KING & SPALDING

Health Headlines

April 11, 2011

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Rates of Hospital-Acquired Conditions Available on CMS's Hospital Compare Website – On April 6, 2011, CMS announced that it is adding to its Hospital Compare website information about the rate of eight hospital-acquired conditions (HACs) in more than 4,700 hospitals across the country. The data shows the rate per 1,000 discharges of the following HACs in each hospital between October 2008 and June 2010 for Medicare fee-for-service claims: (i) foreign object retained after surgery; (ii) air embolisms; (iii) incompatible blood in blood transfusions; (iv) pressure ulcers stages III and IV; (v) trauma and falls; (vi) vascular catheter-associated infections; (vii) urinary-tract infections from catheters; and (viii) manifestations of poor glycemic control. Notably, however, the information is not adjusted to take into account a hospital's patient population or other factors. Although the data is currently posted on CMS's website and is only accessible on the Hospital Compare website via a link to the CMS website, CMS intends to incorporate the data into the framework of the Hospital Compare website in the future. The information is currently available in an Excel spreadsheet and also allows users to compare a hospital's rate to the national rate.

The Inpatient Prospective Payment System (IPPS) 2009 Final Rule established that Medicare no longer would assign an inpatient hospital discharge to a higher paying MS-DRG for services rendered to a patient for certain conditions if the hospital had not appropriately documented that the condition was present on the patient's admission. As a result, a hospital is not paid more for treating the cost of a patient's HAC. The eight HACs included in the data on the Hospital Compare website comprise some, but not all, of the HACs for which Medicare will not pay.

To access the Hospital Compare website, click **here**, and click **here** to access CMS's website posting information regarding the rate of eight HACs by hospital. To view the 2011 IPPS Final Rule listing all of the current conditions or infections that CMS has listed as HACs when not documented as present on admission, click **here**.

Reporter, *Kate Stern*, Atlanta, +1 404 572 4661, kstern@kslaw.com.

District Court Rejects Constitutional Challenges to PPACA Brought By Physician Owned Hospitals – On March 31, 2011, a Federal district court rejected a suit brought by individual physician owned hospitals (POHs) and a trade association representing more than one hundred POHs, challenging the constitutionality of Section 6001 of the Patient Protection and Affordable Care Act (PPACA), Pub. L. No. 111-148, 124 Stat. 119, 684–89 (2010). That provision prohibits new or expanded POHs from filing claims for health services covered by Medicare if there is a financial relationship between the referring physician and the hospital receiving payment. In other words, it limits the whole-hospital exception to the Stark law to POHs as they existed on March 23, 2010, the effective date of PPACA. In the suit, the POHs contended that "Section 6001 violates their due process and equal protections rights under the Fifth Amendment because it is not rationally related to a legitimate purpose and improperly singles out POHs." In addition, the POHs claimed that Section 6001 effects an unconstitutional and retroactive taking of their "property because dozens of POHs around the country had to halt and abandon their expansion and construction projects, regardless of previous investments, because the plans were not economically viable without the ability to bill Medicare for self-referrals." The court ruled

against the POHs on all counts.

On the Plaintiffs' first contention that their due process rights were violated because the law was not rationally related to a legitimate interest, the court held that "although Plaintiffs present considerable evidence that questions the wisdom and judgment of the legislature, all of the evidence, even when viewed in favor of Plaintiffs, cannot support a finding that Congress acted arbitrarily when passing Section 6001." The court responded to the Plaintiffs' argument that "the Secretary's proposed justifications are pretextual and that Section 6001 was instead the product of a backroom deal brokered for the benefit of the American Hospital Association" by stating that unless there was "no other conceivable rational basis for the law besides the allegedly illegitimate protectionist purpose, the law must be upheld."

Responding to the Plaintiffs' regulatory takings claim, the court recounted the contentious history of the whole-hospital exception to the physician referral prohibition and held that "under existing law, Plaintiffs could have no *reasonable* expectation that the Medicare program would remain unchanged." In particular, the court recounted that "in 2007 and 2008, Congress considered and almost enacted previous versions of Section 6001 that also did not include the broad grandfathering provisions that Plaintiffs claim they expected." Since there was no "reasonable expectation that the Medicare program would remain unchanged," the change in the law did not arise to a "taking." In addition, the court held that "Section 6001 does not proscribe, limit, or otherwise interfere with Plaintiffs' use of their real property" because "Plaintiffs could lawfully complete their projects and continue to bill Medicare for health services as long as those services were not the result of a physician-owner's referral." That is, "the only value Plaintiffs have lost, under the law, is the ability to bill Medicare for self-referred patients." Therefore, according to the court, Section 6001 does not result in a regulatory taking of Plaintiffs' real property.

The court's decision is available **here**.

Reporter, *Daniel J. Hettich*, Washington, D.C., +1 202 626 9128, dhettich@kslaw.com.

HHS Releases Action Plan to Reduce Racial and Ethnic Health Disparities – On April 8, 2011, HHS unveiled its Action Plan to Reduce Racial and Ethnic Health Disparities. The Plan, available by clicking **here**, outlines goals, strategies, and specific actions HHS will take to combat documented disparities in access to quality healthcare among racial and ethnic minorities.

The Plan is organized around five primary goals:

- Transform healthcare by taking steps to increase minority access to quality care through insurance and innovative delivery system models
- Strengthen the healthcare workforce by enabling professionals to better recognize and address healthcare disparities
- Advance health and safety by increasing the availability and effectiveness of community-based programs to address areas such as obesity, tobacco-related illness, and maternal health
- Advance scientific knowledge and innovation by increasing the quality and availability of data regarding minority populations and by supporting research to inform disparities reduction initiatives
- Increase the efficiency, transparency, and accountability by streamlining grant administration and through regular monitoring and evaluation of the Plan

Simultaneously with its release of the Action Plan, HHS also released the National Stakeholder Strategy, which HHS describes as "a common set of goals and objectives for public and private sector initiatives and partnerships to help racial and ethnic minorities and other underserved groups reach their full health potential." The Stakeholder Strategy, available by clicking **here**, is also centered around five main goals: (i) increasing awareness of the significance of health disparities; (ii) strengthening leadership for addressing health disparities; (iii) improving healthcare outcomes for minorities; (iv) improving cultural and linguistic competency and diversity in the healthcare workforce; and (v) improving data availability, coordination, and utilization of research.

Both plans emphasize data reporting and the need for coordination of efforts with and among community leaders to promote awareness and understanding. HHS's Action Plan will be implemented with no additional funding. The HHS

Press Release is available by clicking **here**.

Reporter, *Susan Banks*, Washington, D.C., +1 202 626 2953, sbanks@kslaw.com.

FTC and DOJ Release Policy Statement Regarding ACOs – On March 31, 2011, the Federal Trade Commission and Department of Justice released for public comment a joint Policy Statement regarding how the agencies will enforce the antitrust laws regarding Accountable Care Organizations (ACOs). The joint Policy Statement covers, among other areas, an antitrust safety zone for certain ACOs, and a mandatory antitrust review process for certain other ACOs. For more information regarding the joint Policy Statement, please view the firm's client alert by clicking **here**.

King & Spalding Upcoming Roundtable on ACOs on April 15, 2011 – On Friday, April 15, 2011, we will be hosting a Roundtable in our Atlanta office from 1:00 p.m. - 2:30 p.m. Eastern Time titled ***Planning to Qualify As an Accountable Care Organization: Overview of Proposed Rules and Agency Announcements on Accountable Care Organizations***. The Roundtable will cover the much-anticipated proposed rule recently published by CMS regarding Accountable Care Organizations (ACOs). The Roundtable also will cover the OIG/CMS notice regarding waivers for certain ACO payments under the Stark, Anti-Kickback and Civil Money Penalties laws, and ACO-related announcements by the Federal Trade Commission, Department of Justice and the Internal Revenue Service released March 31, 2011.

In-person attendance is limited, so please register soon to reserve seats for your organization. We will again also offer a Webinar option for this Roundtable. You can register to attend the Roundtable by clicking **here**. Lunch will be provided between 12:00 p.m. and 1:00 p.m. before the Roundtable. We hope you will be able to join us.

General information on our practice is available at www.kslaw.com/health and in our electronic publications *Serving the Healthcare Industry* and *Healthcare Reform Task Force*. If you would like to be included on our regular healthcare practice mailing list to receive notices of other events and written updates, you can be added by submitting your full contact information to healthcare@kslaw.com.

Health Headlines – Editor:

Dennis M. Barry
dbarry@kslaw.com
+1 202 626 2959