



NEWS & VIEWS

A Complimentary Newsletter from Med-Net Concepts, LLC

A Network of Healthcare Compliance & Consulting Companies

Growth in Telehealth and Potential for Fraud Emphasize the Importance of Implementing Comprehensive Contracting Principles

By: Louise Lindsey

The Coronavirus fueled an explosive growth in the use of telehealth within long-term care facilities and across the general healthcare sector. In early March, the Centers for Medicare & Medicaid Services (CMS) eased the federal restrictions on the use of telehealth technology. Along with the CMS approval of dozens of new billing codes allowing medical professionals to bill for these services, patients could consult with their doctors about everything from mild flu-like symptoms or a backache to a psychiatry visit.

CMS also allowed telemedicine providers to waive patient deductibles and copayments during the pandemic, which would have normally been considered a kickback. This action discouraged patients from filing complaints regarding charges or overusing medical services, which could previously have led to civil or criminal penalties.

An operations officer with the Department of Health and Human Services Inspector General's Office described it, saying, "There are unscrupulous providers out there, and they have much greater reach with telehealth. Just a few can do a whole lot of damage." He also said, "Anti-fraud guardrails have been removed under this epidemic. The concern is that things will never go back to what they were.... There will be a lot of pressure on CMS to make at least some of these changes permanent."

Even before the pandemic, the Department of Justice (DOJ) was seeing fraudulent schemes involving telemedicine. In September 2019, 35 people were charged for allegedly "ripping off" Medicare for more than \$2.1 billion.

On October 20, 2020, the DOJ Criminal Division reported the results of what it termed an "historic, nationwide enforcement action." The results of this extraordinary effort include the charging of 345 defendants from across 51 federal districts and involves more than \$6 billion in false and fraudulent claims to Medicare, Medicaid, and private insurers. A significant part of that \$6 billion involved over \$4.5 billion in false and fraudulent claims associated with telemedicine technology used to provide remote healthcare services.

According to court documents, the cases related to telemedicine company "executives who allegedly paid doctors and nurse practitioners to order unnecessary durable medical equipment, genetic and other diagnostic testing, and pain medications, either without any patient interaction or with only brief telephonic conversation with patients they had never met or seen. Durable medical equipment companies, genetic testing laboratories, and pharmacies then purchased those orders in exchange for illegal kickbacks and bribes to

submit false and fraudulent claims to Medicare and other government insurers.”

Stark Law and Anti-Kickback Laws

The federal Stark law (42 USC § 1395nn) as it applies to Medicare and Medicaid involves these prohibitions:

- Physicians are not allowed to make referrals for certain designated health services (DHS) that are reimbursed by Medicare or Medicaid to an entity with whom the physician or an immediate family member of the physician has an investment/ownership interest in or a compensation arrangement (including employment and contractor relationships).
- Filing of claims for those referred services is not allowed unless the arrangement has a statutory exception. See, 42 U.S.C. § 1395nn(b)-(e).

Stark Law equivalents, known as Physician Self-Referral Prohibitions, frequently apply to all payors, where similar designated services are involved. Under the Stark Law, intent is irrelevant, and the assumption is made that if an arrangement does not meet exception criteria, it is too dangerous to be allowed.

Basically, the determining question to be asked regarding the Stark Law is this: Does the arrangement involve a physician referring patients to an entity for the furnishing of designated health services covered by Medicare?

The federal Anti-Kickback Statute (42 U.S.C. § 1320a-7b) prohibits offering, paying, soliciting, or receiving remuneration to induce referrals of items or services covered by federally funded programs, including Medicare, Medicaid, and TRICARE.

In the above described Department of Justice (DOJ) enforcement action, some of the defendants were indicted for allegedly conspiring to pay and receive kickbacks in exchange for physicians' orders from presumed telemedicine companies. The orders were used to submit claims for payment from federal healthcare programs. The schemers acquired patient information that included protected health information, and other identification information. This ill-gotten information was then used to create fictitious physicians' orders that were then sold to durable medical equipment providers.

The False Claims Act (FCA) covers fraudulent claims made against any federal agency, program, contract, or grant. Many states also have similar fraud protection laws. Violations of the Stark Law and Anti-Kickback statutes ultimately result in the submission of fraudulent false claims.

Healthcare Compliance and Ethics Programs Require Contracting Parties to Comply with State and Federal Laws

Contract management from the smallest single facility to the largest multi-facility organization must ensure conformity with applicable laws and regulations and must be consistent with the company's Compliance and Ethics Program. This management requires diligence and a best practices approach, using general contracting principles. Within the healthcare sector, some of the most common contracts and agreements long-term care facilities have involve the following:

- Vendors providing services reimbursable by state or federal healthcare programs
- Outside contractors who are not employees, including physicians and other referral sources (Clinical Laboratory Services; Rehabilitation Services; Radiology/Imaging Services; Radiation Therapy Services; Durable Medical Equipment and Supplies; Prosthetics, Orthotics, and Prosthetic Devices and Supplies; Home Health Services; Outpatient Prescription Drugs; Inpatient and Outpatient Hospital Services; Nuclear Medicine Services; Telehealth Services; and Building and Equipment Leases)
- Outside billing service providers
- Staffing Agencies
- Therapy Contracts and Services (Physical Therapy, Speech Therapy, Occupational Therapy, Outpatient Therapy Services)

Compliance with general contracting principles should ensure that contracts receive appropriate review and that the company is not committed to contracts that are against its own best interests. Whenever possible, uniform contracts that have been reviewed by the company's Compliance and Ethics Attorney should be used for transactions with vendors

and purchasers of services.

Self-renewing or “Evergreen Contracts” should be avoided, and all contracts should have a specific, written termination date that is no more than two years from the effective date. Only an authorized representative of the company and the other contracting party can execute a contract.

Facilities should carefully review their contracts involving telehealth (telemedicine) covering a wide specter of services using video, telephone, or email to ensure that they are carefully constructed based on excellent general contracting principles.

New NAB/NCERS Approved Privacy Series Course Now Available

The Privacy Management for Post -Acute Healthcare Professional Series is designed to provide a policy focused framework for leaders in post-acute healthcare settings.

This series will help leaders to plan, implement and evaluate privacy practices consistent with laws, regulations and best practices. It is intended for administrators, directors, officers, clinical staff, employees, contractors, consultants and others working in the post-acute care setting.

The course consists of 4 modules. Each module includes a post-test. The program is approved for 2.25 CE's from NAB/NCERS. A combined minimum passing percent of 70% for all post-tests is required to earn the 2.25 CE's.

For full details please click on this link:

<https://mednetcompliance.com/store/product/nab-ncers-approved-privacy-series-course/>

Med-Net Concepts, LLC Affiliates

[Med-Net Academy, LLC](#)

[Med-Net Compliance, LLC](#)

[Med-Net Healthcare Consulting, LLC](#)

[Med-Net IPA, LLC](#)

© 2014-2020 All Rights Reserved. Med-Net Compliance, LLC
MED-NET COMPLIANCE, LLC An Independent Affiliate of MED-NET CONCEPTS, LLC

| www.mednetcompliance.com |

| [Med-Net Compliance Blog](#) |

compliance@mednetconcepts.com