

NEWSSTAND

HealthcareUpdate - Healthcare News From Capitol Hill and The Department of Health and Human Services

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Healthcare matters remained highly relevant throughout the month of September, as comments were released on important home health regulations, as a lawsuit appeared likely to move forward, and as lawmakers and the President marked the six-month anniversary of the new healthcare reform law.

36-MONTH RULE COMMENTS MADE PUBLIC:

As we reported to you in our August 9 update (please visit www.eapdhealthcarereform.com to view this and other past updates), comments associated with the Centers for Medicare and Medicaid Services' (CMS's) proposed rule for the Medicare Home Health Prospective Payment System (HH PPS) Rate Update for Calendar Year 2011 were due to the agency by September 14. This proposed rule promulgated changes to the so-called "36-month rule" for home health agencies (HHAs) that went into effect in January 2010.

Under the 36-month rule, the provider agreement and Medicare billing privileges do not convey to a new owner if an HHA owner sells, transfers or relinquishes ownership within 36 months after the effective date of Medicare enrollment. Exemptions were proposed in July 2010 in response to concerns that the rule would have the unintended consequence of harming the business of legitimate HHAs and potentially affecting financing to the industry. Such exemptions included public companies, changes in ownership resulting from changes in business structure or death, and internal corporate restructuring.

Thirty-two comment letters have been publicly posted, many of which address the ongoing concerns surrounding the 36-month rule and the proposed exemptions. A sampling of comments included:

- Former CMS Acting Administrator Leslie Norwalk cited financing concerns, stating: "Ironically, CMS's proposal on the change of ownership requirements jeopardizes the ability of even long-established HHAs to gain access to capital. As the preamble makes clear, credit is critical to a functioning business, whether that business is new or established...The impact of limiting an HHA's access to capital will in turn limit job creation, investments in technology, and Medicare beneficiaries' access to quality care, especially in rural areas, where more capital is needed for expansion. This significant unintended consequence does nothing to limit the core issue of 'flipping' or 'certificate mills' while severely restricting access to capital for legitimate HHAs."
- The New York State Association of Health Care Providers, Inc. recommended that "CMS should rescind the current 36-month rule and establish a technical advisory committee with experts from home care and the finance sector to establish guidelines that will ensure that patient care remains a top priority for existing and new home care agencies."
- A coalition of HHAs said that it is "very important that the rule not apply to HHAs that have submitted cost reports to Medicare for more than 36 months."
- Catholic Health East stated, "Why single-out the publicly-traded companies for exception, and leave non-profit organizations (i.e. voluntary non-profit - church) at a disadvantage in acquiring an HHA within the first thirty-six months of Medicare participation."
- The Home Care Association of New York State recommended that "the existing 36-month rule and any revisions be applied prospectively only. Specifically, no HHA that is currently Medicare enrolled should be subject to the rule in the event of any implicated ownership change as they entered into Medicare without a restriction on the sale of the HHA other than those restrictions existing at that time."

We continue to monitor CMS for information on the anticipated final rule for the 2011 Medicare HH PPS.

HEALTHCARE LAWSUIT MAY MOVE FORWARD:

Also on September 14, the healthcare reform lawsuit filed by the Attorneys General of 20 states against the federal government appeared ready to move forward - at least in part. Following oral arguments, it was reported that U.S. District Judge Roger Vinson stated that he would probably dismiss part of the suit, but not all of it. He was reportedly not specific about what portions might not be dismissed, but if such a scenario occurs, it would represent a victory for the states that have challenged the constitutionality of the new healthcare law's requirement that all Americans obtain insurance and that the Medicaid program be expanded.

Officials from the Obama Administration have previously expressed confidence that they will win in court, and according to the Associated Press, the Justice Department stated during oral arguments that if Judge Vinson does uphold the 20-state challenge, he would be overturning 75 years of law that has affirmed the government's ability to regulate interstate commerce.

Attorney General Bill McCollum of Florida - who is leading the 20-state effort - stated that he believes Judge Vinson will be finished with the suit either by the end of 2010 or by early next year, at which time he believes the losing side will appeal the ruling and the case may end up before the United States Supreme Court.

The Judge's formal ruling is expected by October 14.

HEALTHCARE REFORM LAW REACHES SIX-MONTH MARK:

The following week marked the six-month anniversary of President Obama signing major healthcare reform legislation into law

(Public Law 111-148) – an occasion that included several days of renewed attention to both the impact of and public opinion toward the new law.

The President kicked off the anniversary with a meeting with state insurance commissioners, followed by a suburban “backyard event” in which he met with individuals from across the country. On Capitol Hill, Democratic supporters of the law continued to promote its implementation in an effort to boost public opinion and increase public knowledge of the massive law’s many provisions.

At the same time, Republicans marked the occasion and renewed their opposition to the measure, encouraged by recent polling that has demonstrated that the public has still not embraced the new law. Republican lawmakers have introduced various legislative initiatives aimed at repealing the law or targeting specific parts of it, and most recently, the Ranking Republican on the Senate Health, Education, Labor and Pensions Committee offered a resolution of disapproval that would overturn specific small business provisions.

September 23 – the official six-month anniversary – was the day that a host of the law’s insurance changes officially went into effect, including provisions that will: allow young adults to remain on their parents’ health insurance until the age of 26; end lifetime limits on insurance coverage; require plans to cover preventative services without charging out-of-pocket costs; and prevent discrimination against children who have pre-existing conditions.

NEXT STEPS:

We continue to follow news from CMS and Congress, as the implementation of healthcare reform moves forward and as other related matters arise. We will provide timely updates when such developments occur.

Edwards Angell Palmer & Dodge LLP is pleased to provide regular updates on issues affecting the Healthcare industry. Our lawyers not only provide sophisticated legal services to a broad array of clients in the healthcare industry, we also monitor and analyze federal and state legislative and regulatory processes to ensure that our clients are informed of government actions and initiatives.

Should you have any questions on the content of this advisory, or wish to discuss any other healthcare related issue, please contact those listed below or call the Edwards Angell Palmer & Dodge LLP attorney responsible for your affairs.

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