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Compliance and Legal Issues in Long Term Care – Post Health Reform

Presented to

Health Enterprises Network

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DISCLAIMER: The information in the following slides is an overview of some of the key provisions of the Patient Protection and Affordable Care Act (PPACA) that impact long term care providers and suppliers. This presentation is not intended to cover all the fine points of PPACA, which is a multifaceted law that requires the Secretary of Health & Human Services to issue further interpretive guidance. Accordingly, it is not intended to be legal advice, which should always be obtained in direct consultation with an attorney.

The Health Reform Laws Impacting Long Term Care

- Temporary Extension Act of 2010 (TEA), P.L. No. 111-114 (March 2, 2010)
- Patient Protection and Affordable Care Act (PPACA), P.L. No. 111-148 (March 23, 2010)
- Health Care and Education Reconciliation Act (HCERA), P.L. No. 111-152 (March 30, 2010)

PPACA “Secretly” Swept in Tough New Rules and Sentences for Criminals

- Increased sentences by 20% to 50% for health care fraud offenses involving more than \$1 million in losses
- Obstructing a health care fraud investigation or audit is a crime
- Eased the intent requirement for health care fraud: *Department of Justice does not have to prove a person had actual knowledge or specific intent to commit a crime*



PPACA Turns up the HEAT on Fraud

- “There’s never been a worse time to try and steal Americans’ health dollars.”
- “The days when you could just hang out a shingle and start submitting claims are over.”
- “For years we tolerated health care fraud . . . but those days are coming to an end.”

HHS Secretary Kathleen Sebelius
Attorney General Eric Holder
May 13, 2010 Press Briefing

PPACA's Program Integrity Provisions

- Established New Center for Program Integrity:
 - Peter Budetti, M.D., J.D., Deputy Administrator of the new Center
- Four Goals:
 - Better coordination between Medicare and Medicaid
 - Leverage and target resources to geographic areas and provider types that are high-risk
 - Move from *"pay and chase"* to prevention
 - Form partnerships with private sector, specifically commercial payers, to combat fraud

Three Categories of PPACA Program Integrity Provisions

- Preventing fraud and abuse
- Bolstering enforcement tools to help fight fraud and abuse
- Mandating provider education **and compliance programs**

PPACA Section 6102: Mandatory Compliance Programs

- Nursing facilities must implement a compliance and ethics program.
- HHS to establish regulations for specific components – more formal program to be required for entities with 5+ facilities.
- Effective by March 23, 2013
- HHS may disenroll providers/suppliers who do not comply

PPACA Section 6102: Mandatory Compliance Programs

Must include the following components:

- Compliance standards/procedures to guide employees/agents and reduce violations;
- Senior management responsibility with resources to oversee compliance with standards/procedures;
 - At risk individuals should not have responsibility
- Effective training on standards/procedures;
- Monitoring/auditing/reporting systems;
- Consistently followed disciplinary mechanisms;
- Mechanisms to respond and take corrective action to detected offenses
- Periodic reassessment to improve standards where indicated

☀ PPACA Compliance Program Tips

Effective compliance & ethics programs

should align with Health Reform's focus on transparency and accountability:

- Conflict of interest in financial relationships among those providing services and supplies
- Honest and trustworthy employees, contractors and vendors
- Claims that are provided, properly documented, covered, and correctly coded and submitted
- Board of Director involvement in compliance efforts and quality of care
- Training and education of employees

Why Should
Long Term Care Providers
Step Up
Compliance Efforts?

*Here are some
very good reasons. . .*

PPACA Enabled Government Agencies to Share Data to Fight Fraud

- Implementing an **Integrated Data Repository** combining claims and payment information from Medicare, Medicaid, VA, DOD, SSD Insurance, and the Indian Health Service
- Matching data among all agencies to **identify outliers** and potential fraud, waste, and abuse.
- ☀ **Net Effect:** Improved law enforcement and oversight activities.

PPACA Enhanced the Screening of Providers & Suppliers

- Improved screening procedures for Medicare, Medicaid and S-CHIP providers
 - Must include licensure checks
- Before being allowed to bill, new providers and suppliers can now be subject to:
 - criminal background checks
 - fingerprinting
 - database inquiries
 - site visits

Enhanced Screening, etc. (cont'd)

- Pre-payment reviews and caps for up to 1 year.
- HHS must provide states with information on Medicare terminated providers within 30 days of such action to allow states to act accordingly
- Medicare and Medicaid payments may be withheld pending an investigation if a credible allegation of fraud has been made

Enhanced Screening, etc. (cont'd)

- New providers/suppliers must disclose **past affiliation** with any provider/supplier with uncollected debt, suspended payments, or exclusion from Federal health care program
 - ✿ If such an affiliation exists, HHS can exclude or prevent the enrollment of providers/suppliers if necessary to prevent fraud, waste, or abuse

What More Should I know?

Know the PPACA provisions that impact a long term care provider's compliance with the law and that require action NOW.

PPACA Section 6402: Duty to Disclose Overpayments

- Must REPORT, NOTIFY OF REASON and RETURN an overpayment by the later of:
 - 60 days of “identified” overpayment or
 - the date a corresponding cost report is due, if applicable

- What constitutes “Identified”?
 - PPACA does not define it
 - “Overpayment” includes any funds a person is not entitled to receive or retain “after applicable reconciliation” (cost reports)

False Claims Act Liability for Overpayments

- PPACA makes a failure to comply with the duty to disclose overpayments actionable under the False Claims Act
- FCA Fines & Penalties: Treble damages *plus* \$5,500 to \$11,000 in fines *per claim*.
 - ☀ Compliance Program Tip: Have an internal system to identify, report, determine reason for, and repay government overpayments.

PPACA Section 6404: Reduced Period to Submit Medicare Claim

- Time period for filing a written request for payment is reduced from 3 calendar years to 1 calendar year for Medicare Part A and Part B services.
- Effective Date: January 1, 2010. NOW!
 - ☀ Compliance Program Tip: Ensure that process is in place to timely submit all claims.

PPACA Sections 6406, 6407: Durable Medical Equipment (DME) and Home Health

Physicians ordering DME or home health services must:

- Be enrolled in Medicare
 - Have face-to-face (telehealth) encounter with patient before certifying patient
 - Maintain documentation of written orders and referrals of DME/home health
- ☀ Compliance Tips: Ensure all physicians ordering services/supplies are enrolled in Medicare; provide education to staff; audit for compliance.

PPACA Section 6401: The Ordering Physician Must be Identified on Claim Form

- National provider identification numbers must be included on any claim for payment that is based on an order or prescription from a physician or health care professional.
- Effective immediately!
 - ☀ Compliance Program tip: Provide education to claims processing staff.

PPACA Sections 6703: Reporting of Crimes (Elder Justice Act)

- Long-term care facilities that received \$10,000 in federal funding in preceding year must notify each individual who is an owner, operator, employee, manager, agent, or contractor (covered individuals) that they must report any **reasonable suspicion** of a crime against a facility resident to HHS and relevant local law enforcement.
 - If serious bodily injury, report immediately (<2 hours); if not, then report within 24 hours of forming suspicion.
 - Penalties for failure to timely report: Up to \$300,000 + exclusion.
 - Employer of excluded individual unable to receive federal funds, with limited exception.
 - Protection against retaliation.
- ☀ Compliance Tips: Ensure facility has abuse reporting policy and procedure that complies with both state and federal law; train everyone!

PPACA Section 6111: Civil Monetary Penalties for Deficiencies

- HHS now has discretion to reduce CMPs up to 50% if:
 - Facility self-reports
 - Promptly corrects the deficiency;
 - Waives right to appeal
- Facility not qualified if: a) repeat deficiency; or b) a pattern of harm or widespread harm with immediate jeopardy to health and safety of resident, or deficiency resulted in resident death.
 - ☀ Compliance Program Tip: Implement policy and procedure to weigh benefit of self-report against cost of appeal.

PPACA Section 6409: Duty to Disclose Prohibited Physician Referrals

- Stark Law prohibits physician from referring patients to receive designated health services from an entity in which the physician has a direct or indirect financial arrangement unless an exception applies.
- If no exception applies, the parties must self-report the prohibited referral.
 - ☀ Compliance Program Tip: Have an internal system to track all physician ownership and compensation arrangements.

What else
does PPACA
have in store
for
Long Term Care?

PPACA Section 6101: Nursing Facility Ownership Transparency

Nursing facilities will be required to **disclose**:

- **Ownership** and organizational structure information to HHS, *which will be made public.*
- **Financial information** of owners, officers, directors, and other management individuals or entities.
- **Staffing data** to HHS. Staffing data and complaints filed will be published on *CMS Nursing Home Compare.*

PPACA Section 6103: Nursing Home Compare Website

HHS to enhance information on the website with:

- Ownership, org. structure and governing board information;
- CMS's Special Focus Facilities;
- Staffing data: resident census, hours of care per resident per day, staff turnover and tenure;
- Number, type, severity and outcome of substantiated complaints;
- Number of adjudicated criminal violations by nursing facility or crimes by nursing staff;
- Number of civil monetary penalties levied against facility, employees, contractors, and other agents.

Miscellaneous Provisions:

- HHS to establish a nationwide program for criminal background checks (PPACA 6201)
- HHS to *study* feasibility of national nurse aide registry; study funds--\$500,000 (PPACA 6703)
- Standardized complaint forms for nursing home residents (PPACA 6105)
- Training for dementia management and abuse prevention (PPACA 6121)
- Medicare Part D drug to develop dispensing techniques to reduce drug waste (PPACA 3310)



QUESTIONS?

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