



Recent court decisions show it is essential to be vigilant in protecting your medical records and updating physician employment agreements. For the first time in 25 years, Medicare is completely changing how it pays for surgeries done at ambulatory surgery centers. The Board of Osteopathic Medicine is proposing changes to its violations and penalties. How will this affect you? And, do you know what the Medicare fraud investigators are going to be focusing on in 2007? Make sure your policies and procedures are in compliance. **This, and more, in this month's edition of the newsletter.**

Has your employment agreement expired?

If so, the benefits and protections you negotiated in the agreement maybe lost. A Miami Court of Appeals upheld a trial court decision this month that stated a physician practice didn't have the right to compel arbitration with a former employee because the employment agreement lapsed. In Silverman v. Dennis, the court held that once Dr. Dennis's employment agreement expired, he became an at-will employee and the non-compete in the agreement was no longer in effect. After leaving the practice, Dr. Dennis filed a suit in circuit court seeking payment for work he allegedly performed. Silverman filed a motion to compel arbitration stating that although the agreement had expired, both Silverman and Dennis continued operating under the guidelines that the agreement set forth. When making its decision, the Court of Appeals cited a 1995 decision in which a non-compete clause of an employment agreement was unenforceable because the underlying agreement had expired.

This latest decision enunciates the importance for both physician practices and employees to review their current employment agreements to make sure they have not lost their protections and enforceability.

[Email us](#) with your questions about employment agreements.

Surgery Center Payment Changes on the Horizon

The Centers for Medicare and Medicaid Services announced a proposal to completely change its current system of paying for surgeries done at surgery centers. These proposed changes, if approved, will potentially change the surgery center landscape for years to come. As more and more surgery centers are built across the country, Medicare is trying to find a balance for the pay schedules between them and hospitals. Currently surgery centers are paid 62% of what hospitals are paid for the same surgery.

Surgery centers that specialize in areas such as gastroenterology, urology and ophthalmology will likely see a decrease in payment because the pay rate for common procedures will drop. For example, payment for after cataract laser surgery will drop from \$446 to \$316. Payment per biopsy of prostate will drop from \$446 to \$316. This means we could see a move back to hospital-based surgeries for specialties like these.

The winners are orthopedics, neuro and spine surgeons and psysiatry, as common surgeries in these specialties would be paid at a higher rate. Dermatologists will benefit, as the proposal includes adding 700 new codes to the list of approved procedures that can be performed at a surgery center. Those 700 codes are currently not reimbursed with an ASC facility fee component to the ASC and, therefore, are typically done in an office.

Another effect of adding the 700 new codes to the ASC approved procedures list is that it may become easier for surgeons to meet the regulatory requirements for surgeon investment in surgery centers. Surgeons must provide one-third of their services as outpatient surgery and one-third of their income must come from outpatient surgical services to meet the Anti-Kickback Statute safe harbor for referrals of patients to surgery centers in which the referring physician has an ownership interest. The more services there are on the ASC list, the easier it is to meet the thirty percent rules.

Usually when Medicare makes a move like this, private insurers like Aetna and Blue Cross Blue Shield aren't far behind.

[Email us](#) to find out how you will be affected.

Medicare Claims Fraud

Two people were charged with conspiracy to defraud the United States in Southern Florida for stealing patient information and using it to make false claims to Medicare. Isis Machado obtained confidential patient information at the clinic she worked at in Weston, Florida and sold it to her cousin, Fernando Ferrer. Mr. Ferrer used his company, Advanced Medical Claims, Inc., to file more than eleven hundred false claims to Medicare that totaled 2.8 million dollars. Machado and Ferrer were also charged with fraud in connection with computers, wrongful disclosure of individually identifiable health under HIPAA and aggravated identity theft. They each face up to twenty-two years and prison and fines totaling one million dollars. These charges show that practices need to have in place reasonable methods of detecting and addressing security breaches. It is wise to review HIPAA security plans in light of these charges.

DOJ Healthcare Fraud Investigations

According to a report released by the Department of Health and Human Services Office of Inspector General (OIG) and the Department of Justice (DOJ) this month, the government won or negotiated more than \$1.4 billion in judgments in health care fraud cases in 2005. Also in 2005, the Medicare Trust Fund received \$1.5 billion and \$63.64 million of federal money was transferred to the Centers for Medicare and Medicaid Services.

The report also stated that in 2005, 1,597 potential defendants were involved in 935 new criminal healthcare fraud investigations. A total of 523 defendants were convicted for healthcare fraud-related crimes.

In 2005 the DOJ opened 778 civil healthcare fraud investigations and filed complaints or intervened in 266 civil healthcare cases.

These numbers show that federal enforcement of the billing rules and the False Claims Act, as well as the Stark Law prohibition against physician self-referrals and the Anti-Kickback Statute, remain strong.

OIG Releases 2007 Enforcement Targets

Speaking of health care fraud enforcement, did you know that each year the federal government publishes its enforcement targets for you to read?

The Office of the Inspector General of the federal Department of Health and Human Services ("OIG") has released its [Work Plan for 2007](#). The annual OIG Work Plan discusses subjects the OIG will be targeting in the upcoming year. Some of the issues that will be targeted in 2007 are:

- Assessing Center for Medicare & Medicaid Services or CMS oversights of physician-owned specialty hospitals to ensure safety and quality of patients.
- Reviewing whether physicians properly coded the place of service on claims for services in either an ambulatory or hospital outpatient department
- Studying the appropriateness of Medicare services performed “incident to” the professional services of physicians and whether the services met Medicare standards for medical necessity, documentation and quality of care.
- Examining the appropriateness of imaging services, such as MRI, PET and CT scans, provided in physician’s offices.

The Bittinger Law Firm utilizes the Work Plan to tailor Compliance Plans for individual physician groups and hospitals. If an organization has adopted a formal Compliance Plan, it receives less harsh punishments from the government if issues arise.

For a complete list of targeted subjects for 2007 please visit [our website](#).

The Board of Osteopathic Medicine Proposes Changes

The Board of Osteopathic Medicine has proposed a number of changes to current disciplinary rules and penalties. According to the September 1 Florida Administrative Weekly, the Board proposed to lower the minimum penalty for “repeated malpractice” from “denial or probation and \$7,500 fine” to “revocation or denial of license and fine of \$1,000.” The Board has also removed its distinction in first and second offenses. Also proposed is a change to the language defining the standard of care. The proposed new language will read “failure to practice medicine in accordance with appropriate level of care, skill and treatment recognized in general law of medicine.” It is currently worded: “Failure to practice with level of care, skill and treatment recognized by a reasonably prudent physician as acceptable under similar conditions and circumstances.” The penalty for acts not meeting the standard would also change. The first offense minimum would change to a “letter of concern, up to one (1) year or probation and \$1,000 fine”, down from a \$5,000 fine. The first offense maximum would change to a “denial or revocation and \$10,000 fine” which is up from \$7,500. The second offense minimum would change to “two (2) year probation and \$7,500 fine.” The second offense maximum will stay the same.

The Board has also proposed to change the language defining minimum and maximum penalties for “violating any rule adopted by the board or department”. The new first offense minimum would read: “denial or letter of concern and \$1,000 fine” which is down from \$5,000. The new first offense maximum would state: “denial or suspension to be followed by probation and a \$5,000.”

The Board has proposed to add language regarding disciplinary action involving physician assistants. The new language would state: “the probable cause panel shall include one (1) licensed physician assistant whenever disciplinary action against a physician assistant is considered...”

Upcoming Events

October 19 - John Collier from the health care consulting and accounting firm Pershing Yoakley will speak at the MGMA meeting at 11:30am at the San Jose Country Club. The Bittinger Law Firm works frequently with consultants, accountants and billing experts from Pershing Yoakley’s Sarasota, Atlanta and Knoxville offices. We encourage medical practice administrators to attend the meeting.

November 16 - The First Coast Lawyers Forum is hosting a comprehensive business law review. Please join us at the Wyndham Jacksonville Riverwak Conference Center. Hear top attorneys from different areas of law talk about what you need to have a successful business.

For more information please [Email us](#).

***The content of this newsletter is not legal advice and should not be relied on as legal advice.
Consult your attorney for advice on these and other legal matters.***

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