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# Healthcare Law Update- A Smorgasbord of Information

Brian Werst  
K&L Gates LLP  
2014 WA-AK HFMA Annual  
Conference and Trade Fair

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## **Take Aways:**

Identify a broad array of current legal issues that can impact your operations.

Distinguish real legal issues from less significant issues.

Identify resources to assist in identifying and resolving issues.

## Affordable Care Act

Individual Mandate moving forward (sorta)

- ❖ Every American must have health insurance or pay a penalty, subject to exceptions largely based on income level
- ❖ Exemptions

Coverage, ability to pay, and penalty fines coordinated through the IRS

Tax penalty- the greater of \$95 or 1 percent of income



## Affordable Care Act

Employer Mandate delayed and modified

- ❖ Medium sized employers of 50 to 99 full-time employees - January 2016 to provide health insurance or pay the fine

Large employers of 100 or more full-time employees

- ❖ Must offer insurance to only 70% of full-time employees in 2015 and 95% in 2016

Must still offer affordable insurance

Effect- more full-time employees may remain working until January 2016.



## Affordable Care Act

### Small Business Health Options Program Delay

- ❖ DHHS delayed part of the Small Business Health Options Program (SHOP) until at least 2015.
- ❖ SHOP is the online insurance marketplace, or exchange, for small businesses.

Effect- delay means that small businesses using SHOP will choose a single plan for all their employees in 2014.



## Affordable Care Act

Insurance Marketplaces moving forward

- ❖ 17 States and District of Columbia
- ❖ Open enrollment started October 1, 2013
  - ❖ Coverage took effect on January 1, 2014
- ❖ Open enrollment for 2014 ends March 31, 2014
- ❖ November 15, 2014 - proposed date for 2015 open enrollment to start
- ❖ January 15, 2015 - proposed date for 2015 open enrollment to end
- ❖ 3.3 million people have signed up.
- ❖ About 25 percent are young adults, aged 18 to 34

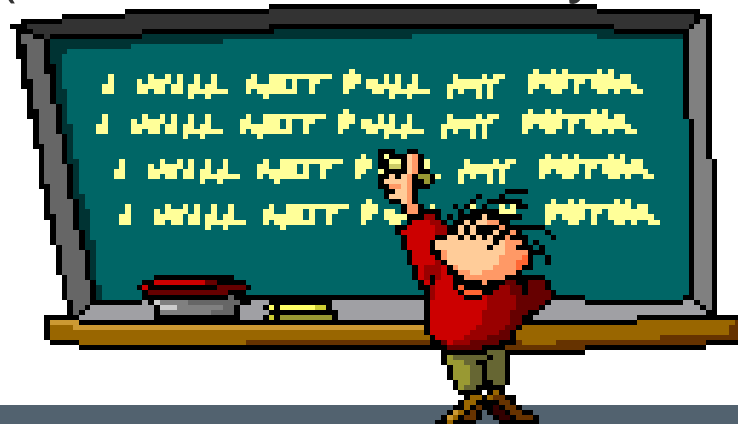


## False Claims Act

Big penalties are becoming the norm

### U.S. ex. rel. Drakeford v. Tuomey Healthcare System Inc.-

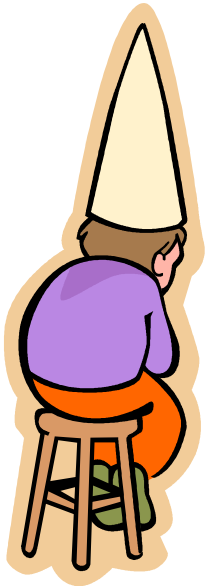
- ❖ Jury determined Stark violation by overpaying contract doctors for referrals
- ❖ Jury verdict - \$237,000,000 (more than Tuomey annual revenues)





## False Claims Act

U.S. ex. rel. Simpson v. Bayer Healthcare et al.-  
“fraud in the inducement” of the contract with  
the government, even though no allegation of  
a false claim ever being submitted



Government can recover the full value of the  
contract without subtracting the value of any  
benefit received

And then treble it for damages

## Healthcare Mergers and Acquisitions

St. Luke's Health System Ltd./Saltzer Medical Group PA

- ❖ Challenge to acquisition of physician group
- ❖ Judge acknowledged the acquisition was intended to “primarily improve patient outcomes”
- ❖ Section 7 of Clayton Act violated because “it appears highly likely that health care costs will rise as the combined entity obtains a dominant market position that will enable it to negotiate higher reimbursement rates from health insurance plans that will be passed on to the consumer, and raise rates for ancillary services to the higher hospital-billing rates”



## Reimbursement

Gentiva Healthcare Corp. v. Sebelius- Medicare contractor may determine on their own whether “sustained and high levels” overpayments have been made to providers

- ❖ HHS may delegate authority to contractor to review small sample of audited billing statements to determine whether overpayments have been made.
- ❖ What is “high level”?

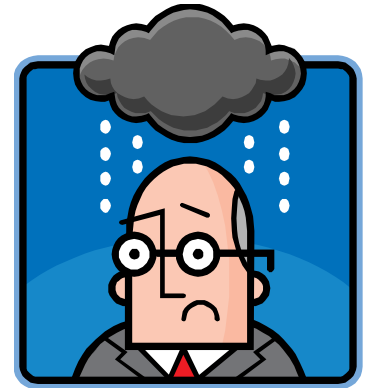


## Reimbursement

Catholic Health Initiatives-Iowa Corp. v.

Sebelius- calculation of DSH payment

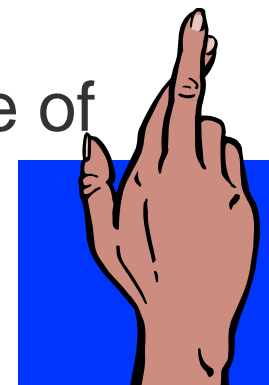
- ❖ DSH payment for patient that is “dually eligible” for Medicare and Medicaid, but has exhausted her benefit
- ❖ If patient is considered as not being entitled to Medicare coverage, then hospital entitled to higher DSH payments for treating more uninsured
- ❖ Court - Exhaustion of benefits irrelevant
- ❖ Court - Patient is viewed based on whether entitled to benefits



## Reimbursement

Allina Health Services et. al. v. Sebelius- calculation of DSH payment

- ❖ DSH payment determined by the percentage of Medicare patients who are low-income.
- ❖ Before 2004 - Medicare Advantage patients excluded from determination
- ❖ 2004 - HHS included Medicare Advantage patients, resulting in lower payments for many
- ❖ Trial court - HHS failed to give notice and solicit comment required for rulemaking



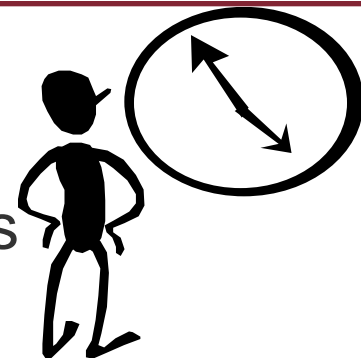
## Reimbursement

### 2-Midnight Rule

- ❖ Enforcement delayed until 10/1/14
- ❖ CMS instructed Medicare Administrative Contractors and Recovery Auditors to not engage in post-payment reviews for admissions between 10/1/13 and 10/1/14
- ❖ MACs will carry out pre-payment reviews of admissions between 3/31/14 and 9/30/14
  - ❖ To “educate” hospitals on the rule
  - ❖ Auditors review 10-25 claims per facility
- ❖ If Medicare patient is admitted by proxy or verbal order by non-physician, physician must sign off on admission and “accept responsibility” for the decision before discharge.



## Reimbursement



### 96 Hour Payment Rule for Critical Access Hospitals

- ❖ 42 USC 1395f(8): as a condition of payment for inpatient CAH services under Medicare Part A, the physician must certify that the individual may reasonably be expected to be discharged or transferred to a hospital within 96 hours after admission to the CAH
- ❖ 42 USC 1395i-4: as a condition of participation, the CAH provides acute inpatient care for a period that does not exceed, on an annual average basis, 96 hours per patient.

## Reimbursement

### SGR Repeal and Medicare Provider Payment Modernization Act

- ❖ Bipartisan agreement on legislation to repeal sustainable growth rate formula
- ❖ Physicians would receive a 0.5 percent increase for each of the next five years as Medicare transitions to an alternative payment model designed to reward physicians based on the “quality, efficiency and innovation” in care
- ❖ Use of proven medical practices will be encouraged





## Finance

### Municipal Advisor Registration Rule



- ❖ 2010- Dodd-Frank Wall Street Reform and Consumer Protection Act amended Section 15B of the Securities Exchange Act of 1934
- ❖ SEC rules effective July 1, 2014
- ❖ Purpose- strengthen oversight of the municipal securities markets and to expand market protection to cover previously unregulated municipal market participants.
- ❖ Intent- increase the supply of information available to assist municipal entities and obligated persons in choosing and engaging in transactions with municipal advisors, with the goal of promoting accountability and transparency
- ❖ MSRB has authority over municipal advisors.

## Finance



“Municipal Advisor” must register with the SEC as a prerequisite to (1) soliciting a municipal entity or obligated person or (2) providing advice to or on behalf of a municipal entity or an obligated person with respect to municipal financial products or the issuance of municipal securities.

Exclusions- Generally excludes underwriters and certain professionals providing “advice”- attorneys, engineers, registered investment advisers, registered commodity trading advisors, accountants and officials and employees of municipal entity or obligated person

## Technology

HITECH Act promoted “meaningful use” of EHR via incentive payments

- ❖ 93+ percent of hospitals have implemented EHR (CMS)
- ❖ 86 percent received incentive payments for making “meaningful use” of technology (CMS)
- ❖ 82 percent of physicians have implemented EHR
- ❖ 63 percent received incentive payments
- ❖ \$19+ billion paid out



## Technology

2015- Medicare reimbursements will be reduced for providers who don't participate.

Stage 2 meaningful use- delayed until 2016

Stage 3- delayed until fiscal year 2017 for hospitals and calendar year 2017 for doctors if completed 2 years of Stage 2

❖ Final rules expected in first half of 2015

CMS delayed meaningful use attestation for 2013 year until March 31

CMS allowing hospitals that missed 11/30/13 deadline to submit attestation retroactively until 3/15/14



## Labor and Employment Issues

### Expedited Union Elections

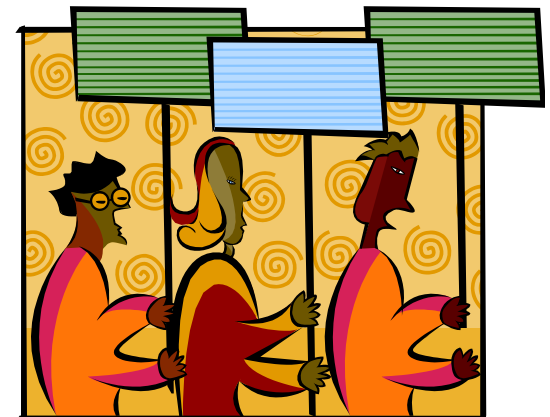
- ❖ NLRB accepting comments on “Ambush Election Rules” through April 7

### DOL Persuader Rule and “Advice Exception”

- ❖ Final rule pushed back to March 2014

### Specialty Healthcare affirmed

Effect- easier to organize



## Labor and Employment Issues

Employer policies and codes of conduct may violate NLRA- William Beaumont Hospital

- ❖ Hospital policy- prohibited comments or gestures “that exceed the bounds of fair criticism” of the hospital or behavior “counter to promoting teamwork”
- ❖ NLRB- policy “may reasonably chill” the exercise of worker rights under NLRA
- ❖ Acknowledged hospital has legitimate interest in employee behavior and maintaining a safe workplace
- ❖ But may reasonably prohibit lawful discussions or complaints protected by NLRA



YOU  
ARE  
FIRED

## Labor and Employment Issues

### Piel v. City of Federal Way

- ❖ Employee active in his union was terminated and grieved under his union rights. Employee was reinstated, with back pay and benefits for 14 months
- ❖ Employee returned, allegedly threatened violence against co-workers, and then terminated again.
- ❖ Sued for wrongful termination in violation of public policy, claiming he was fired for engaging in union-protected activities
- ❖ WSSCT- Agency remedies inadequate because tort damages are not available



## Labor and Employment



### Injury and Illness Prevention Program Rules

- ❖ Historical OSHA approach- rules focused on a specific hazard
  - ❖ Penalized for an incident related to the hazard
- ❖ I2P2- Employers charged with identifying all hazards in the workplace and developing a plan for preventing and controlling those hazards
- ❖ Rules still being formulated
  - ❖ Anticipated program elements- management leadership, worker participation, hazard identification and assessment, hazard prevention and control, education and training, and program evaluation and improvement



## The Crystal Ball



### ACA

- ❖ Here for good?
- ❖ More delays? Individual mandate?
- ❖ Revise full time employee definition?
- ❖ Contraceptive mandate- stayed pending USSCT review
- ❖ Government oversight and enforcement
- ❖ Increased FCA claims?

### Insurance exchanges

- ❖ What will be the result?
- ❖ How will it affect margins?

## The Crystal Ball

### Mergers and acquisitions

- ❖ Fueled by strong debt and equity markets
- ❖ Hindered by ACA and “large employer” concerns
- ❖ Costs

### Technology

- ❖ Continued implementation of EHR

### Labor

- ❖ Past and current NLRB composition

