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Health Law Client Action Alert

New Regulations Require Physicians to Disclose Alternate Suppliers of MRI, CT and PET Scan Services After January 1

The Centers for Medicare and Medicaid Services ("CMS") recently issued regulations implementing a provision in the federal health reform law that requires some physicians who order Medicare-covered MRI, CT or PET scans to disclose in writing to the patient, at the time of the referral, the names, addresses and telephone numbers of other suppliers of the services within 25 miles of the referring physician's office. The requirement applies if the physician has a financial relationship with a supplier of such services (such as a group practice) and the patient can be referred for those services only because of the "in-office ancillary services" exception to the federal self-referral law. The disclosure must list at least five other suppliers of such services in the area (or all such suppliers if there are less than five). Hospitals and other institutional providers are not considered suppliers for this purpose; they can also be listed but will not count toward the required five suppliers. The requirement takes effect January 1, 2011.

Supervision Requirements for Hospital Outpatient Services Revised by CMS

Many outpatient hospital services are covered by Medicare only if they are directly supervised by a physician (or in some cases, a non-physician practitioner). Last year, CMS adopted rules stating that direct supervision requires the practitioner to be (1) "immediately available to furnish assistance and direction throughout the performance of the procedure," and (2) "present on the same campus" or in the case of an off-campus outpatient department, "present in the off-campus provider-based department of the hospital." CMS recently revised these rules to remove the second requirement, effective January 1, 2011. The primary impact of this change is that the required supervision for an off-campus hospital department can be provided in an adjacent physician's office that is not part of the hospital.

In addition, CMS designated certain nonsurgical "extended duration" therapeutic services—those which have a substantial monitoring component typically performed by auxiliary personnel and having a low risk of requiring practitioner availability after initiation of the service—as requiring "direct" supervision only during the initiation of the service (and "general" supervision thereafter).

CMS Will Not Enforce Supervision Requirements for Outpatient Therapeutic Services in Certain Hospitals During 2011

CMS also announced that it will not enforce the supervision requirements for *therapeutic* services provided to outpatients in critical access hospitals and "small rural hospitals" during 2011, while it further considers the potential impact of these controversial requirements. The term "small rural hospitals" is defined as a hospital with 100 or fewer beds and either located in a "rural area" (as defined by CMS) or paid under the outpatient prospective payment system with a rural wage index.

FTC To Develop New Antitrust Guidance for Accountable Care Organizations

The Federal Trade Commission ("FTC") recently announced that it will develop antitrust "safe harbors" for accountable care organizations ("ACOs") as well as an expedited review process for ACOs that do not quality for those safe harbors. The Patient Protection and Affordable Care Act directs the Secretary of Health and Human Services to establish, by January 1, 2012, a shared savings program for ACOs that meet quality performance standards. Among other requirements, an ACO must be accountable for the quality, cost and overall care of the Medicare fee-for-service beneficiaries assigned to it. The FTC has informally taken the position that an ACO owned by competing providers can negotiate prices paid to those providers if (1) the ACO is financially or clinically "integrated" and in the case of clinical integration, such price negotiations are reasonably necessary to achieve the benefits of the clinical integration, and (2) the procompetitive benefits outweigh any anticompetitive effects. Lack of clarity about these rules could limit the development of ACOs. While the FTC's interpretation of these antitrust laws is not binding on the Department of Justice or the court system, the new pronouncements will clarify its enforcement intentions.

Federal Court Dismisses Federal Whistleblower Claim Based on Arbitration Clause

A federal court recently decided that a former employee violated the arbitration provision of his employment agreement by filing a whistleblower action under the federal False Claims Act. The provision required arbitration of "disputes arising out of or related to" the agreement. The plaintiff claimed that his employment was terminated in retaliation for reporting compliance violations to his superiors. Because the plaintiff had agreed to arbitration, the court dismissed the case. *Gilchrist v. Inpatient Medical Services*, N.D. Ohio No. 5:09-cv-02345-SL (August 23, 2010).

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If you have questions concerning this alert, please call Dennis Witherell or Jenifer Belt at 800-444-6659, Ed Emerson at 614-463-9441, 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.