LAW ALERT
HEALTH CARE

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Warning to Providers: NO Percentage Arrangements With Billing Companies

The New York State Medicaid Fraud Control Unit ("MFCU") has recently embarked on a campaign to recover thousands of dollars of Medicaid payments plus interest from various health care providers who pay billing companies a percentage of collections for their billing services.

MFCU has been sending letters to Medicaid providers in New York State demanding the return of payments where Medicaid discovered that the providers used billing companies who were paid on a "percentage of collections" basis. This demand by Medicaid is not based on a claim of overpayment or improper billing methodology by the provider. Rather, Medicaid relies on an arcane provision found in the Medicaid rules1 which states that:

"A provider of medical care services or supplies may employ a business agent, such as a billing service or an accounting firm. Such agent may prepare and send bills and receive MA payments in the name of the provider only if the compensation paid to the agent is:

1. Reasonably related to the cost of the services;

2. Unrelated, directly or indirectly to the dollar amounts billed and collected; and

3. Not dependent on actual collection of payments."

Medicaid had issued a warning to providers about this billing agent requirement in March 2001 and advised providers then that Medicaid had expanded this billing rule2 to also include those who verify client eligibility, submit claims, or obtain service authorization on behalf of a provider. Medicaid also reminded providers that billing agents are required to be enrolled in the Medicaid program in order to process claims for providers. But after that warning and reminder, it appears that Medicaid did not take further concerted action to enforce the rule, until now.

Now, in its recent letters to providers, MFCU calls providers to task, declaring that an audit and investigation has been conducted and a determination has been made that the provider is in violation of Medicaid rules because its compensation to its billing agent is based on a prohibited percentage-based arrangement. Medicaid also warns that the provider's conduct may be deemed a violation of New York State's Education Law which prohibits fee-splitting.

Providers cannot rely on the defense of "but everyone else is doing it!" to justify their percentage billing arrangements and avoid Medicaid's demand. Medicaid acknowledges in its letters to providers that the percentage fee arrangement with billing companies may be common in the community, but asserts that it is not legal or acceptable to Medicaid.

Medicaid's position is consistent with the position previously taken by New York State's Department of Health ("DOH") on the issue of fee-splitting by licensed health care providers. As far back as April 1997, DOH General Counsel, Henry Greenberg, stated the following in an advisory opinion that addressed whether a medical practice could pay a billing company a percentage of the amount it collects:

"We maintain that any compensation arrangement which is based upon a percentage of physicians' gross revenues or profits, or net revenues or profits, of their practice or a discrete portion thereof, constitutes illegal fee-splitting unless expressly authorized by statute. The compensation of a person or company based upon a percentage of the total fees billed and/or collected clearly constitutes such an illegal arrangement when the billing company is providing billing services for all or a portion of a physician's practice…. Further, nothing in the statute permits the characterization of such arrangements as anything but an illegal fee-splitting arrangement."

The statute referred to in that DOH advisory letter is the Professional Misconduct Statute, §6530(19) of the New York State Education Law and corresponding regulations3, which prohibit fee-splitting, violation of which could be grounds for a charge of professional misconduct against a licensed health care provider.

WHAT IS A PROVIDER TO DO?

Health care providers should immediately review their billing arrangements to ensure that they do not provide compensation that is percentage-based or otherwise in violation of either the Medicaid rule or New York's fee-splitting rule. Any improper arrangement should be corrected so that payments to billing agents reflect a payment at fair market value for services rendered, based either on time, number of claims submitted, or a flat fee. The foregoing actions should be taken by all providers, not just Medicaid providers. In addition, Medicaid providers should require proof from their billing agents who process Medicaid claims, that they are properly enrolled in the Medicaid program.

Although the recent MFCU letters focus on Medicaid providers, this may be an important "wake-up call" to all providers to ensure that they are in compliance with New York's fee-splitting rules in order to avoid any enforcement action that may come from other sectors as well.

118 NYCRR §360-7.5(c). A similar provision is found in federal regulations at 42 CFR §447.10(f).

218 NYCRR §504.9(a)(1).

38 NYCRR §29.1(b)(4).

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