

Healthcare Law UPDATE

In This Issue:

Medicaid Fraud Control Units Fiscal Year 2020 Report

NJ Legislative Update

Brach Eichler in the News

Attorney Spotlight

HIPAA Corner

FEDERAL UPDATE

HHS Agencies Issue Guidance for COVID-19 Vaccine Distribution to the Disabled and Elderly

In furtherance of President Biden's Executive Order and National Strategy pledging an equitable pandemic response and recovery in all communities, three agencies under the U.S. Department of Health & Human Services published guidance documents to assist states, municipalities, vaccination providers, and other organizations with improving access to vaccines for the elderly and those with disabilities.

[Guidance issued by the Office for Civil Rights \(OCR\)](#) outlines the prohibition of disability discrimination under federal civil rights laws and explains how the laws apply to a distribution of the COVID-19 vaccine. A [Fact Sheet](#) further details how communities can ensure compliance with disability rights, including removing barriers in the administrative process to obtain a vaccine, such as simplifying the registration, appointment scheduling, and communication processes. OCR previously issued COVID-19 guidance concerning the prohibition of discrimination based on race, color, and national origin.

The [Administration for Community Living \(ACL\)](#) issued [guidance](#) for states, municipalities, and community-based partners to take affirmative steps in removing barriers to ensure that people with disabilities and older adults can access COVID-19 vaccines. The document suggests ideas for outreach and education, vaccine appointment scheduling and transportation, accessibility to websites, and vaccination sites, and providing the vaccine to those who cannot leave their homes. Community-based networks of aging and disability organizations will receive \$100 million in federal grants to assist the disabled and elderly with the scheduling of and travel to vaccine appointments, as well as to identify those who are unable to travel to obtain a vaccine.

Lastly, the [Office of the Assistant Secretary for Planning and Evaluation \(ASPE\)](#) published an [Issue Brief](#) on the barriers to accessing the COVID-19 vaccine for homebound older adults. These individuals may miss the opportunity to obtain a vaccine because they are unable to find, sign up for, travel to, and get their vaccine. These individuals often lack internet access or are unfamiliar with online scheduling. They also typically have difficulty leaving their homes unassisted and traveling to a vaccination site. The guidance advises communities on how to identify such homebound individuals to target their education outreach and arrange for in-home vaccination if necessary.

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UnitedHealthcare Accused of Squeezing Out Competition

In separate legal actions in [Colorado](#) and [Texas](#) courts, a large anesthesia group has accused one of the country's largest insurance providers of using its market power and diverse business portfolio to push doctors out of its insurance network to steer business to its affiliated providers. The lawsuits were filed by U.S. Anesthesia Partners (USAP), a large multistate anesthesia practice that



BRACH EICHLER

is backed by a large private equity firm. The lawsuits were filed against health insurance giant UnitedHealthcare (UHC), and also owns various medical provider businesses, including Optum, which operates the largest physician practice organization in the United States, and Sound Physicians, a national physician practice group that competes with USAP.

According to the lawsuits filed by USAP, UHC and its affiliates violated antitrust rules and engaged in unfair trade practices by unilaterally terminating USAP's long-standing contractual relationship with UHC and thereby forcing USAP "out-of-network" with UHC, so that UHC could attempt to improperly increase its profits. USAP's allegations include that UHC used multiple unlawful tactics and pressure campaigns to interfere with USAP's relationships with providers and patients, including providing significant financial incentives to in-network surgeons in exchange for their commitment to steer patients toward UHC's preferred providers and away from USAP, imposing penalties on providers with contractual agreements with USAP to force them to stop using USAP's services, and providing misleading and inaccurate information about USAP to patients and other stakeholders.

In response to USAP's accusations, UHC has asserted that USAP's litigation is merely an effort to distract the public from USAP's refusal to negotiate rates for anesthesiology services. According to UHC, many private equity-backed practices expect to be paid double or even triple the median rate paid to other physicians providing the same services, and USAP's lawsuit is just the latest example of private equity-backed group's efforts to pressure UHC into agreeing to its rate demands and to distract from the real reason that USAP no longer participates in UHC's network.

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Medicaid Fraud Control Units Fiscal Year 2020 Report

The U.S. Department of Health & Human Services, Office of the Inspector General (OIG) is the designated federal agency that oversees and annually approves federal funding for Medicaid Fraud Control Units (MFCUs). MFCUs investigate and prosecute Medicaid provider fraud and patient abuse or neglect. In March 2021, OIG issued [a report](#) that analyzed outcomes such as convictions, civil settlements, and judgments, and recoveries that the 53 MFCUs submitted for fiscal year (FY) 2020. In FY 2020 1,017 total convictions were from MFCU cases which resulted in 774 convictions for fraud and 243 convictions for patient abuse or neglect. MFCU convictions lead to the exclusion of individuals and entities from participation in federally funded healthcare programs.

Compared to other provider types, personal care services attendants and agencies had the highest number of fraud convictions. There were also 146 MFCU convictions related to drug diversion in FY 2020 and associated criminal recoveries



totalled \$3.16 million in FY 2020. Drug diversion cases involve the fraudulent billing of Medicaid for drugs diverted from legal and medically necessary uses, or the fraudulent activities by Medicaid providers related to drug diversion regardless of whether the Medicaid program was billed. Though the report concluded that there were numerous challenges for MFCU staff due to the pandemic, OIG states its priority to continue to enhance the efficacy of MFCUs. OIG has enhanced the efficacy of MFCU by (1) enhancing OIG oversight; (2) increasing the use of data; (3) expanding the MFCU program to better align with a growing and evolving Medicaid program; (4) enhancing MFCU training where it can be of the greatest assistance to MFCUs; and (5) increasing collaboration between MFCUs and OIG.

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STATE UPDATE

New Jersey Legislative Update

Senate Passes Telemedicine Insurance Coverage Bill – On March 25, 2021, the New Jersey Senate passed [Bill S2559](#) to revise New Jersey's telemedicine and telehealth law to require health benefits plans, Medicaid and NJ FamilyCare, and the State Health Benefits Program (SHBP), and School Employees' Health Benefits Program (SEHBP) to provide expanded coverage for services provided using telemedicine and telehealth. The Bill is currently being reviewed in the New Jersey Assembly. Specifically, the Bill would require that reimbursement for telemedicine and telehealth services for physical and behavioral healthcare be equal to the reimbursement rate for the same services when they are provided in person, as long as the services are otherwise covered when provided in person in New Jersey. Current law provides telemedicine and telehealth services may be reimbursed up to the amount at which the service would be reimbursed if provided in person. If a telemedicine or telehealth organization does not provide a given service on an in-person basis in New Jersey, the coverage parity requirements of the Bill would not apply. The Bill would also prohibit health benefits plans, Medicaid and NJ FamilyCare, and the SHBP and SEHBP from imposing "place of service"

BRACH EICHLER

requirements on providers or patients in connection with telemedicine and telehealth services and from placing restrictions on the electronic or technological platform used to provide telemedicine and telehealth if the federal Centers for Medicare and Medicaid Services has authorized the use of the platform to provide services using telemedicine and telehealth under the federal Medicare program.

Bill Requiring Bias Training Passes New Jersey Legislature

– On March 25, 2021, the New Jersey Legislature passed [Bill S703](#) to require certain health care professionals to undergo explicit and implicit bias training. The Bill now awaits Governor Phil Murphy’s approval. The Bill would require every hospital that provides inpatient maternity services and every birthing center licensed in New Jersey to implement an evidence-based explicit and implicit bias training program for all health professionals who provide perinatal treatment and care to pregnant persons at the hospital or birthing center, regardless of the compensation agreement, contractual status, or privilege status that may exist between the health professional and the hospital or birthing center, and all support staff members, as defined by the Department of Health (DOH) who interact with pregnant persons at the hospital or birthing center. A healthcare professional who provides perinatal treatment and care to, and all support staff members who interact with, pregnant persons at a hospital or birthing center would be required to complete the training program, as well as a biennial refresher course, designed to provide the healthcare professional or supportive staff member with updated information about racial, ethnic,



and cultural identity, and best practices in decreasing interpersonal and institutional explicit and implicit bias. The DOH would be required to identify an explicit and implicit bias training tool to be utilized by the explicit and implicit bias training program implemented by a hospital or birthing center. Also, the Bill would direct the New Jersey Board of Medical Examiners and the New Jersey Board of Nursing to require all licensed physicians, physician assistants, professional nurses, practical nurses, nurse midwives, certified professional midwives, and certified midwives who provide perinatal care to pregnant persons to complete one credit of continuing education programs concerning explicit

and implicit bias that meets the requirements established under the Bill.

New Rule Amends the Definition of Qualified Supervisors and Adds Additional Continuing Education Requirement for Professional Counselors – Under new [rules](#) adopted by the Board of Marriage and Family Therapy Examiners effective April 5, 2021, the definition of “qualified supervisor” was amended to provide that a qualified supervisor is an individual who holds a clinical license to engage in the practice of professional counseling, marriage and family therapy, psychology, psychiatry, or social work for a minimum of three years in the state if the qualified supervisor has been certified by the National Board for Certified Counselors Center for Credentialing and Education or an equivalent credential recognized by the individual’s respective professional healthcare licensing board. Before the amendment, a “qualified supervisor” was defined as an individual who holds a clinical license to provide mental health counseling services for a minimum of two years. Also, the new rule increases the minimum required hours of work experience needed to become a qualified supervisor from 3,000 hours to 4,500 hours over a minimum of three years, but no more than six years. Further, the new rule mandates that every professional counselor, within each biennial renewal period must complete at least one of the 40 contact hours of continuing education on topics concerning prescription opioid drugs, including the risks and signs of opioid abuse, addiction, and diversion. Lastly, the new rule broadens licensees’ discretion regarding confidentiality of treatment of minors by not requiring licensees to release to a minor’s parent or guardian records or information relating to treatment considered confidential information under New Jersey law.

New Rule Regarding the Nursing Facility Patient Care Ratio Requirements – On April 19, 2021, the Department of Human Services (DHS) proposed a [new rule](#) to establish a patient care ratio (PCR) reporting and rebate requirement for nursing facilities. Under the new rule, nursing facilities would be required to pay a rebate to DHS if less than 90% of the revenue the facility received from DHS and its contracted managed care organizations is expended on the care of individual beneficiaries. Nursing facilities would be required to report information to DHS concerning total revenues. DHS noted in its proposal that the objective of the PCR is to ensure that state resources are expended in support of quality care for individuals receiving services.

State Board of Dentistry Proposes Amendments to Scope of Practice for Hygienists in School Settings and Sedation Office Inspections – On April 19, 2021, the State Board of Dentistry [proposed amendments](#) to recently adopted regulations to both expand the scope of practice of licensed dental hygienists and to standardize the inspection periods for mobile equipment, drugs, and supplies, and office inspections. Specifically, the Board is proposing to amend the dental hygienist scope of practice to allow a licensed dental hygienist practicing under the general supervision of a licensed dentist in a school setting to perform complete

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prophylaxis, so long as the Federal Occupational Safety and Health Administration and Centers for Disease Control and Prevention guidelines are followed. The Board is also proposing to amend its office inspection period for both parenteral conscious sedation (moderate sedation) and general anesthesia from six years to five years. In doing so, the Board noted that there is evidence-based science to conclude that inspections of facilities every five years better protect the health, safety, and welfare of the public.

State Board of Physical Therapy Examiners Proposes Revised Examination Standards for Licensure – To assist the number of applicants who repeatedly take and fail the physical therapy licensing exam, the State Board of Physical Therapy Examiners is proposing to add a [new rule](#) to require applicants who do not pass the licensing examination in three attempts to complete a 45-hour remediation course before taking the examination again. An applicant who has completed the remediation course would be permitted to retake the licensing examination. If the applicant does not pass the licensing examination again, the applicant would be required to retake the remediation course before any further attempts to pass the licensing examination. The Board anticipates that this requirement would address deficiencies in an applicant's education and would facilitate an applicant's ability to pass the licensing examination.

State Board of Dentistry Adopts Amendments to Rules – The State Board of Dentistry has [adopted](#) amendments to its rules clarifying current standards of practice and licensure and

registration requirements. The final rules reflect updates related to statutory changes, additions to enhance the safety of patients receiving dental services and those working in the profession, and identifies continuing education courses that must be completed in each renewal period. The amendments are effective as of April 19, 2021.

The Division of Aging Services Announces Request for Applications Related to PACE – On April 19, 2021, the Department of Human Services, Division of Aging Services announced that it is [soliciting applications](#) from eligible entities to become a Program of All-Inclusive Care for the Elderly (PACE) organization. Federal law, 42 U.S.C. § 1396u-4, permits the establishment of a PACE organization following the requirements of that law and rules promulgated by the Federal Centers for Medicare and Medicaid Services. The PACE program provides frail individuals age 55 and older with comprehensive medical and social services, coordinated and provided by an interdisciplinary team of professionals in a community-based center and their homes, thereby helping the program participants delay or avoid admission to long-term care facilities.

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ATTORNEY SPOTLIGHT

Get to know the faces and stories of the people behind the articles in each issue. This month, we invite you to meet Member Riza I. Dagli and Associate Cynthia J. Liba.



Riza Dagli

Riza Dagli is the Chair of the firm's Criminal Defense and Government Investigations practice. He defends healthcare professionals and entities in criminal investigations, including healthcare fraud, Medicare/Medicaid, kickbacks, runners, and the prescribing of

opioids. He also litigates civil and administrative matters, including reimbursement, licensing, and business disputes. Prior to private practice, he was the Director of New Jersey's Medicaid Fraud Control Unit and head of the Office of the Insurance Fraud Prosecutor. While at the New Jersey Division of Criminal Justice, he prosecuted a variety of crimes including organized crime, racketeering, money laundering, and environmental crimes.

On the weekends, Riza loves camping, hiking, and mountain biking with his family. He is also a licensed professional engineer, and enjoys coaching his son's robotics team.



Cynthia Liba

Cynthia provides legal counsel to health care entities including ambulatory care facilities, physicians, and hospitals. She advises clients on regulatory compliance issues, employment issues, contract disputes, and various corporate transactions

and business matters, including practice formation and sales. Cynthia has also provided counsel for the sale of an ownership interest in an ambulatory surgery center to one of the largest ambulatory surgery providers in the U.S.

In her spare time, Cynthia enjoys photography, trying new restaurants, and spending time outdoors with family, friends, and her new puppy.

Brach Eichler In The News

Register today for the Healthcare Practice Resource Group’s (HPRG) upcoming webinars, [“Practice Revenue Enhancement Strategies”](#) on May 4 at 12:00 p.m. and [“Pandemic Impact - PPP Questions Addressed, New HHS Funding Opportunities and Employee Tax Deferral and Related Considerations”](#) on May 25 at 12:00 p.m. HPRG is a newly formed multidisciplinary collaborative comprised of well-experienced firms and individuals providing comprehensive support for all aspects of your practice – legal, financial, operational, and strategic. Click on the link if you missed HPRG’s last webinar where Healthcare Law Member **John D. Fanburg** discussed, [“Telemedicine Opportunities and Guidance.”](#)

On April 14, Labor and Employment Co-Chairs **Matthew M. Collins** and **Anthony Rainone** issued a client alert discussing #MeToo legislation, [“Mandatory Workplace Arbitration Survives #MeToo Legislation For Now.”](#)

On April 5, Managing Member and Healthcare Law Chair **John D. Fanburg** talks [Benefits of Telehealth and Telemedicine](#) in *Commerce Magazine NJ* on page 52.

We are pleased to welcome **Caroline J. Paterson**, Counsel, and **Emily J. Harris**, Associate, to our Healthcare Law Practice.

HIPAA CORNER

Former Employees Create Breach Risk – Covered entities and their business associates must be mindful to terminate all electronic access by employees and contractors immediately

upon termination of employment or the contracted relationship. The failure to do so is a violation of the HIPAA Security Rule and creates a risk of breach of protected health information (PHI) if the former employee or contractor, for good reason or bad reason, continues to access the systems of its former employer.

For example, the City of New Haven, Connecticut, agreed last year to a [settlement](#) with the Department of Health & Human Services, Office for Civil Rights (OCR), including payment of more than \$200,000, implementation of a corrective action plan, and two years of OCR monitoring, based upon the city’s filing of a breach report with the OCR stating a former employee may have accessed a file on the city’s computer systems containing the PHI of almost 500 individuals. The employee gained access to the city’s systems by logging into her old computer with her still-active user name and password and downloaded PHI onto a USB drive. OCR also found that the former employee had shared her user ID and password with an intern, who continued to use the credentials after the termination of the employee.

OCR determined that the city failed to conduct an enterprise-wide risk analysis, and failed to implement termination procedures, access controls such as unique user identification, and HIPAA Privacy Rule policies and procedures. Covered entities and their business associates must be mindful to ensure all HIPAA Security Rule requirements are continuously monitored and met.

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