OPINION

Extraordinary Changes in Extraordinary Times

Relaxation of physician self-referral law to help fight COVID-19 pandemic

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Addressing the COVID-19 pandemic has required extraordinary changes to many societal aspects to enable healthcare workers to help those sickened by the disease. One example of an unprecedented change is the relaxation of otherwise stringent health care fraud and abuse laws, giving health care providers financial flexibility in fighting COVID-19.

Financial relationships surrounding the provision of healthcare are highly regulated by the federal government to ensure providers do not submit fraudulent bills to federal healthcare programs, such as Medicare, and thereby waste taxpayer money. One such law is the physician self-referral law, commonly called the Stark Law, which governs circumstances under which a physician may refer patients to an entity with which the physician has a financial relationship. The Stark Law's goal is to eliminate or lessen any financial motivation physicians might have to refer patients for certain services.

While intended to serve a worthwhile purpose, the Stark Law's inflexibility can hinder the healthcare system and prevent it from reacting quickly and appropriately to public health emergencies. Fortunately, on March 30, 2020, the Secretary of the U.S. Department of Health and Human Services issued blanket waivers of the Stark Law during the COVID-19 public health emergency. The purpose of these blanket waivers is to relax some requirements surrounding physician

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Despite popular belief, lawyers do have lives outside the office. Colorado's legal professionals can be found performing ballet on stage, building a 1,000-horsepower Mustang in a mechanic's garage, or even skiing across the Antarctic. Law Week is on the lookout for more unique stories happening, "Outside the Law."

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CURFEW
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level. Many more challenges to solicitation curfews have been resolved without litigation through cease and desist letters to city attorneys, Fielding added.

Aptive is "very supportive of regulatory structures that are designed to protect and ensure the safety of residents and respect their privacy," Fielding said. He recommended cities pursue those ends by adopting measures such as background checks, permitting requirements and do-not-knock registries for solicitors as alternatives to more onerous restrictions like curfews.

"What the curfew is saying is we're just going to make the decision for all of the residents of our city that none of them want to receive solicitors after… seven o'clock," he said. "Well Aptive knows that's not true, because Aptive sells thousands and thousands of accounts every single day after seven o'clock, including all over the Denver metropolitan area."

Fairfield and Woods director Todd Messenger filed an amicus brief in the case on behalf of the Colorado Municipal League and in support of Castle Rock.

He said the 10th Circuit's decision builds on a trend in case law in which "courts are more and more skeptical about local government ordinances, in particular, that implicate First Amendment rights."

"What the court did was it affirmed a trend in the law that the Central Hudson test has teeth," Messenger added.

Fielding echoed that interpretation. "I think what these cases stand for is the proposition that the Central Hudson test has real bite, and the courts are going to hold cities to that burden," he said, adding that the "real acid test" for a community's commitment to free speech is whether it tolerates speech deemed unpopular. "And I think solicitation certainly meets that definition there."

Messenger said rather than creating "any major explosion in First Amendment law," the decision is just the latest in a recent string of cases on judicial skepticism. "I think it did provide at least the notion that the courts are going to be looking deeper," he said, "and that municipalities need to be finding the facts in support of the ordinances and preserving those records."

Castle Rock residents who don't want salespeople ringing their doorbells after 7:00 p.m. still have options, according to Fielding, including posting "No Soliciting" signs or signing up for the town's "No Knock" list, which was created as part of the 2008 solicitation ordinance.

"Our problem has always been the curfew is using a missile to cure the proverbial mosquito," he said. "Oftentimes— and Castle Rock really struggled with this, too — there isn't a mosquito in the first place. They don't have a crime problem with solicitors."•

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financial arrangements during the pandemic to allow health care providers flexibility and creativity in responding to the COVID-19 crisis.

Specifically, the secretary issued 18 blanket waivers allowing physicians to engage in a variety of financial relationships which, under ordinary circumstances, would violate the Stark Law. Importantly, these waivers are limited to certain financial relationships that are "solely related to COVID-19 Purposes."

The secretary then defined "COVID-19 Purposes" broadly to include "[e]nsuring the ability of health care providers to address patient and community needs due to the COVID-19 outbreak in the United States," "[s]ecuring the services of physicians and other health care practitioners and professionals to furnish medically necessary patient care services, including services not related to … COVID-19" and "[e]xpanding the capacity of health care providers to address patient and community needs due to the COVID-19 outbreak."

Any of these reasons can justify providing additional support to physicians, including non-monetary compensation that will enable them to better and more quickly manage current needs.

The secretary gave numerous examples of how these blanket waivers could be applied during the pandemic, including: a hospital paying physicians above their previously contracted rate for caring for COVID-19 patients in particularly hazardous environments; hospitals renting office space or equipment from an independent physician practice at below fair market value or at no charge in order to accommodate patient surge; and hospitals providing meals or on-site child care for medical staff physicians who spend long hours at the hospital during the COVID-19 outbreak.

However, each arrangement should be carefully reviewed to ensure financial relationships are consistent with the blanket waivers and do not violate other applicable state and federal laws, including the federal anti-kickback statute.

Fortunately, on April 3, the HHS Office of Inspector General issued a policy statement announcing it would not impose sanctions under the federal Anti-Kickback Statute, 42 U.S.C. § 1320a-7b(b), relating to remuneration that is covered in the first 11 Stark Law waivers. Because there is not a complete overlap between the waivers issued by HHS and those by OIG, for conduct subject to both sets of laws, providers should be careful to ensure their conduct falls within the scope of both waivers or does not otherwise violate the Stark Law or Anti-Kickback Statute. Both agencies have made a point to note that, despite the waivers, more aggressive relationships still could be challenged, particularly if there are not strong ties to the COVID-19 pandemic or if the arrangement appears intended to encourage referrals.

The waivers are limited in duration and will remain in effect for the remainder of the COVID-19 public health emergency. Questions have arisen as to how financial relationships entered into in reliance on the blanket waivers should be undone and brought back into compliance with the Stark Law once the public health emergency ends. On April 21, the Centers for Medicare and Medicaid issued Explanatory Guidance addressing this issue.

CMS clarified that if a provider and physician (1) were parties to an existing agreement as of March 1, (2) the agreement is amended to address the COVID-19 public health emergency consistent with the blanket waivers, and (3) the agreement is then amended a second time after the public health emergency is over to return the agreement to the original agreement, the series of amendments will not cause the arrangement to fall out of compliance with the Stark Law.

Although these blanket waivers are specific to the COVID-19 pandemic, it may be that HHS permanently revises some aspects of the fraud and abuse laws after the pandemic subsides. Indeed, in fall 2019, HHS announced it was already considering revisions to these laws to ease regulatory burdens as part of its "Regulatory Sprint to Coordinated Care."

As with other health care delivery changes—such as the widespread use of telehealth—now seemingly here to stay, the experience of needing to quickly mobilize to address a rapidly spreading and novel disease may prompt permanent changes to the fraud and abuse laws.•

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WORK-SHARING PROGRAMS
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reopening businesses that were temporarily closed during the pandemic, serving as a way for employers to bring back much of a business's work force even in times when social distancing and a decline in business prevents the business from operating at full staff.

Section 2108 of the CARES Act provides for temporary 100% federal financing of short-time compensation payments in a state with a short-time compensation program whether the short-time compensation program is new or existing. A state without a short-time compensation can enter into an agreement with the U.S. Secretary of Labor to operate a temporary federal short-time compensation program, for which the state will receive federal reimbursement of 50% of the benefit costs.

This guidance reiterates that reimbursement is available for weeks of unemployment through December 31, 2020. In addition to reimbursement, the CARES Act provides $100 million in grants to support states in implementing and administering short-time compensation programs and promoting and enrolling employers.

WHAT IS THE CATCH?

There are two limitations to reimbursement. First, no reimbursement will be made when short-time compensation is paid to an individual during a benefit year in an amount that exceeds 26 times the amount of regular unemployment compensation. Second, no reimbursement will be made for payment of short-time compensation if the individual is employed by the employer on a seasonal, temporary, or intermittent basis, as defined under state law. If the state law does not define these terms, UIPL No. 22-12 provides guidance on these terms.

Employer participation in a short-time compensation program is voluntary. An employer must submit a written plan to the state unemployment agency, and the plan is subject to the state's approval. The employer's plan must specify the percentage reduction in the workweek for affected employees and be consistent with employer obligations under applicable federal and state laws. Employers must maintain (to the same extent as other employees not participating in the short-time compensation program) health benefits and retirement benefits for employees in the affected unit, despite the reduced hours. Employees must be available for their workweek to meet the "able and available for work" requirements.

In order to qualify for Colorado's work sharing program, an employer must reduce the work hours of at least two employees, either within the entire business or within a certain unit, subject to the qualification that the employer would have laid off those employees but for work sharing. Employers must reduce the work hours for that group by at least 10% and no more than 40%. Finally, as noted above, employers cannot rescind or reduce employee benefits while participating in the work sharing program. Employees participating in a work sharing program and receiving partial unemployment insurance benefits are also eligible to receive the federal $600 weekly benefit through July 31, 2020.

Work sharing plans must be submitted to the Colorado Department of Labor and Employment, Unemployment Insurance Employer Services. A form for a request for approval of a work sharing plan may be found here. The Department of Labor and Employment also has handy factsheets for both employers and employees.•

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