



Riker Danzig Health Care Update July 2, 2018

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New Jersey State: Selected Proposed Legislation

- A. 3880 – Introduced – Directs DOH to develop plan to phase out use of latex gloves in health care facilities and food establishments.
- A. 3857 – Introduced – Authorizes visiting advanced practice nurses who are not certified by endorsement in New Jersey to engage in the limited practice of prescribing medications and devices, if they have appropriate educational qualifications.
- A. 3866 – Introduced – Requires suicide prevention training for mental health practitioners.
- A. 3939 – Introduced – Limits rescheduling, cancellation, and no-show fees providers of health care services may charge in certain instances.
- A. 3993 – Introduced – Prohibits pharmacy benefits managers from collecting “clawback” copayments; requires certain language prohibiting “gag clauses” in contracts with pharmacists; provides certain penalties.
- A. 3958 – Introduced – Requires children’s psychiatric facilities to have on-site staff members supervise patients 24 hours a day, seven days a week.
- A. 4013 – Introduced – Reinstates prior property tax exemption for nonprofit hospitals with on-site for-profit medical providers; requires some of these hospitals to pay community service contributions; establishes Nonprofit Hospital Community Service Contribution Study Commission.
- A. 4027 – Introduced – Revises criteria for payment of charity care to certain hospitals.
- A. 4045 – Introduced – Clarifies registration requirements of health care service firms and employment standards of certified homemaker-home health aides.
- S. 1612 – Amended/Substituted – Establishes minimum certified nurse aide-to-resident ratios in nursing homes.
- S. 1820 – Amended/Substituted – Makes certain changes to hourly reimbursement rate for personal care

services reimbursed by Medicaid.

- S. 2591 – Introduced – Called the “Pharmaceutical Representative Licensing Act,” the bill directs the Board of Medical Examiners to develop criteria for licensure of pharmaceutical representatives.
- S. 2598 – Introduced – Expands Medicare health care coverage to all New Jersey residents.

Federal: Selected Proposed Legislation

- H.R. 5699 – Introduced – Directs the Secretary of Health and Human Services to develop guidance on pain management and the prevention of opioid use disorder for hospitals receiving payment under part A of the Medicare program.
- H.R. 5724 – Introduced – Amends the Fair Housing Act to clarify the applicability of that Act to recovery facilities.

Federal: Selected Proposed and Adopted Regulations

- 83 FR 19431-01 – Adopted – This final rule clarifies the Departments of Labor, Health and Human Services, and the Treasury’s (the Departments) decision not to adopt recommendations made by American College of Emergency Physicians and certain other commenters regarding a final rule published in November 2015 in the Federal Register titled “Final Rules for Grandfathered Plans, Preexisting Condition Exclusions, Lifetime and Annual Limits, Rescissions, Dependent Coverage, Appeals, and Patient Protections Under the Affordable Care Act.”
- 83 FR 20008-02 – Proposed – The Department of Health and Human Services, Health Resources and Services Administration, is proposing to further delay, and solicit comments on further delaying, the effective date of the January 5, 2017 final rule “340B Drug Pricing Program” that sets forth the calculation of the ceiling price and application of civil monetary penalties, in order to allow a more deliberate process of considering alternative and supplemental regulatory provisions and to allow for sufficient time for additional rulemaking.
- 83 FR 21104-01 – Proposed – This proposed rule by the Centers for Medicare and Medicaid Services (CMS) would, among other things, update the prospective payment rates for Medicare inpatient hospital services provided by inpatient psychiatric facilities (IPFs), update the IPF labor-related share, update the IPF wage index for FY 2019, make technical corrections to the IPF regulations, update quality measures and reporting requirements under the Inpatient Psychiatric Facility Quality Reporting Program, and includes a Request for Information related to health information technology.
- 83 FR 20972-01 – Proposed – This proposed rule by CMS would, among other things, update the prospective payment rates for inpatient rehabilitation facilities (IRFs) for FY 2019. CMS is also soliciting comments on removing the face-to-face requirement for rehabilitation physician visits and expanding the use

of non-physician practitioners in meeting the IRF coverage requirements.

- 83 FR 20164-01 – Proposed – CMS is proposing to revise the Medicare hospital inpatient prospective payment systems for operating and capital-related costs of acute care hospitals to implement changes arising from CMS' continuing experience with these systems for FY 2019.
- 83 FR 21018-01 – Proposed – This proposed rule by CMS would, among other things, update the payment rates used under the prospective payment system for skilled nursing facilities for FY 2019.
- 83 FR 20934-01 – Proposed – This proposed rule by CMS would update the hospice wage index, payment rates, and cap amount for FY 2019, and also proposes to make conforming regulations text changes to recognize physician assistants as designated hospice attending physicians effective January 1, 2019. The rule also proposes changes to the Hospice Quality Reporting Program.

Federal/Other State Litigation

- Connecticut General Life Insurance Co. and Cigna Health and Life Insurance Co., two units of Cigna, recently agreed to settle a suit against three Texas-based ambulatory surgical centers whereby the centers paid Cigna \$8 million. Cigna alleged that the centers violated ERISA and overcharged the insurance company by more than \$8 million by waiving certain payments for out-of-network patients, but billed the insurance companies as if the patients had paid. For more information on the suit, see, [Connecticut General Life Insurance Company et al. v. Elite Center For Minimally Invasive Surgery LLC et al.](#), case number 4:16-cv-00571, in the U.S. District Court for the Southern District of Texas.
- The District of New Jersey recently ruled to boot a complaint from court brought by Ridgewood, New Jersey-based Complete Foot and Ankle against Cigna Health and Life Insurance Co. for alleged violations of ERISA. Specifically, the podiatry group had argued that the insurer shortchanged it on medical claims. However, Judge Wigenton stated in her decision that the podiatry group's failure to identify the nature and dates of the services performed and the terms of the plan the podiatry group said the benefits were owed under were fatal to its claim. For more information on the suit, see, [Complete Foot and Ankle v. Cigna Health and Life Insurance Co.](#), case number 2:17-cv-13742, in the U.S. District Court for the District of New Jersey.
- The Second Appellate District of the California Court of Appeals recently held that when confronted with an insured plaintiff who has chosen to be treated with doctors and medical facility providers outside their insurance plan, the Court will consider the plaintiff uninsured, as opposed to insured, for the purpose of determining economic damages. Such a result may drive up those damages and, therefore, drive up the potential settlement value and verdict awards in their cases. For more information on the case, see, [Pebley v. Santa Clara Organics, LLC](#), 2018 WL 2112307.

In the News

- In a rule clarification posted in the Federal Register, the U.S. Departments of Health and Human Services, Labor and the Treasury told the American College of Emergency Physicians that its concerns about the “greatest of three” regulation – which interprets a provision of the Affordable Care Act and requires insurers to calculate three methods of paying out-of-network hospitals for emergency services, then pay the greatest of the three – are unfounded. ACEP proposed that insurers should be required to consult FAIR Health to calculate rates. However, the agencies told ACEP that requiring insurers to consult a database like FAIR Health would be costly and time-consuming for the federal government. The agencies further told ACEP and other commentators that they did not provide adequate information to support their assertion that the methods used for determining the minimum payment for out-of-network emergency services under the regulation are not sufficiently transparent or reasonable.
- In a recently released advisory opinion, the Office of Inspector General for the U.S. Department of Health and Human Services said that a distributor of ostomy products can give free product samples to Medicare beneficiaries without running afoul of the Anti-Kickback Statute. The opinion stated that the samples, worth up to \$38, implicate the AKS because they “may be intended to induce federal health care program beneficiaries” to buy the products in the future; however, the samples present “a low risk of fraud and abuse” because: (1) the samples cannot be billed to Medicare and thus the arrangement won’t directly increase costs for the program; (2) “inappropriate patient steering” to a particular product is unlikely to occur because comparable products are available from other companies and the samples aren’t linked to any future purchase obligations; (3) “inappropriate utilization” is unlikely to result; and (4) a contractor that processes sample requests has safeguards in place to ensure that it doesn’t have financial incentives to boost sales of the ostomy products.

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. © 2018 Riker Danzig Scherer Hyland & Perretti LLP.

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

Glenn A. Clark
Khaled J. Klele
Stephen M. Turner
Clarissa Gomez

Attorneys:

Glenn A. Clark · Khaled John Klele

Practice:

Health Care Law

Headquarters Plaza, One Speedwell Avenue, Morristown, New Jersey 07962-1981 • t: 973.538.0800 f: 973.538.1984

50 West State Street, Suite 1010, Trenton, New Jersey 08608-1220 • t: 609.396.2121 f: 609.396.4578

500 Fifth Avenue, New York, New York 10110 • t: 212.302.6574 f: 212.302.6628

399 Knollwood Road, Suite 201, White Plains, NY 10603 • t: 914.539.3360 f: 914.539.3361

1200 Summer Street, Suite 201C, Stamford, CT 06905 • t: 203.326.6740 f: 914.539.3361

www.riker.com