
Health Law Daily Wrap Up

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By WK Editorial Staff

This Strategic Perspective details the top developments for April 2020.

In April, the Supreme Court held that the government must pay insurers the full amount owed under the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) risk corridors program, and the federal government moved to allow further flexibility for providers in light of the COVID-19 pandemic. Read these stories and others you may have missed last month.

STRATEGIC PERSPECTIVES: Health facilities contribute to the climate crisis, can be leaders in mitigation

Health care facilities—whose purpose is to safeguard patients’ health—have enormous carbon footprints that contribute to climate change, which many consider to be a global public health crisis. Hospitals, for example, run around the clock and have energy-intensive operations and supply chains. These same facilities, however, can play a major role in mitigating the climate crisis through a number of measures, including reducing waste and transitioning to renewable energy.

STRATEGIC PERSPECTIVES: Health care policies slip through the CARES Act window

In passing the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (P.L. 116-136) on March 27, 2020, Congress prioritized patient access to care and patient safety over the competing interests of payers and even privacy during the public health emergency brought on by the novel coronavirus (COVID-19). The law allows for increased usage of telehealth, boosts Medicare payments for hospitals, and allows providers certain additional flexibility. This Strategic Perspective explores the most impactful health care provisions of the CARES Act, which attorney experts Michael Clark and Laura Collins from Baker, Donelson, Bearman, Caldwell & Berkowitz, PC described in an interview with Wolters Kluwer as “breathtaking in scope,” but, along with other government actions, “reactive.”

HEALTH INFORMATION TECHNOLOGY—FINAL RULES: Agency rule implements certain provisions of 21st Century Cures Act to advance interoperability of health information

The ONC of the Department of Health and Human Services (HHS) has issued a final rule implementing key provisions in Title IV of the 21st Century Cures Act (Cures Act) that are designed to advance interoperability; support the access, exchange, and use of electronic health information (EHI); and address occurrences of patient information blocking. The final rule also addresses Conditions and Maintenance of Certification requirements for health IT developers, as well as enhancing patient access to their EHI in a more convenient form (Final rule, 85 FR 25642, May 1, 2020).

COVID-19—FINAL RULES: Interim final rule to give individuals and medical provider entities flexibility to respond to COVID-19 pandemic

CMS has announced an interim final rule intended to provide needed flexibility to respond effectively to the serious public health threats posed by the spread of the 2019 Novel Coronavirus (COVID-19). Among the changes to the Medicare regulations are provisions for interim payment rules so that physicians and other practitioners, home health and hospice providers, inpatient rehabilitation facilities, rural health clinics (RHCs), and federally qualified health centers (FQHCs) are allowed broad flexibilities to furnish services using remote communications technology to avoid exposure risks to health care providers, patients, and the community (Interim final rule, 85 FR 19230, April 6, 2020).
INPATIENT REHABILITATION FACILITIES—PROPOSED RULES: IRFs could see $270M reimbursement increase in FY 2021

Payments to inpatient rehabilitation facilities (IRFs) would increase by $270 million in fiscal year (FY) 2021, according to an advance release of the FY 2021 IRF prospective payment system (PPS) proposed rule. The deadline for submitting comments is June 15, 2020. CMS noted that, in light of the COVID-19 pandemic and providers’ limited capacity to review and comment on extensive proposals, the annual rulemaking was limited to "essential policies," (Proposed rule, 85 FR 22065, April 21, 2020).

HIPAA—NOTICES: OCR exercises enforcement discretion for potential violations of use, disclosure of PHI

Due to the COVID-19 nationwide public health emergency, the HHS Office of Civil Rights (OCR) is applying its enforcement discretion to certain general and organizational use and disclosure requirements of the Health Insurance Portability and Accountability Act of 1996 (HIPAA) Privacy Rule (P.L. 104-191). Effective immediately, OCR will not impose potential penalties for violations of 45 C.F.R. §§164.502(a)(3), 164.502(e)(2), 164.504(e)(4) and 164.504(e)(5) against covered health care professionals (covered entities) or their business associates (BAs) for uses and disclosures of protected health information (PHI) by BAs for public health and health oversight activities if the BAs meet certain conditions. The Notification of Enforcement Discretion will remain in effect until the Secretary determines that the public health emergency no longer exists or when the expiration date of the declared public health emergency, whichever comes first (see 42 U.S.C.§247d) (Notification of enforcement discretion, 85 FR 19392, April 7, 2020).

HEALTH CARE REFORM—U.S.: Plain language of ACA requires Congress to make full risk corridor payments

Congress must make the payments it promised to insurers under the ACA’s risk corridor program, the Supreme Court held. In an 8-1 decision, the court found that the risk corridors statute created a government obligation to pay insurers the full amount regardless of whether Congress expressly provided budget authority before appropriating funds (Maine Community Health Options v. U.S., April 24, 2020, Sotomayor, S.).

DISPROPORTIONATE SHARE HOSPITALS—5th Cir.: District court’s enjoining of HHS’ Medicaid DSH payment rule overturned

The Fifth Circuit reversed a district court ruling granting summary judgment to a group of Mississippi hospitals that sued HHS over the 2017 final rule on calculating disproportionate share hospital (DSH) payments. The hospitals disputed the method for calculating the hospital-specific limit for annual DSH payments; however, the appeals court ruled that the final rule was consistent with Medicaid Act, which expressly delegates gap-filling authority to the Secretary (Baptist Memorial Hospital-Golden Triangle, Incorporated v. Azar, April 20, 2020, Higginbotham, P.).

BILLING AND CODING—10th Cir.: Rural hospitals lose battle alleging Secretary’s reimbursement calculations were arbitrary

The district court properly granted the HHS Secretary’s motion for summary judgment finding that the method for calculating rural hospitals’ hospital-specific reimbursement was not arbitrary or capricious. Eleven rural hospitals alleged the Secretary’s method was arbitrary and capricious under the Administrative Procedure Act (APA) (5 U.S.C. §706(2)(A)) claiming that the Secretary’s methodology was double counting the budget neutrality adjustment. The appellate court affirmed the district court’s judgment finding that the Secretary’s methodology is not arbitrary or capricious. The appellate court disagreed with the hospital’s double application argument, concluding that the hospitals arguments rested on flawed premises. The court also rejected the hospital’s contention that the Secretary misunderstood the methodology (Hays Medical Center v. Jones, April 21, 2020, Holmes, J.).

MEDICARE PART D—OTHER AGENCY DOCUMENTS: Medicare Advantage, Part D payment methodologies set for 2021

CMS published its calendar year (CY) 2021 rate announcement that finalizes Medicare Advantage (MA) and Part D payment methodologies for CY 2021. The rate announcement addresses comments received on Parts
I and II of CY 2021 advance notices that published on January 6 and February 5, 2020. CMS noted in the rate announcement that the policies will continue to modernize and maximize competition within the MA and Part D programs. CMS will also continue phasing out indirect medical education amounts from the MA capitation rates. A 1.66 percent expected average revenue change is expected in CY 2021 for plan payments relative to CY 2020 (Rate announcement, April 6, 2020).