



HEALTH LAW ADVOCATE™

PUBLISHED BY THE HEALTH CARE PRACTICE GROUP OF FARRELL FRITZ, P.C., ATTORNEYS AT LAW

Welcome!

The law is affecting the business and practice of health care as never before. Whether you are a physician or hospital administrator, insurer, manufacturer or provider of related services, maintaining regulatory compliance and meeting revenue goals are daily challenges that increasingly require an in-depth understanding of legal issues.

(Continued on page 2)

Inside

Farrell Fritz Briefs

Our Health Care practice group welcomes back two experienced partners.
Page 2

Ambulatory Surgery Joint Ventures Can Benefit Both Hospitals and Physicians
Page 2

Avoiding Penalties for Fraud and Abuse Requires Proactive Compliance Program
Page 3

Events Calendar
Page 4



Identify Yourself! NPI Rule Presents New Challenges for Providers



By Christopher J. Kutner, Esq

Who are you? Under the new National Provider Identifier (NPI) Rule, the way health care organizations answer that question is becoming a critical compliance issue.

Mandated under HIPAA's Administrative Simplification provisions, the NPI Rule is intended to improve the efficiency and effectiveness of the health care system through a uniform system of identifying providers. The NPI is one of the standards adopted by the Department of Health and Human Services to be used in electronic health care transactions.

By May 23, 2007, all Covered Entities (health plans, health care providers and clearinghouses) must be in compliance with the rule – although small plans are provided one additional year to comply. After that date, use of legacy identifiers other than the new NPI assigned by the Centers for Medicare & Medicaid Services (CMS) or its designee – or use of a combination of legacy and NPIs – will result in non-compliance with the rule.

By now, Covered Entities should be well on their way in identifying non-compliance risks. A notable risk involves transactions between two Covered Entities (for example, a provider and health plan) requiring the use of NPIs. Non-compliance by one may put the second entity in a difficult position. Therefore, Covered Entities should know which of their trading partners are continuing to perform transactions with an identifier that does not conform with the NPI Rule. The rule requires good faith efforts to address such situations when they become known. Covered Entities should therefore be cooperating with each other in their compliance efforts.

What does compliance entail and how will the rule be enforced? In sum, all HIPAA-covered transactions (i.e., electronic claims from a provider to a plan in connection with reimbursement) that require health care provider identifiers must now use NPIs. Unlike the privacy rules of the Administrative Simplification provisions of HIPAA, which are enforced by the Office of Civil Rights of HHS, the non-privacy provisions (including NPIs) will be enforced by the administrator of CMS.

Initial enforcement will be based upon reported complaints. Thus, when CMS receives a complaint about a non-compliant transaction, it will notify the Covered Entity of the complaint filed against it. The Covered Entity will then have the opportunity to: (1) demonstrate compliance; (2) document its good faith efforts to comply with the standards, and/or (3) submit a corrective action plan. Under Section

(Continued on page 4)

Welcome!

(Continued from page 1)

For that reason, we are pleased to present the inaugural issue of Farrell Fritz Health Law Advocate™. As practicing attorneys with extensive experience in health care law, we will seek to keep you up to date on important decisions being made in the legislatures and courts – here in New York as well as nationally. In addition, as we have both also worked on the client side for major health care companies, we will apply that experience to help you understand the business implications of new laws and industry trends.

We encourage feedback from all our readers. Please contact us with your comments and suggestions about topics that are of particular concern or interest to you.

Christopher J. Kutner, Esq.
Michael E. McDermott, Esq.

Farrell Fritz BRIEFS

Farrell Fritz is pleased to welcome back Michael E. McDermott and Christopher J. Kutner, both partners in our Health Care practice group. Mike has represented hospitals, HMOs, integrated delivery systems, nursing homes, home care and hospice care agencies, MSOs, multi-specialty physician groups and physicians in a wide variety of transactional and regulatory matters. He was previously general counsel at Lenox Hill Hospital (New York, NY) and deputy general counsel at Lutheran Medical Center (Brooklyn, NY).

(Continued on page 4)

Ambulatory Surgery Joint Ventures Can Benefit Both Hospitals and Physicians



By Michael E. McDermott, Esq.

Hospitals and physicians continue to search for alternative revenue sources at a time when costs are increasing dramatically, reimbursement is decreasing significantly, and regulatory oversight is intensifying. Physicians have been particularly hard hit as their overhead costs rise at levels well above inflation due to many factors, including labor costs and professional liability insurance premium increases. Many physicians are exploring ownership interests in Ambulatory Surgery Centers (ASCs) as a possible source of additional revenue. This presents significant issues to hospitals, such as the movement of profitable procedures from the hospital to the ASC and competition from their own medical staff.

Many hospitals have opposed the opening of ASCs within their catchment area and have penalized physicians on their medical staff for participating in a competing ASC. Such penalties include restrictive covenants in employment agreements or denial of hospital privileges for physicians with an ownership interest in competing ASCs.

Other hospitals, however, have seen physician-owned ASCs as an opportunity to participate in a joint venture that can assist with physician recruitment, improve patient satisfaction and operational efficiency and, most importantly, offset the loss of revenue.

Hospitals and physicians have used several equity participation ASC joint venture models, including equal ownership (50/50) and variations with differing equity interests, such as 70/30 or 30/30/40, with a management company participating in the venture. Additionally, some types of ASC services can ideally be structured as “under arrangement” ventures in which the services are provided on the hospital campus. Under this type of joint venture, the participants are reimbursed based upon the hospital’s outpatient department rates rather than a lower ASC rate. Under the 30/30/40 model mentioned above, the addition of a management company creates further opportunity to share in the revenue generated by the ASC.

When contemplating ASC joint ventures, hospitals and physicians must keep in mind the regulatory risks involved. These include possible violations of the federal Anti-Kickback Statute, federal and state Physician Anti-Referral (Stark) statutes, federal tax exemption laws for a not-for-profit hospital participant, corporate practice of medicine laws, and antitrust statutes. Careful consideration must be given to the Office of the Inspector General Special

(Continued on page 4)



Avoiding Penalties for Fraud and Abuse Requires Proactive Compliance Program



By Christopher J. Kutner, Esq.

Given the huge sums the federal government pays for Medicare beneficiaries and New York State pays for Medicaid beneficiaries, there is likely to be an increase in fraud and abuse enforcement efforts.

Providers of health care services and suppliers of medical equipment to individuals covered under federal and state programs (Medicare, SCHIP, Medicaid, etc.) should therefore take heed and ensure that their business operations are in lock step with federal and state requirements. There are two important steps you should take:

1. Train employees on compliance

First, it would be wise to have a formal corporate compliance program tailored to your specific business model. However, in deciding whether a compliance program should be a mitigating factor in assessing penalties, the Office of Inspector General (OIG) of the federal government and the Medicaid Inspector General (MIG) for New York State would likely evaluate the program's effectiveness. Therefore, a compliance program cannot consist of a binder of policies and procedures that no one knows about. Companies need to make an active and concerted effort to ensure all employees abide by the applicable regulations, as evidenced by their awareness of and training on the elements of such a program.

2. Monitor every transaction

If you are a provider of services or a supplier of medical equipment to an individual for whom you will seek reimbursement from Medicare or Medicaid, you should be actively overseeing the reimbursement and eligibility processes to ensure that you are following state and federal rules to the letter.

Why? Because the risks are too great not to. An audit by the OIG or MIG, or their trained and experienced auditor designees, could result in findings of overpayments to you going back years. Not only might you be faced with the prospect of repaying large sums in restitution, but consider the prospect of being excluded from participation in these programs in the future and, in the most egregious cases, a criminal conviction. In other words, allowing questionable transactions to proceed could result in drastic and devastating penalties. It will not be sufficient to claim ignorance if, through reasonable diligence, fraud and abuse could have been prevented.

The time is now for detecting fraud and abuse and taking steps to stop it. The Inspectors General will be keenly interested in the efforts a company makes to educate and train employees on compliance, as well as its efforts in reporting questionable practices. Such good faith efforts could pay dividends in mitigating fines and penalties under consideration after an adverse finding.

Farrell Fritz BRIEFS

(Continued from page 1)

Chris re-joins the firm from HIP of Greater New York, where he was corporate and regulatory compliance counsel. Previously, he served as associate general counsel and compliance officer at Vytra Health Plans, and later, as counsel to the president/CEO, focusing on strategic planning. As a litigator, Chris has represented local, national and global companies in civil and criminal matters in state and federal courts. He holds an MBA and has been certified in corporate compliance by the Healthcare Compliance Certification Board. Additional partners in our Health Care practice group include Robert C. Creighton, Christopher P. Daly, George J. Farrell, Thomas J. Killeen and Charles M. Strain.

NPI Rule Presents New Challenges

(Continued from page 1)

1176(b) of the Social Security Act, HHS may not impose a civil money penalty where the failure to comply is based on reasonable cause and is not due to willful neglect, and the failure to comply is cured within a 30-day period. CMS will be looking at each complaint on a case-by-case basis to determine whether there is reasonable cause for the non-compliance.

What should you do if you have not begun efforts to comply? Delay no more – identify the actions necessary to become compliant and begin taking steps toward compliance. And, by all means, document all of your efforts to identify non-compliant transactions and the steps you have taken to remedy those deficiencies.

Ambulatory Surgery Joint Ventures

(Continued from page 2)

Advisory Bulletins and Opinions on hospital-physician joint ventures as well as relevant case law and regulations in order to avoid the imposition of significant penalties from regulatory agencies.

Notwithstanding the inherent risks, these joint ventures offer hospitals and physicians the opportunity to enhance revenue at a time when reimbursement is declining. They are certainly worth exploring.

Events Calendar

July 11

CLE Seminar:

“Privacy Law - An Overview”

Topics include privacy laws concerning medical records and personal health information. Nassau County Bar Association, Mineola, NY

For further information, contact Barbara Kraut: phone, 516-747-4464; or by email bkraut@nassaubar.org



1320 RexCorp Plaza
Uniondale, NY 11556
516.227.0700

290 Broad Hollow Rd.
Suite 100
Melville, NY 11747
631.547.8400

370 Lexington Avenue,
Suite 500
New York, NY 10017
212.687.1230

2488 Main Street
Bridgehampton, NY 11932
631.537.3100

40A Newtown Lane
East Hampton, NY 11937
631.324.0512

To be added to, or removed from, our Health Law Advocate™ newsletter mailing list, please email healthcare@farrellfritz.com or call Kristina Filippi, marketing coordinator, at 516-227-0768. For further information about our practice areas and attorneys, please visit us online at www.farrellfritz.com.

Under New York's Code of Professional Responsibility, this newsletter may constitute attorney advertising. Prior results do not guarantee a similar outcome.