McCARTER &ENGLISH
ATTORNEYS AT LAW

Health Law Insights

April 2014

In this issue:

Federal Updates

State Updates

HIPAA Updates

FEDERAL UPDATE

Centers for Medicare & Medicaid Services Issues Guidance for Meaningful Use Hardship Exception

The Centers for Medicare & Medicaid Services (CMS) has issued guidance for participating Stage 1 providers and hospitals applying for the hardship exemption to the meaningful use requirements due to technology vendor issues. The exemption will be applicable only to Medicare-participating providers and hospitals that are unable to meet the electronic health record (EHR) criteria for 2014. Applications for this exemption will relieve the applicant from monetary penalties in 2015 for failing to meet relevant meaningful use criteria. Similarly, to avoid payment penalties in 2015, providers and hospitals new to the meaningful use program in 2014 and unable to implement certified EHR technology in 2014 may also apply for a hardship exemption.

CMS Initiates Pilot Program for Hospice Patients

CMS has announced a pilot program, as mandated by the Medicare Care Choices Model of the Affordable Care Act, that will allow hospice patients to access palliative care along with curative care. Presently, Medicare beneficiaries have access to only one modality. CMS will use the pilot program to determine whether quality of care and quality of life can be improved while reducing Medicare expenditures. Hospice providers wishing to participate in the pilot program are required to file an application by June 19, 2014.

Doc Fix Included in Protecting Access to Medicare Act

President Barack Obama signed into law the Protecting Access to Medicare Act. Notably, the law includes the following: (i) it eliminates the 24 percent cut in physician reimbursement rates starting April 1, 2014, and instead extends the current 0.5 percent increase through December 31, 2014, and then includes a 0 percent increase from January 1, 2015, through March 31, 2015; (ii) it extends the Medicare therapy cap exceptions process through March 31, 2015, and delays the adoption of the International Classification of Diseases, Tenth Revision (ICD-10) to October 1, 2015; (iii) it mandates the conduct of probe-and-educate reviews of hospitals' compliance with the Two-Midnight Rule through March 31, 2015, and prohibits the recovery contractors from conducting post-payment patient status reviews for dates of service between October 1, 2013, and March 31, 2015, absent evidence of systematic gaming, fraud, abuse, or delays in the provision of care by a provider; and (iv) it establishes value-based purchasing and readmission reduction programs for skilled nursing facilities and a process for adjusting Medicare payment rates for clinical laboratories.

US Department of Health and Human Services Office of Inspector General Broadens Scope of Compliance Reviews

Until recently, the United States Department of Health and Human Services' (HHS) Office of Inspector General (OIG) focused Medicare compliance reviews on hospitals. However, the scope of compliance reviews will be expanded to include home health. These reviews will audit Medicare payments made to home health providers and will focus on risk areas discovered during prior OIG hospital audits and investigations. As with the hospital compliance initiative, data analysis will be used to determine which home health providers will be audited.

Doctor Payment Data Released on CMS Website

After a number of Freedom of Information Act requests, CMS has released data showing Medicare payment records to physicians for services reimbursed by the Medicare Part B Fee-for-Service program. Posted on the CMS website, the data shows the number and type of services physicians have administered, as well as payments and submitted charges for services and procedures rendered.

OIG Issues Notice of Termination to Previous Advisory Opinion

The OIG has reconsidered its conclusion in a 2011 advisory opinion concerning referral service discounts. The advisory opinion initially involved a web-based "coordination service" that helped doctors refer patients. If a service provider made a referral to a provider within its network, it received a fee discount of no more than $1 for the web-based services. The advisory opinion had stated that the fee structure would be unlikely to influence an ordering health professional's referral decisions in a material way. However, the OIG has changed its stance, believing that even this kind of minimal discount could potentially create an improper incentive for physicians to make referrals to "in-network" rather than "out-of-network" providers.

However, the OIG has changed its stance, believing that even this kind of minimal discount could potentially create an improper incentive for physicians to make referrals to "in-network" rather than "out-of-network" providers.

OIG Issues Unfavorable Advisory Opinion on EHR Interface

The OIG issued an unfavorable advisory opinion on an arrangement whereby a laboratory pays a fee to an EHR vendor for each test order that the vendor transmits to the laboratory under certain circumstances. Physician practices utilizing the vendor's EHR would have the ability to transmit orders to, and receive results from, the laboratory using a bidirectional interface integrated into the EHR service. When utilizing that feature, the laboratory would be deemed an "in-network" laboratory. In exchange for this designation, and the ability to utilize the feature, the laboratory pays the vendor a per-order fee for each test set that a practice orders from the laboratory through the EHR service. When a practice utilizes the EHR service to order tests from an "out-of-network" laboratory, the practice must pay the vendor a per-test fee. The OIG concluded that this arrangement posed more than a minimal risk of fraud and abuse, because the practices would be faced with a choice of paying or not paying a fee based on the laboratory receiving their referrals — and there appeared to be no reason for the laboratory to pay the fees to the vendor other than to secure referrals.

CMS to Develop Rating System for Hospitals, Home Health and Dialysis Providers

Starting at the end of 2014 or the beginning of 2015, and with a projected completion date of 2016, CMS will transition to a five-star rating system for hospitals, home health agencies, and dialysis providers. The ratings will be available on the "Compare" websites: Hospital Compare, Home Health Compare, and Dialysis Facility Compare. Quality indicators have yet to be developed, and CMS plans on collaborating with a number of providers to ensure accurate rankings of quality of care. Currently, only Medicare Advantage plans and nursing homes use a star rating system, and Physician Compare will start using a similar system soon.

Proposed Rule Would Amend Fire Safety Standards for Providers

CMS proposed a rule that would amend fire safety standards for Medicare and Medicaid participating hospitals and other providers. The standards would include minimum requirements for the installation, inspection, testing, maintenance, performance, and safe uses of health care facility materials, equipment, and appliances. These standards would incorporate the National Fire Protection Association's 2012 editions of the updated Life Safety Code and the Health Care Facilities Code. Comments are due by June 16, 2014.

Halifax Hospital Medical Center and Department of Justice (DOJ) Reach $85 Million Settlement

On March 11, 2014, Halifax Hospital Medical Center (HHMC) and the Department of Justice (DOJ) announced an $85 million settlement following a lawsuit initiated by an HHMC employee turned whistle-blower. The whistle-blower alleged that HHMC incorporated referrals into the bonuses of various oncologists and neurosurgeons, thereby violating the Stark Law and the False Claims Act. HHMC has agreed to enter into a corporate integrity agreement (CIA) with the OIG. The agreement requires an internal compliance overhaul and independent review of federal health care program claims for the next five years.

OIG Excludes Dental Provider for Five Years

After multiple alleged violations of a CIA, a pediatric dental management company has been excluded from participating in federal health care programs for five years. The organization allegedly failed to comply with components of its CIA agreement. Notably, the organization allegedly neglected to report severe quality-of-care events and falsely certified compliance with its obligations under the CIA. The exclusion will begin in September 2014.

STATE UPDATE

New Jersey Attempts to Unify Mental Health Privilege

The New Jersey Supreme Court's Committee on the Rules of Evidence will be accepting comments on a rule that would update privileges for patient communications with mental health providers. Currently, the system provides different levels of privilege depending on the provider. For instance, psychologists are given more protection for patient communication than psychiatrists and social workers. The proposed evidentiary rule would expand the definition of "mental health service provider" to include any person authorized or reasonably believed by the patient to be authorized to engage in the diagnosis or treatment of a mental or emotional condition. The definition specifically includes psychologists, physicians, marriage and family therapists, victim counselors, social workers, alcohol and drug counselors, nurses, professional counselors, and psychoanalysts.

NJ Department of Health Proposes Amendments to Reimbursement Rates to Hospitals Providing Certain Psychiatric Services

Currently, hospital Medicaid reimbursement rates for certain outpatient psychiatric services to persons 21 years of age or over are the lower of charges or prospective unit rates. The New Jersey (NJ) Department of Health (DOH) has recently proposed an amendment to the unit rates in an effort to provide appropriate fee-for-service reimbursement. The reimbursement adjustments include an increase from $40 to $50 in the half-hour unit rate for individual outpatient hospital psychiatric services, an increase from $50 to $62.50 to the half-hour unit rate for initial evaluations, and an increase from $34 to $42 to the 15-minute unit rate for medication monitoring and medical management. Further, the proposal excludes from outpatient cost settlements all costs related to outpatient psychiatric services for youth and young adults (individuals under the age of 21. Last, the proposal will require hospitals to maintain a separate Medicare cost center and report all psychiatric outpatient costs, charges, and statistics to the cost center.

The reimbursement adjustments include an increase from $40 to $50 in the half-hour unit rate for individual outpatient hospital psychiatric services, an increase from $50 to $62.50 to the half-hour unit rate for initial evaluations, and an increase from $34 to $42 to the 15-minute unit rate for medication monitoring and medical management.

HIPAA UPDATE

HHS Gears Up for HIPAA Audits

HHS Office for Civil Rights recently announced that it will initiate a survey of 1,200 organizations, including both covered entities and business associates, as it begins to determine which entities will be audited for the second round of Health Insurance Portability and Accountability Act (HIPAA) audits. The audits will assess compliance with a number of HIPAA-related issues such as privacy, security, and breach notification. The major focuses of the audit will include whether entities have implemented security risk assessments, data encryption, and updates required by the HIPAA Omnibus Rule.

Free Software Released to Aid HIPAA Compliance

Free software released by federal regulators seeks to help health care providers, insurers, and clearinghouses meet HIPAA security requirements. Accessible on both desktop computers and tablets, the software allows users to input basic company information, including names of business associates who must comply with HIPAA safeguards and lists of equipment that may contain protected health information. Subsequently, users answer questions concerning their data-protection activities and are then presented with current threats to data security and possible safeguards. Notably, however, the tool does not guarantee HIPAA compliance but seeks to aid businesses in meeting required levels of data security.

Class Certification Sought After Widespread Data Breach

A class action lawsuit has been filed against Los Angeles County and a medical billing contractor after computers containing the names, addresses, Social Security numbers, medical diagnoses, and dates

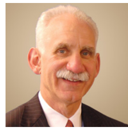
of birth for about 168,000 people were stolen. The plaintiffs allege negligence and violations of medical record privacy laws, arguing that their personal and medical information was not stored securely and that Los Angeles County and the contractor failed to notify potential victims of the breach within a reasonable amount of time. Due to the amount of personal information stored on the computers, the class may consist of thousands of members.

Hospital Settles Data Breach Action for $4 Million

After 19,500 emergency room patients' names, diagnoses, and account numbers were accidentally posted online, a California judge has preliminarily approved a $4.1 million settlement. The class action sought violations of the California Confidentiality of Medical Information Act after Stanford Hospital & Clinics and its contractors accidentally leaked a spreadsheet of personal information. The leak was brought to the attention of Stanford after a patient noticed the information posted on the website Student of Fortune.

EDITORS

Todd C. Brower // Partner
Co-Leader Health Care Group
973.639.2079
tbrower@mccarter.com



Scott A. Kobler // Partner
Co-Leader Health Care Group
973.639.2019
skobler@mccarter.com

Glenn P. Prives // Associate
973.639.2089
gprives@mccarter.com

HEALTH CARE TEAM MEMBERS

Gerard G. Brew // Partner
973.639.6976
gbrew@mccarter.com

Richard L. Green // Partner
860.275.6757
rgreen@mccarter.com

Robert A. Mintz // Partner
973.639.7916
rmintz@mccarter.com

Debra M. Perry // Partner
973.639.2083
dperry@mccarter.com

Eleanor D. Thompson // Special Counsel
215.979.3860
ethompson@mccarter.com

Todd C. Brower // Partner
973.639.2079
tbrower@mccarter.com

Scott A. Kobler // Partner
973.639.2019
skobler@mccarter.com

Richard J. Myslinski // Associate
973.849.4084
rmyslinski@mccarter.com

Glenn P. Prives // Associate
973.639.2089
gprives@mccarter.com

Beth Yingling // Partner
973.639.7911
byingling@mccarter.com

Mark A. Daniele // Partner
973.639.2090
mdaniele@mccarter.com

Christopher S. Mayer // Partner
973.848.5393
cmayer@mccarter.com

Richard T. Nolan, Jr. // Partner
973.639.2096
rnolan@mccarter.com

Geoffrey N. Rosamond // Partner
973.639.8461
grosamond@mccarter.com

Disclaimer by McCarter & English, LLP: This publication is for informational purposes only and is not offered as legal advice regarding any particular matter. No reader should act on the basis of this publication without seeking appropriate professional advice. Before making your choice of attorney, you should give this matter careful thought. The selection of an attorney is an important decision. If this publication is inaccurate or misleading, the recipient may make a report to the Committee on Attorney Advertising, Hughes Justice Complex, P.O. Box 037, Trenton, NJ 08625.
Copyright 2014. McCarter & English, LLP. All Rights Reserved.

ATTORNEY ADVERTISING