decision impacts employer-sponsored retirement, health and welfare benefit plans. The *Windsor* decision impacts virtually all employers who sponsor employee benefit plans, from large hospital systems to small physician practices and other health care entities.

Now, legally married same-sex spouses have the same federal tax rights as opposite-sex spouses, regardless of their state of residence. Both the IRS and DOL have adopted a "state of celebration" rule for employee benefit plan purposes. This means that the state where the marriage takes place, not the state of residence, determines whether a couple is entitled to spousal rights and benefits for federal tax purposes. This is not the case for Family and Medical Leave Act (FMLA) purposes, where the state of residence determines the definition of "spouse." Tax benefits apply only to marriages, not to civil unions, registered domestic partnerships, or other formal arrangements recognized under state law.

This ruling has important implications for qualified retirement plans, group health plans, health FSAs, dependent care FSAs, and cafeteria plans. For example:

1. Qualified benefits provided to an employee's lawfully married spouse are excludable from the employee's income for federal tax purposes.
2. Pre-tax payroll deductions under a cafeteria plan can be made to pay for benefits for same-sex spouses.*
3. A legal marriage between same-sex partners can be treated as a change in status for purposes of mid-year cafeteria plan election changes.*
4. Reimbursements can be made under a healthcare flexible spending account for eligible medical expenses incurred by or for a same-sex spouse.
5. Same-sex spouses are subject to the joint deduction limit for contributions to a health savings account.
6. Same-sex spouses who file joint income tax returns are subject to the $5,000 annual limit on contributions to a dependent care flexible spending account, and same-sex spouses who file separately are subject to the $2,500 limit.
7. Same-sex spouses are eligible for qualified joint and survivor annuities (QJSA) under qualified retirement plans.
8. Spousal consent rights under qualified retirement plans now apply to same-sex spouses.
9. Same-sex spouses are eligible for qualified pre-retirement survivor annuity (QPSA) benefits offered under retirement plans.
10. Same-sex spouses are eligible to submit qualified domestic relations orders (QDRO) under qualified retirement plans.
11. Spousal rollover rights apply to same-sex spouses in qualified retirement plans.
12. Hardship distributions can be taken from a 401(k) plan on account of qualifying spousal expenses.*
13. Same-sex spouses covered by a group health plan are COBRA qualified beneficiaries.

**It is important to note that the rights enumerated above may or may not apply in a particular case, depending on the terms of the applicable employee benefit plan.*

The *Windsor* decision does not obligate employers to offer health or welfare benefits to same-sex spouses, and recent IRS and DOL guidance does not resolve state law issues pertaining to the definition of "spouse" and the taxation of employee benefits under state laws.

Employers should review their retirement and health plan documents, SPDs, employee handbooks and forms to ensure that the definition of "spouse" is compliant with the law and consistent with their intentions. Some plan language may be flexible enough to permit same-sex participation without plan amendments, while other plan documents may require eligibility clarification. For example, many health and welfare plans will arguably cover same-sex spouses if they generally refer to spouses "as recognized under the Internal Revenue Code."

Kate Paradise's practice focuses on employee benefits and health law. She assists public and private employers with qualified and non-qualified retirement plans, health plans, wellness programs, fringe benefit plans, and non-qualified deferred compensation plans She specializes in matters concerning the Patient Protection and Affordable Care Act. Kate may be reached at 919.783.2886 or kparadise@poynerspruill.com.

The Scope of OIG Enforcement

OIG is not the only enforcement agency. The Centers for Medicare and Medicaid Services (CMS), the U.S. Department of Justice, and State agencies and prosecutors are also involved. But the OIG alone reports that for 2013 it recovered $5.8 billion. The great majority of this – that is, $5 billion – was from its investigative arm, and the rest was from audits. Although $5.8 billion is a very large number, it is only about 0.8% of all Medicare, Medicaid, and CHIP spending. Even if you assume that 10% of Medicare, Medicaid, and CHIP money is misspent (as is often said, though without much empirical data behind it), the OIG is only recovering a bit more than 8% of all the waste, abuse, and fraud. Even after we add the efforts of the other agencies, most of the misspent money is undetected.

Turning from money to people, the OIG reports that – last year – it excluded 3,214 individuals and entities from the federal health care programs. There were 960 criminal cases and 472 civil actions of every kind. If you compare these numbers to the sampling of providers listed above, you see right away that the people punished by the OIG are just a tiny fraction of everyone in health care. Even if you set aside the aides, the techs, and the assistants, the number of people punished is a tiny fraction of all the professionals at the top of the jobs pyramid.

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"OIG alone reports that for 2013 it recovered $5.8 billion...$5 billion was from its investigative arm..."

Who Is Being Punished?

The OIG publishes lists of people it has punished, and these lists tell a lot about what the OIG is really targeting. In the period from mid-October 2012 through mid-October 2013, here is what was reported regarding Civil Money Penalty (CMP) cases settled by OIG:

1. Number of reported CMP cases 72
   a. Highest penalty $1,577,000
2. Number of cases based on employment of excluded persons ..... 42 cases
   a. Percentage of all cases 58
   b. Highest penalty $427,000
   c. Lowest Penalty $2,883
3. Number of other kinds of cases ..... 30 cases
   a. Up-coding ..... 6 cases
   b. Services not provided ..... 6 cases
   c. Misuse of NPI numbers ..... 2 cases
   d. Unbundling ..... 3 cases
   e. Incident to/supervision ..... 3 cases
   f. No medical necessity ..... 2 cases
   g. Miscellaneous ..... 8 cases

At the same time, OIG reports on a number of Stark self-referral and anti-kickback cases settled by the OIG. Violations here included excessive physician compensation, free space, discounts, free trips, and cash payments.

From these numbers alone, it seems the OIG is not terribly busy, but what should be concerning is the scope of criminal prosecutions and civil cases in which the OIG cooperates with the U.S. Department of Justice. For the six months from July 1 to December 31, 2013, there were 280 indictments, guilty pleas, settlements, and convictions; the number of separate people and companies involved in these cases is larger than that. Looking at the month of January 2014, alone, we saw – among many other cases – a physician sentenced to prison and ordered to pay $2 million in restitution for providing medically unnecessary services, a hospital ordered to pay $16.5 million for unnecessary cardiac services, seven oncologists ordered to pay $2.6 million for using unapproved drugs, and a "patient recruiter" sentenced to jail for kickbacks and money laundering. Others who were convicted, pled guilty, or settled claims include ambulance companies, home health agencies, physical therapy providers, healthcare executives, DME providers, psychologists, and pharmacists. Clearly, there is a lot more to worry about regarding U.S. Justice and the OIG working collaboratively than there is with the OIG working independently, not only in the relative number of cases, but also with regard to the severity of the punishments.

The Work Plan in Context

Now let's compare what the OIG and the Department of Justice have been doing recently to some of what OIG says it will be looking at in the coming year. As you see above, there has been a lot emphasis on up-coding, unbundling, medical necessity of services, and services not actually being provided. The new work plan contains lots of items that fit this pattern, for example:

1. Hospitals
   a. Billing outpatient evaluation and management services (E&M) at the new patient rate.
   b. Proper use of the new inpatient admission criteria.
   c. Performance of cardiac cath and biopsy during the same operating session.
   d. Other inpatient and outpatient billing requirements.
2. Physicians
   a. Medical necessity of high-cost radiology.
   b. Appropriateness of E&M services.
3. Nursing Homes
   a. Billing for the highest level of therapy after it may have become unnecessary or prove to be ineffective.
   b. Unnecessary hospitalizations.
4. Hospice
   a. Use and suspected overuse of hospice in assisted living facilities.
5. Durable Medical Equipment
   a. Medical necessity of "scooters" and adherence to billing requirements.
   b. Medical necessity of nebulizers.
   c. Medical necessity of frequently replaced supplies.

Also, in light of the emphasis on detecting and recouping money where providers employed excluded persons, it is worth noting that OIG says it will look closely at home health agencies to see if they are employing persons with criminal convictions of any sort.

Inoculation and Prophylaxis

So what is a provider to do? One thing, obviously, is to be careful not to hire excluded persons. This means checking before hiring and periodically rechecking. Recall that the least expensive case last year cost the provider about $2,000 and the most expensive cost $427,000. Here, for sure, effective screening and early detection is vital.

Beyond that, revisit and evaluate your coding, billing, and choice of services. Especially look for the outlier, the provider who does more of the expensive things than anyone else. Likewise, look at the provider who simply generates more money than the rest, both within your organization and as compared to your peer group. Some people who work very hard also up-code, unbundle, or bill for phantom services, so hard work may not be the full explanation for high A/R.

Of course, be concerned about unusual business arrangements, but also be sure the routine arrangements are documented correctly. This includes rereading your contracts to be sure they are current, are signed, are for fair market value, and are not with excluded persons. Also, be sure you are using the correct NPI numbers and be sure that template electronic medical records do not mask the actual medical necessity of services with lots of boilerplate language.

Review your actual operations

Make sure your supervisory arrangements are correct and are being followed. Make sure only qualified people are providing the services. Make sure your work is properly documented.

Conclusions

Whether or not the new work plan involves a specific matter that is a big part of your practice or services, what it clearly does is reinforce the government's long-term trends of checking to be sure services are needed, are billed correctly, and are provided by the right people. These things – Who, What, Why, and How Much – are the key issues behind every OIG work plan. They were last year, and they will be in the year to come.

So, even assuming that relatively small fractions of waste, abuse and fraud are detected, recouped, and punished, can you relax? Not at all. From the federal government's perspective, the fact that so much goes undetected is a reason to make examples of those who seriously abuse and defraud the system whenever they are detected.

Steve Shaber has spent his entire career in health law – first with the North Carolina Attorney General's Office and, since 1985, in private practice. His clients range from large hospitals to sole practitioners. Most of his work focuses on Medicare and Medicaid fraud and abuse, false claims, hospital medical staff matters, and professional licensing board cases. His cases have involved patient deaths, large-dollar claims for recoupment, and other urgent matters. Steve has also helped providers with a number of innovative business transactions. He may be reached at sshaber@poynerspruill.com or 919.783.2906.

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