

March 30, 2010

## **Health Law Client Action Alert**

## Immediate Action May Be Needed to Comply with Health Reform Law

As you know, the Patient Protection and Affordable Care Act (the Act") was signed by President Obama on March 23, and the related Health Care and Education Affordability Reconciliation Act was signed today. In addition to some of the widely publicized provisions that take effect later, this newsletter identifies some provisions of the Act that immediately affect health care providers and practitioners.

Physician Ownership Disclosures for MRI, CT and PET Scans. Section 6003 of the Act amends the federal self-referral law (known as the "Stark Law"). That law permits physicians and their group practice to provide certain in-office ancillary services to their patients only if specific requirements are met, including requirements specified by the Secretary of Health and Human Services in regulations. Section 6003 of the Act states:

"Such requirements shall, with respect to magnetic resonance imaging, computed tomography, positron emission tomography, and any other [imaging services] that the Secretary determines appropriate, include a requirement that the referring physician inform the individual in writing at the time of the referral that the individual may obtain the services for which the individual is being referred from a person other than [the ordering physician or his group practice] and provide such individual with a written list of suppliers . . .who furnish such services in the area in which such individual resides."

The Act states that this amendment "shall apply to services furnished on or after January 1, 2010." Since the Act did not become law until March 23, 2010, it will not apply to services performed before that date. It is unclear whether this amendment can be effective before the Secretary issues implementing regulations; however, it appears to require that whenever the regulations are issued, they will apply to all services rendered on or after March 23, 2010. We recommend that physicians and their groups immediately begin providing the required information to patients who are receiving MRI, CT or PET services if the entity furnishing the services is relying on the in-office services exception.

Face-to-Face Encounter Prior to Medicare or Medicaid Home Health and Durable Medical Equipment Certifications. Section 6407 of the Act amends the conditions of payment for Medicare and Medicaid-covered home health services to require that any physician signing a certification after January 1, 2010, must document, prior to making the certification, that "the physician himself or herself has had a face-to-face encounter" with the individual "within a

reasonable timeframe as determined by the Secretary." (This can be done through use of telehealth in some cases.) Section 6407 also includes a face-to-face encounter requirement before a physician, physician assistant or nurse midwife can certify the need for durable medical equipment that is covered by Medicare or Medicaid. For this reason, all providers, suppliers and practitioners should immediately establish procedures to assure that certifications of home health services and durable medical equipment are preceded by a face-to-face encounter, and that documentation of this encounter is maintained.

**Documentation Requirements**. Section 6406 of the Act requires that any physician, supplier or provider maintain documentation relating to written orders or requests for payment for durable medical equipment, certifications for home health services, and referrals for other items or services written or ordered by such physician, supplier or provider under the Medicare program, "as specified by the Secretary," and that this requirement "shall apply to orders, certifications, and referrals made on or after January 1, 2010." The Secretary can revoke a violator's participation in the Medicare program. For this reason, all providers, suppliers and practitioners should immediately establish procedures to assure that such documentation is maintained.

## A Little Good News for a Change

The following sentence is found on page 1739 of the Act: "Reduction in Amounts Owed.-- The Secretary of Health and Human Services is authorized to reduce the amount due and owing for all violations under [the Stark Law] to an amount less than that specified in subsection (g)[of that law]." The referenced subsection (g) states in part:

- "(1) Denial of payment.—No payment may be made under this title for a designated health service which is provided in violation of [the Stark Law].
- (2) Requiring refunds for certain claims.—If a person collects any amounts that were billed in violation of [the Stark Law], the person shall be liable to the individual for, and shall refund on a timely basis to the individual, any amounts so collected."

Thus, HHS now has discretion to waive repayments for amounts billed in violation of the Stark Law. (In the past, HHS has taken the position that it has no authority to waive such repayments.) The Act also specifies certain criteria that HHS may consider in deciding to make such a reduction. While no one wants to be in a position to depend on HHS's willingness to exercise its discretion, this change is very important because of the very Draconian results that were required under the prior law for even minor, innocent violations.

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If you have questions concerning this newsletter, please call Dennis Witherell, Jenifer Belt or Karl Strauss at 800-444-6659, or Ron Christaldi or Erin Aebel at 800-677-7661.

This newsletter is designed to provide general information on matters of interest to health care providers and practitioners and is not intended to constitute legal advice.