BRACH | EICHLER LLC

Health Law UPDATE

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FEDERAL UPDATE

Senate Committee Unanimously Passed Opioid Response Bill

In late April, the Senate Health, Education, Labor and Pensions (HELP) Committee unanimously voted to advance the Opioid Crisis Response Act of 2018 (OCRA). OCRA focuses largely on public health measures and includes provisions to develop and research non-addictive painkillers and alternative strategies to manage pain and substance use; clarify the authority of the Food and Drug Administration to require packaging for certain drugs, such as "blister packs" for patients who may only need a three- or seven-day supply of opioids; improve detection and seizure of illegal drugs; support states to improve their Prescription Drug Monitoring Programs and encourage data sharing; increase access to mental health programs; and improve training and education.

The key criticism of OCRA is lack of funding for the proposals. The bill must be approved by the full Senate before being sent to the House of Representatives for consideration.

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Release of HHS Mental Health and Substance-Use Disorder Parity Action Plan

The Department of Health and Human Services recently released an action plan for the ongoing implementation of the Mental Health Parity and Addiction Equity Act of 2008 (MHPAEA). MHPAEA applies to employment–based large group health plans and health insurance issuers choosing to provide mental health and substance-use disorder coverage and requires that health insurers and group health plans provide the same level of benefits for mental health and substance-use disorder (MHSUD) treatment and services that they do for medical and surgical (MS) care. The action plan will assist carriers in achieving parity between MS care and MHSUD through the establishment of comparable limitations on MHSUD benefits (such as copayments, visit limits, and preauthorization requirements) with those for MS benefits. To be compliant with MHPAEA, carriers must demonstrate parity in aggregate lifetime and annual dollar limits, financial requirements, quantitative treatment limitations, non-quantitative treatment limitations, and availability of information. Read the action plan here.

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CMS Proposes Overhaul of Nursing Facility Payment System

The Centers for Medicare & Medicaid Services (CMS) recently issued a proposed rule that would significantly overhaul the payment system for skilled nursing facilities (SNFs) for fiscal year 2019. The proposed rule would update the payment rates used under the prospective payment system (PPS) for SNFs and replace the existing case-mix classification methodology with a new methodology that shifts the focus away from the volume of services provided and toward treating the needs of the whole patient, which CMS expects will reduce paperwork and other administrative burdens for providers. CMS also has proposed changes to the SNF Quality Reporting Program, including a new quality measure that measures and weighs costs associated with recording against the benefits of its continued use in the program. In an effort to incentivize SNFs to reduce hospital readmissions, the rule would also modify the SNF Value-Based Purchasing Program by providing positive or negative incentives for readmission performance. Public comments on this proposed rule will be accepted until June 26, 2018.

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CMS Releases 2019 Medicare Inpatient Payment Rule

The Centers for Medicare & Medicaid Services (CMS) recently issued a proposed rule outlining the fiscal year 2019 Medicare Inpatient Prospective Payment System that also includes updated Medicare rates for long-term care hospitals. CMS expects inpatient Medicare spending to increase by $4 billion in fiscal year 2019, including a 1.75% payment rate increase for acute care hospitals participating in CMS' quality

programs and a $1.5 billion increase in uncompensated care payments, bringing the total available uncompensated care funding to $8.25 billion. The rule would also increase transparency by requiring hospitals to publish a list of their standard charges online, and CMS is requesting information from hospitals to better understand what stops providers from giving patients sufficient price information and how price transparency can be improved. The proposed rule also streamlines quality and value-based purchasing programs by reducing and streamlining measures and easing documentation requirements, which CMS estimates will result in providers saving an estimated two million hours previously spent filing paperwork. CMS has also proposed to overhaul the Meaningful Use Program to put a new focus on interoperability and flexibility, and rename the program "Promoting Interoperability." Public comments on this proposed rule will be accepted until June 25, 2018.

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OIG Audit Reveals Improper CMS Payments for Telehealth Services

According to a recent report published by the Office of Inspector General of the Department of Health and Human Services (OIG), the OIG has revealed that the Centers for Medicare and Medicaid Services (CMS) has systematically paid practitioners for telehealth services that do not meet Medicare requirements, including location, practitioner, technology, and other Medicare requirements. Only a certain designated set of health care services are reimbursable under Medicare as telehealth services. Telehealth services also must meet certain other requirements, including requirements pertaining to the location of the patient and the technology that is utilized to provide the service. Except for certain limited circumstances, Medicare will reimburse for telehealth services only if the patient is located in a rural or medically underserved area. When receiving the telehealth service, the patient must be physically present at an eligible "originating site," such as a practitioner's office, a hospital, a rural health clinic, or a skilled nursing facility. In addition, the services must be provided through live or interactive technology, such as video conferencing, that permits two-way communication.

The OIG made certain recommendations to CMS, including that CMS (1) should conduct periodic reviews of reimbursed telehealth claims to disallow payments for ineligible claims; (2) work with Medicare contractors to implement all telehealth claim edits listed in the Medicare Claims Processing Manual; and (3) offer education and training sessions to practitioners relating to Medicare telehealth requirements. According to the OIG, CMS has agreed to implement the OIG's recommendations.

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STATE UPDATE

NJ Federal Judge Holds that a Hospital's Medical Executive Board is a Separate Legal Entity Capable of Being Sued

On April 27, 2018, United States District Judge Robert B. Kugler denied a motion for summary judgment filed by a New Jersey hospital, Shore Medical Center, finding that a medical executive committee (MEC) responsible for making supervisory decisions in connection with medical staff privileges, among other things, may be considered an unincorporated association capable of being sued. Under New Jersey regulations, hospitals are required to have "an executive committee for the medical staff which performs supervisory functions ..." N.J.A.C. § 8:43G-16.1(g).

The case, *Nahas v. Shore Medical Center, et al.,* was brought by an endovascular surgeon against Shore Medical Center and its MEC, respectively, for failing to restore full staff privileges to the surgeon after his license to practice was temporarily revoked and subsequently restored by the New Jersey Board of Medical Examiners following the surgeon's prior conviction in federal court. In response to the suit, the MEC argued that it is not a legal entity capable of being sued. The plaintiff disagreed, however, arguing that the MEC is an unincorporated association wholly capable of being sued separately and distinctly from the hospital.

Ultimately agreeing with the Plaintiff's position, Judge Kugler observed that "[a]lthough this Court has its misgivings about the analytical rigor of treating a group of people on a committee as a singular committee for purposes of legal capacity, the clear trend under New Jersey law is to regard such groups as unincorporated associations. We find that the MEC has the capacity to sue or be sued, but express no opinion whatsoever on what claims may be brought against it." Notably, Judge Kugler stressed that while an MEC could in fact be a legal entity capable of being sued as an unincorporated association, it may nevertheless still be immune from such suit under related state or federal law.

In light of Judge Kugler's findings in this case, New Jersey MECs should take great care to review their respective directors' and officers' liability insurance policies to ensure that there are no coverage gaps for MECs (and their individual members) to cover claims arising in similar lawsuits.

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New Jersey Legislative Update

Proposed Legislation Regarding Nursing Home Resident Rights—On April 16, 2018, Bill S2480 was introduced in the New Jersey Senate to provide nursing home residents with the right to a timely response to certain complaints, concerns, or requests. The bill amends the statutory list of rights of nursing home residents to expressly include the right to receive a timely response, and corrective action when appropriate, to a complaint, concern, or request by the resident concerning resident health, safety, or welfare, or conditions in the nursing home, and the right for a timely request for assistance, made after the resident's discharge from the nursing home, that is within the nursing home's capacity to provide.

Proposed Legislation Regarding Emergency Medical Service Providers—On April 16, 2018, Bill S2504 was introduced in the New Jersey Senate to prohibit emergency medical services providers from billing patients unless the provider actually provides necessary services when responding to emergency dispatch. Specifically, the Bill prohibits an emergency medical services provider from billing a patient unless the provider was dispatched to the scene of the incident, actually provided medically necessary services, and was an appropriate entity to provide such services.

Senate Passes Bill to Amend Physician Orders for Life-Sustaining Treatment Act—On April 12, 2018, the Senate passed Bill S1109 which changes the name of the Physician Orders for Life-Sustaining Treatment Act to the Practitioner Orders for Life-Sustaining Treatment Act. The Bill allows physician assistants to sign, modify, or revoke a Practitioner

Order for Life-Sustaining Treatment (POLST) form in the same manner as physicians and advanced practice nurses are currently permitted. A POLST form complements an advance directive by converting a person's wishes regarding life-sustaining treatment into a medical order.

Governor Murphy Signs New Jersey Health Insurance Market Preservation Act—On May 30, 2018, Governor Murphy signed into law the "New Jersey Health Insurance Market Preservation Act." The Act restores, at the State level, the recently repealed shared responsibility tax provided under the Affordable Care Act (ACA), which required most individuals, other than those who qualify for certain exemptions, to obtain health insurance or pay a penalty. Specifically, the Act requires that every resident taxpayer obtain health insurance coverage that qualifies as minimum essential coverage under the Act. If a taxpayer does not obtain coverage, the Act imposes a State shared responsibility tax equal to a taxpayer's federal penalty under the ACA prior to the repeal of that provision. The Act applies to tax years beginning January 1, 2019.

Proposed Legislation Regarding Disposal of Unused Prescription Drugs—On May 17, 2018, Bill A3988 was introduced in the New Jersey Assembly to require that pharmacists, prescribers, and hospice programs furnish patients with information and products to safely dispose of unused prescription drugs and medications when issuing or dispensing certain prescriptions. The informational materials are to include oral instructions and written information advising the patient of the risks of theft, diversion, abuse, misuse, and accidental ingestion when unused, unwanted, and expired drugs and medications are not properly, promptly, and safely disposed of, and that improperly disposing of drugs and medications presents a risk of harm to both individuals and the environment. In addition, patients are to be offered, either for purchase or at no cost, a nontoxic composition that can be used to permanently sequester or deactivate unused, unwanted, or expired drugs and medications for the purpose of safe disposal.

Proposed Legislation Regarding Hospital Property Tax Exemption—On May 17, 2018, Bill A4013 was introduced in the New Jersey Assembly to reinstate the property-tax-exempt status of nonprofit hospitals, including satellite emergency care facilities, with for-profit medical providers on site. Under the bill, these hospitals would instead be required to pay annual community service contributions to their host municipalities to offset the costs of public safety services, such as police and fire protection, which directly benefit these hospitals and their employees. The bill would establish a commission to study this new system and would also eliminate certain third-party property tax appeals.

Proposed Legislation Regarding HIV Screening—On May 10, 2018, Bill A3927 was introduced in the New Jersey Assembly to require hospital, bio-analytical, and clinical laboratories to provide information and offer HIV screening to patients living in areas with a high prevalence of HIV. Specifically, the Bill requires hospital, bio-analytical, and clinical laboratories to provide individuals who reside in an area with a high prevalence of HIV with a verbal and written statement of the Centers for Disease Control and Prevention policy regarding HIV, and offer to provide an HIV screening test to that individual. If the individual consents to undergo an HIV screening test, the laboratory is to perform the test and transmit the test results to the health care provider rendering the referral for laboratory services.

New Regulations Permit Certified Medical Assistants to Perform Injections and Venipuncture—Effective May 21, 2018, the New Jersey State Board of Medical Examiners adopted new regulations which provide for the delegation of the administration of subcutaneous and intramuscular injections and the performance of venipuncture to Certified Medical Assistants. In order to direct a certified medical assistant to perform venipuncture, a physician must determine that the assistant has completed the required education and training in venipuncture and skin puncture for the purpose of withdrawing blood. The training also must include the performance of at least ten venipunctures. Similarly, in order to direct a certified medical assistant to perform injections, a physician must determine that the assistant has completed the required education and training in intramuscular and subcutaneous injection techniques. The training also must include the performance of at least ten intramuscular injections, ten subcutaneous injections, and ten intradermal injections. The regulations also require certified medical assistants to wear an identification badge indicating his or her name and credentials.

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Brach Eichler In The News

John D. Fanburg and **Mark Manigan** participated in the "Ask the Experts" panel at the New Jersey Association of Ambulatory Surgery Center's 8th Annual Ambulatory Surgery Conference on June 13.

Mark Manigan was quoted in BloombergLaw.com about the effect of the out-of-network bill on providers, June 10.

John D. Fanburg and **Charles X. Gormally** comment in *NJBIZ* and *ROI-NJ* on Strategic Cannabis Solutions, Brach Eichler's strategic alliance with lobbying firm Public Strategies Impact, June 7. Brach Eichler's second white paper on legal cannabis in New Jersey, "Ten Steps to a Billion-Dollar Marketplace: Facts, Observations, and Market Opportunity," was featured in *ROI-NJ* on June 6. The piece was authored by **John D. Fanburg** and **Charles X. Gormally**.

John D. Fanburg addressed the New Jersey Obstetrical & Gynecological Society on "Healthcare Reform" at their annual meeting, June 1.

John D. Fanburg commented on New Jersey's new out-of-network bill in *NJBIZ, ROI-NJ,* and on *NJTV*, June 1

Lani M. Dornfeld presented "Negotiating Dentist Employment and Restrictive Covenant Agreements: Legal and Business Implications," to the NOVA Southeastern University College of Dental Medicine, May 19.

Mark Manigan was named a leader in health care by *NJBIZ* as part of its new Vanguard Series, May 16.

Lani M. Dornfeld and **Matthew M. Collins** are quoted in "How to Best Shield Your Business in Today's Litigious Society," May 8, in *New Jersey Business* magazine.

To view a full listing of recent news items and to read the articles mentioned above, please visit http://bit.ly/2tYYFba.

HIPAA CORNER

FBI Releases IC3 2017 Internet Crime Report – Health Care Providers Impacted by Cyber Crimes

Early last month, the FBI released its Internet Crime Compliant Center (IC3) Internet Crime Report, an annual report highlighting scams trending online. The FBI reports that, in the past five years, losses from cyber crimes total $5.52 billion. Victims across the globe have been affected.

Included in the top three types of crimes reported by victims in 2017, of interest to health care providers, are personal data breach (30,904 complaints received by the FBI) and phishing schemes (25,344 complaints received by the FBI). 2017 hot topics include business email compromise (BEC), ransomware, and tech support fraud. According to the FBI, "BEC is a sophisticated scam targeting businesses that often work with foreign suppliers and/or businesses and regularly perform wire transfer payments. The Email Account Compromise (EAC) variation of BEC targets individuals who regularly perform wire transfer payments." Fraudsters compromise email accounts through social engineering or computer intrusion techniques to conduct unauthorized fund transfers. Because scammers continuously become more sophisticated, BEC and EAC are constantly evolving.

Ransomware "is a form of malware targeting both human and technical weaknesses in an effort to make critical data and/or systems inaccessible." Ransomware may be delivered through such means as Remote Desktop Protocol, enabling computers to communicate with each other, and phishing. Ransomware attackers "lock" electronic files and demand ransom payment, typically in Bitcoin, in exchange for a promise to unlock the data. Payment, however, may provide another means for the attacker to regain access to systems. The FBI stated in the report that it does not support paying ransom to such attackers, as such payments do not guarantee access to locked data and such a payment "emboldens the adversary to target other organizations for profit, and provides for a lucrative environment for other criminals to become involved."

Tech Support Fraud is a scheme in which scammers claim to provide IT support in efforts to defraud victims and gain access to their electronic devices. There are a number of variations on these schemes, including telephone calls, pop up and locked screens, and phishing emails.

The FBI encourages victims to file a complaint online and to take steps to mitigate further loss. Such steps may include contacting banks, credit card companies, and credit reporting agencies, and may also include blocking or freezing accounts, disputing charges, and attempting to recover lost funds. The FBI also suggests being vigilant in reviewing credit reports to dispute unauthorized transactions and considering credit monitoring services.

This report should serve as a reminder to health care providers of the need to conduct periodic security risk and gap analyses, as required by the HIPAA Security Rule. The Department of Health and Human Services, Office for Civil Rights (HIPAA enforcement agency) deems cyber attacks that affect systems and files containing protected health information (PHI) to be a breach of such information, unless a detailed forensic investigation proves otherwise. In the event an attack causes a breach of PHI, providers who have not conducted such analyses on a regular basis will be at risk for potential sizeable penalties.

For more information or if you need assistance with business associate vetting or contracts, your HIPAA compliance program, risk analysis or training, or in responding to a privacy or security breach or incident, contact:

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