RIKER DANZIG SCHERER HYLAND PERRETTI LLP

Riker Danzig Health Care Update August 1, 2018

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New Jersey State: Selected Proposed and Adopted Legislation

- P.L. 2018, c. 31 – Adopted – Called the "New Jersey Health Insurance Market Preservation Act," this new law requires all taxpayers, if an applicable individual, and any dependent of the taxpayer who is an applicable individual, to be covered under minimum essential coverage for that month.
- P.L. 2018, c. 24 – Adopted – Called the "New Jersey Health Insurance Premium Security Act," this new law establishes and provides for the administration of the Health Insurance Premium Security Plan.
- P.L. 2018, c. 29 – Adopted – Allows charitable assets set aside from the sale of a nonprofit hospital to a for-profit entity to be allocated to a successor nonprofit charitable entity that is establishing and operating equivalent nonprofit hospital.
- P.L. 2018, c. 18 – Adopted – Called the "New Jersey Gestational Carrier Agreement Act," this new law authorizes certain gestational carrier agreements.
- P.L. 2018, c. 34 – Adopted – Requires firearms seizure when certain health care professionals determine patient poses a threat of harm to self or others.
- S. 2699 – Introduced – Requires children's psychiatric facilities to have on-site staff members supervise patients 24 hours a day, seven days a week.
- S. 2735 – Introduced – Requires licensure of pain management clinics, establishes process to identify abnormal drug usage and prescribing practices, modifies requirements for opioid prescriptions and medication-assisted treatment, authorizes use of non-opioid advance directives.
- A. 4178 – Introduced – Establishes restrictions on designation of new trauma centers.
- A. 4272 – Introduced – Requires health benefits coverage for private duty nursing services.

New Jersey State: Selected Proposed and Adopted Regulations

- 50 N.J.R. 1368(a) – Adopted – This adoption to the rules governing the physician assistant scope of practice clarifies that the supervisory ratio does not limit the number of physician assistants with whom a supervising physician may enter into a delegation agreement, among other things.
- 50 N.J.R. 1282(a) – Adopted – These amendments expand functions that licensed dental hygienists and registered dental assistants may perform, subject to the supervision of a licensed dentist.
- 50 N.J.R. 1284(a) – Adopted – This adoption to N.J.A.C. 13:35-6.4 addresses the education requirements for a certified medical assistant to administer injections under the direction of a physician.
- 50 N.J.R. 1247(a) – Proposed – This proposed rule would require State licensed clinical alcohol and drug counselors to hold a current Certified Clinical Supervisor credential from an International Certification Reciprocity Consortium member board in order to be deemed a qualified clinical supervisor.
- 50 N.J.R. 1249(a) – Proposed – This proposed rule would ensure that the scope of practice for licensed orthoptist assistants and licensed prosthetist assistants reflects the standards from the American Board for Certification in Orthotics and Prosthetics, and would prohibit licensed assistants from providing an initial evaluation of a patient, developing or modifying an orthotic treatment or prosthetic treatment plan, or providing the final fitting of an orthotic or prosthetic appliance.
- 50 N.J.R. 1423(a) – Proposed – The Small Employer Health Benefits Program Board of Directors is proposing amendments to the standard plans permitted under N.J.A.C. 11:21 Appendix Exhibits F, G, W, Y, HH and II.

Federal: Selected Proposed and Enacted Legislation

- S. 204 – Enacted – Authorizes the use of unapproved medical products by patients diagnosed with a terminal illness in accordance with State law, and for other purposes.
- H.R. 5832 – Introduced – Amends the Public Health Service Act to authorize the Secretary of Health and Human Services to award grants to nursing homes, assisted living facilities, and other long-term care facilities to improve their preparedness for power outages.
- H.R. 5804 – Introduced – Amends Title XVII of the Social Security Act to provide for modifications in payment for certain outpatient surgical services.
- S. 2960/H.R. 5965 – Introduced – Requires health insurance coverage for the treatment of infertility.

Federal: Selected Proposed and Adopted Regulations

- 83 FR 25947-01 – Adopted – This document announces the addition of 31 healthcare Common Procedure Coding System codes to the Required Prior Authorization List of Durable Medical Equipment, Prosthetics,

Orthotics, and Supplies Items that require prior authorization as a condition of payment. Implementation is effective on September 1, 2018.

- 83 FR 26604-01 – Adopted – This final rule finalizes a policy that provides flexibility in the determination of episode spending for Comprehensive Care for Joint Replacement Payment Model participant hospitals located in areas impacted by extreme and uncontrollable circumstances for performance years 3 through 5.
- 83 FR 25943-01 – Delay of Final Rule – This document announces that HHS is delaying the effective date of a final rule published on January 5, 2017, which set forth the calculation of the ceiling price and application of civil monetary penalties concerning section 340B of the Public Health Service Act, known as the "340B Drug Pricing Program," from January 5, 2017 to July 1, 2019.

Federal/Other State Litigation

- The Court of Federal Claims recently determined that it lacked authority to entertain a suit brought by a doctor stiffed on nearly $40,000 in incentive payments after his practice was miscoded by the Centers for Medicare and Medicaid Services. CMS asked for the case to be dismissed, claiming that, as the HHS appeals board found, the statute explicitly precludes judicial review of any CMS primary care identifications. While the judge acknowledged that Plaintiff was not at fault for the misidentification and had tried to rectify the issue, the court noted that his complaint does revolve around his identification as a primary care practitioner and therefore is immune from court review. For more information on the suit, see, Feiss v. U.S., case number 1:17-cv-01263, in the U.S. Court of Federal Claims.
- The Federal Circuit recently ruled that health insurance companies are not entitled to billions of dollars in Affordable Care Act funding that Congress has lawfully withheld for the ACA's so-called risk corridor program, which was intended to lessen financial losses for insurers during the ACA's first few years. For more information on the suit, see, Land of Lincoln Mutual Health v. U.S., case number 17-1224, and Moda Health Plan Inc. v. U.S., case number 17-1994, in the U.S. Court of Appeals for the Federal Circuit.
- A Massachusetts appellate court held that Walgreens had a duty to inform a patient's doctor of the need for an authorization form in order to obtain her potentially life-saving medicine, the first time such an obligation has been placed on a pharmacy. For more information on the suit, see, Correa v. Schoeck et al., case number 12409, in the Supreme Judicial Court of Massachusetts.
- The Wisconsin Supreme Court recently reversed an appellate court ruling that declared unconstitutional a state law that put a $750,000 cap on noneconomic damages in medical malpractice suits. The Wisconsin Supreme Court, specifically, found that the law was not unconstitutional, but, rather, represented a legitimate policy choice of the state legislature. For more information on the case, see, Ascaris Mayo et al. v. Wisconsin Injured Patients and Families Compensation Fund et al., case number 2014AP2812, in the Supreme Court of Wisconsin.

- A Texas federal judge recently blocked CMS in its efforts to recoup $7.6 million in alleged Medicare overpayments to Family Rehabilitation Inc., an affiliate of AngMar Medical Holdings Inc., which stated that it would go bankrupt if forced to pay while it waits out an "extreme backlog" for its administrative appeal of CMS' determination of overpayment. While Medicare laws call for an ALJ hearing within 90 days, a period of time the Judge acknowledged a provider could float its expenses and survive, the Judge found it "unreasonable to expect a healthcare agency to scrape by for three to five years waiting for a hearing and decision while CMS recoups the alleged overpayments." For more information on the suit, see, Family Rehabilitation Inc. v. Hargan et al., case number 3:17-cv-03008, in the U.S. District Court for the Northern District of Texas.
- A D.C. federal judge recently decided to dismiss a suit that accused Laboratory Corporation of America, more commonly known as LabCorp, of violating HIPAA by failing to adequately shield its computer intake stations from public view. Specifically, joining with many federal circuits, as well as his own D.C. Circuit, the judge dismissed the suit on the grounds that HIPAA does not provide for a private cause of action for individuals. The plaintiff had claimed that LabCorp violated HIPAA because the work station where she was directed to enter her PHI during a hospital visit was not properly partitioned off from others' view. For more information on the suit, see, Lee-Thomas v. LabCorp, Laboratory Corp. of America, case number 1:18-cv-00591, in the U.S. District Court for the District of Columbia.

In the News

- CMS recently issued a request for information for feedback on possible regulatory changes to the Stark Law. The goal of relaxing the standards would be to support care coordination that enable different providers to collaborate in hopes of improving outcomes and saving money.
- Experts believe that a bill recently passed out of the New Jersey State Senate to the General Assembly, S. 2144, i.e., the "New Jersey Insurance Fair Conduct Act," has the potential to increase litigation. Specifically, the bill would create a new statutory cause of action permitting policyholders to file civil suits against first-party insurers, such as property and auto carriers, for unreasonable delays or denials of benefit payments or any violations of a New Jersey statute forbidding a wide range of unfair or deceptive practices. The bill provides that an insurer who loses a suit brought pursuant to this Act would be liable for: (1) a claimant's actual damages; (2) treble damages; (3) prejudgment interest; and (4) attorneys' fees and court costs.
- The Department of Labor recently published its long-awaited final rule on association health plans, relaxing the requirements for small businesses to join together to create health care plans that avoid certain Affordable Care Act requirements.

The list above does not *include every proposed or adopted legislation, litigation or guidance document that may impact the health care industry. Instead, it includes only a select few chosen by the authors, and any information in this Update is not intended to provide legal advice. If you are concerned that a proposed or adopted legislation, litigation or guidance document may impact your practice, then you should seek legal advice. We send these Updates to our clients and friends*

to share our insights on new developments in the law. Nothing in this Update should be relied upon as legal advice in any particular matter.

If you have any questions about the issues discussed in this Update, please contact the following Riker Danzig attorneys:

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