Session #12
Emerging COVID Liability Issues: Assessing and Mitigating Risk

Tuesday, October 5, 2021
9:45 – 10:45 a.m.

Presenters: Rebecca Coffin, Attorney, Partner, *Voigt, Rodè, Boxeth & Coffin LLC, St. Paul;* ***Pete Gregory****, Co-General Counsel, Presbyterian Homes and Services, Roseville; and* ***Jesse A. Berg****, Attorney, Lathrop GPM, LLP, Minneapolis*

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Objectives

- Review the early days of the pandemic and the assumptions and official guidance under which older adult services providers operated in good faith, which now have exposed them to liability claims.
- Describe the range of liability issues that might arise for both civil and criminal claims, as well as federal and state regulatory compliance matters.
- Discuss COVID related risk management strategies and options.

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Partner

October 5, 2021

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Provider Relief Fund

- Established under the CARES Act passed in March 2020, which set up a variety of economic assistance funds totaling over $2.2 billion.
- Distributed to cover expenses and lost revenues attributable to the Covid-19 pandemic, provide support for “families, workers, and heroic health care providers.”
  - Three phases of General Distributions of $88.5 billion.
    - Recipients include Medicare fee-for-service providers, Medicaid providers, Medicaid managed care plans, dentists, assisted living facilities, and behavioral health providers.
    - A recipient of a General Distribution has discretion in allocating the funds to support health care related expenses or lost revenue attributable to COVID-19 so long as payment is used to prevent, prepare for, or respond to the pandemic and those expenses or lost revenue are not reimbursed from other sources.
  - Eight Targeted distributions of $56.8 billion.
    - Recipients include rural providers, skilled nursing facilities, tribal hospitals and clinics, urban health centers, safety net hospitals, and hospitals with a high number of COVID-19 related admissions.
    - Terms and conditions for Targeted Distributions depends on the type of distribution and recipient.
  - As of September 2021, about $44 billion in Provider Relief Funds remain unspent.

Requirements for Provider Relief Fund Recipients

- All recipients must register through HRSA's reporting portal which went live on Jul. 1, 2021.
- Providers must report by a specified date depending on when it received its PRF payment.
- Must fully use funds by Jun. or Dec. of 2021 or 2022 depending on the date of receipt.
- Recipients must attest to the terms and conditions and certify that they will submit reports to ensure compliance with the conditions imposed on each PRF payment.
- All recipients will be required to substantiate that funds were used in a manner that meets the terms and conditions of the disbursement.
- Reporting Portal Data Entry Worksheets require data inputs of many data points.
- Guidance from Jul. 2021 states recipients must retain supporting documentation of their PRF reports for a minimum of three years.

Pandemic Related Fraud

- Pandemic related fraud has become a **high priority** for enforcement bodies
  - In Feb. 2021, Assistant Attorney General identified Pandemic-Related Fraud as the. first priority of the Biden Administration's Department of Justice Civil Division.
  - DOJ intends to work with IGs and other stakeholders to identify, monitor, and investigate the misuse of pandemic relief money and translate this into significant cases and recoveries
  - The agency notes that while the pandemic is novel the inevitable fraud schemes will likely resemble misconduct that the False Claims Act has long been used to address, including false representations regarding edibility, misuse of program funds, and false certifications pertaining to loan forgiveness
  - The first Provider Relief Fund misappropriation indictment was in Feb. 2021, charging the owner of a shuttered HHA received over $37,000 that she then distributed to her family members for personal use.

Focus on Enforcement Actions

- In May 2021, the AG announced formation of the COVID-19 Fraud Enforcement Task Force
  - Intention to find and prosecute anyone using the pandemic as an opportunity to scam and steal and protect critical benefit programs from being preyed upon by those seeking to take advantage
  - First announced in connection with adverse administrative actions against over 50 medical providers for involvement in fraud schemes related to COVID-19 or abuse of CMS programs designed to encourage access to medical care during the pandemic
  - DOJ announced in Sep. 2021 it had resulted in charges involving over $1.4 billion in losses due to various fraudulent schemes involving COVID-19 testing, PRF, and telehealth fraud
- Additional Scrutiny for Long Term Care Providers
  - National Nursing Home Initiative launched to coordinate and enhance civil and criminal efforts to pursue nursing homes that provide grossly substandard care to their residents
- Telehealth Enforcement
  - Relaxation of telemedicine requirements in response to the pandemic will lead to enhanced enforcement focus

Anticipated Fraud and Abuse Enforcement

- Various state and federal directives have been issued with to target pandemic-related fraud schemes and prioritize both civil and criminal enforcement
- Investigations for pandemic related fraud schemes could be years away but will mostly likely involve:
  - Audits
  - Hotline complaints
  - Whistleblowers
  - Self-reporting
- Primary sources of risk tied to provider relief funding include:
  - Eligibility requirements
  - Representations in applications
  - Use of funds
  - Follow-on certifications

Terms and Conditions for Recipients

- Recipients were prohibited from using funds:
  - To reimburse for expenses or losses that were reimbursable from other sources or outstanding debt obligations.
  - To pay for salaries above the Executive Level II Cap, though because other funds can be used to pay in excess of the $197,300 cap documentation for these expenses is key.
- Recipients are obligated to abstain from “balance billing:”
  - States have taken various approaches to combat surprise billing that may apply to COVID-19 care, including requiring providers to accept the highest in-network rate as payment in full.
  - Applies to all COVID related treatment, including both presumptive and actual cases.
  - Recipients of PRF funds should not balance bill a patient for COVID-19 related care.
- COVID-19 related expenses must be reasonable:
  - Evaluating the cost of various expense such as staffing and PPE to determine whether the provider vetted enough sources and allocated funds reasonably.

Likely Targets for Enforcement Actions

- Representation in applications
  - Eligibility for Phase I was for those who billed Medicare fee-for-service in 2019 or provided, after Jan. 31, 2020, diagnosis, testing, or care for individuals with possible or actual cases of COVID.
  - Phases II and III Expanded eligibility to Medicaid providers and dental practitioners.
  - All providers were required to sign an attestation and accept the terms and conditions.
- Terms and Conditions required funds to be used only for:
  - Health-care related expenses.
  - Lost revenues attributable to COVID-19.
- Acquisitions
  - Large health systems received significant funds, Congress requested a review based on concern of increased mergers and acquisitions in late 2020 and early 2021.
  - Concern that funds were used to finance mergers rather than care for patients or maintain operations.

Likely Targets for Enforcement

- Capitol Expenses
  - Must be directly related to the “prevention, preparation for or response” to COVID-19:
    - E.g. Ventilators
    - Additional beds
    - Alternative sites
- Expenses
  - Lost revenue calculations:
    - 2019 actual v. 2020 actual patient care revenue
    - 2020 budgeted vs. 2020 actual patient care review
      - Must show budget approved by Mar. 26, 2020
    - Alternative methods
      - Why these methods were reasonable
      - Increased likelihood of audit with this method

Identifying and Managing Risk

- Among the terms and conditions applicable to all Provider Relief Funds is a statement that: “Recipient agrees to fully cooperate in all audits the Secretary, Inspector General, or Pandemic Response Accountability Committee conducts to ensure compliance with these Terms and Conditions.”
- Providers should start preparing now for the possibility that they will be audited
  - Understand the requirements under the T&C’s and recognize the areas of compliance most likely to be audited.
    - Funds attestation
    - Reporting of funds to required entities
    - Appropriate usage of funds
    - No balance billing
  - Ensure that the organization has documented compliance with the requirements.

Preparing for an Audit- Practical Tips

- Be prepared to defend how the organization has catalogued expenses attributable to the coronavirus:
  - How will the organization demonstrate it is reasonable?
  - How will it demonstrate expenditures are related to an allowed expense?
  - Focus on special rule concerning labor and capital expenses.
- Some examples of coverable expenses:
  - Building or construction of temporary structures,
  - Leasing of properties, medical supplies, and equipment including PPE and testing supplies,
  - Increased workforce and trainings,
  - Emergency operation centers,
  - Retrofitting facilities and surge preparation.

Preparing for an Audit- Practical Tips

- A cross-disciplinary team from Compliance and Finance should prepare for potential audits by HHS or other oversight bodies by (1) closely tracking the requirements associated with the funds; and (2) ensuring that it has documented its compliance with these obligations.
- Providers should have a documented recordkeeping and record retention policy that is applicable to payments received and obligated or expended.
- All staff who are responsible for receipt, obligation, and spending of the funds should be trained on the basic compliance obligations under the T&C's and the recordkeeping and record-retention requirements applicable to financial and other documentation.
- Focus on compliance in all areas, as CARES Act funding will not be the only governmental audit focus related to COVID-19. Home health telehealth services, Medicare Part B services, High-Risk HRSA grants and inpatient charges are all likely targets.

Preparing for an Audit- Practical Tips

- On the finance side, providers should:
  - Segregate funds on accounting ledgers to track the direct and indirect application of the funds
  - Separate the Provider Relief payments from other sources of payments or funds for similar services to ensure they are segregated and avoid potential overlap
  - Set up separate general ledger codes for each funding program or each grant for each entities Tax ID
- For direct expenses, identify separate cost centers for losses and other costs attributable to COVID-19. For indirect expenses, identify and document an appropriate allocation methodology to distribute indirect departmental expenses to COVID-19 accounts.
- Develop and document a methodology to identify lost revenue as a result of COVID-19, including:
  - Accounting for known cancellations of elective procedures or visits;
  - Determining revenue based on decreased admissions;
  - Reviewing year-over-year revenue decrease; and
  - Understanding any trends in recent revenue to determine if it was related to COVID-19.

Privacy Issues During COVID

- The declaration of a Public Health Emergency authorized the Secretary to utilize Section 1135 of SSA authority to temporarily waive or modify certain Medicare, Medicaid, and CHIP requirements, impacting business across the continuum of care.
- State and Federal waivers, some are starting to expire.
- Unclear how much notice providers will have regarding the end of PHE's and whether there will be an abrupt stop, a gradual discontinuation, or continuation of waivers.
- OIG and DOJ have stated they will pursue enforcement actions against potential fraud and abuse that occurred in providers use of emergency flexibilities.
- Audits have already started:
  - Feb 2021 audits of home health services provided as telehealth
  - CMS is actively a.uditing providers to ensure compliance with T&C's.

Practical Tips for Federal and State Waivers

- Ensure you have properly documented each and every waiver (blanket or individual entity) that your organization has taken advantage of and how the waiver was utilized
- Develop appropriate matrices tailored to the business unit to support your compliance and auditing strategies.
- Determine if you need the waiver to continue operations and prepare now for if/when the waiver ends. How will the organization return to normal operations and what actions will need to be taken?
  - Clinical service line and operations need to be engaged now- flexibilities won't last forever
  - Engage your government relationship team or leadership on the path needed to resume normal operations
  - Have all stakeholders at the table to plan for the unwind.
- Remember documentation retention requirements.

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