

# Missouri Radiological Society Meeting

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**Holiday Inn Executive Center, Columbia, MO**

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# I. Patient Record Requests

- It can be expected that more patients will be requesting copies of their medical records. In order to assure that these requests are being followed in compliance with various laws and procedures, the following ten tips are recommended:
  1. Be familiar with the requirements under the HIPAA privacy and security regulations.
  2. Follow state laws which may have stricter requirements.
  3. Do not impose unreasonable or unallowable barriers to record access.
  4. Have a consistent patient access request policy.

# I. Patient Record Requests (cont'd)

5. Include your patient record request policy in your notice of privacy practices.
6. Create a checklist or flow chart that delineates the requirements for a patient to request access to its records, including any charges that may be imposed, if allowed by law.
7. Respond to the request as soon as possible in order to meet statutory or regulatory deadlines.
8. Do not place arbitrary restrictions on the format of the records.
9. Do not overcharge for records.
10. Be careful that records are not disclosed improperly.

# I. Patient Record Requests (cont'd)

- In addition to the above, patients sometimes request their records be shared with family members or caretakers. With respect to those kinds of requests, the following procedures are recommended:
  1. As part of the normal intake process, ask patients whether there are persons with whom they would like to have their records shared.
  2. Consider a different authorization form separate from the HIPAA authorization to accomplish the patient's permission to share with family or caretakers.

# I. Patient Record Requests (cont'd)

3. Make sure that information is shared only with persons the patient has authorized in writing. Those accompanying patients are not entitled to receive protected health information without such an authorization.
4. Whatever disclosure is authorized by the patient, make sure that it is well documented.
5. Where a person is authorized to receive oral communications over electronic devices, be it telephone, email or text, create a verification procedure to make sure that the person to whom the information is being transmitted is able to identify themselves, as well as the patient's full name and date of birth.

# I. Patient Record Requests (cont'd)

6. Do not assume that the authorizations are permanent. Review with patients at each appointment whether the prior permission or authorization given is still valid.
7. Abide by the “minimum necessary” rule of HIPAA.

## II. Whistle Blower Retaliation Claims

- Whistleblowers under the Federal False Claims Act who bring *qui tam* lawsuits, if involuntarily terminated, may bring in addition a claim for retaliation in violation of the False Claims Act.
- In 2018, the Department of Justice collected \$2.8 billion in settlements and judgments from civil false claims actions. Of that \$2.1 billion arose from *qui tam* lawsuits and \$2.5 billion of the total involved healthcare providers.

## II. Whistle Blower Retaliation Claims (cont'd)

- While there are certain requirements to file a whistleblower lawsuit under the False Claims Act, recently even in cases where the courts have found that the False Claims Act cases do not meet the requirements of the statute, they are still allowing the retaliation claims to proceed.
- Studies have shown that most whistleblower cases are brought by disgruntled employees who feel that their complaints have been ignored. To avoid this, employers should be careful within their corporate compliance and ethics program and process to make sure that all complaints are treated seriously.

## II. Whistle Blower Retaliation Claims (cont'd)

- When employees are terminated, it is recommended that an “exit interview” be conducted of the employee to determine whether the employee believes that any inappropriate activities were occurring. Frequently, employees will indicate that they know of nothing of that nature but if they later bring a false claims action, their exit interview is evidence of their bad faith, which could defeat both the false claims action and their retaliation claim.

## II. Whistle Blower Retaliation Claims (cont'd)

- The following steps can be taken to attempt to avoid retaliation claims:
  - Foster a culture that encourages employees and others to raise billing concerns.
  - Properly train all supervisors and corporate compliance officers to take complaints seriously.
  - Make sure all complaints are investigated and any needed action taken and documented or, if no substantiation is found, that this is documented as well.
  - Have a policy that forbids retaliation against employees reporting any concerns.

## II. Whistle Blower Retaliation Claims (cont'd)

- Be sure to give feedback to the complaining employee who raises concerns to know that an investigation has occurred and, if appropriate, to explain the result.
- If an adverse action is taken against an employee or even a consultant to the practice, the reasons for it should be well-documented to show that it is not a result of retaliation and that independent grounds exist for that action.

## III. Travel Act

- Sixty years ago, Congress passed the “Travel Act” in order to crack down on organized crime.
- The Travel Act gives federal jurisdiction to a wide range of crimes, including bribery, if state lines are crossed using mail or electronic communications.
- Recently, federal prosecutors have successfully used that law to get verdicts against physicians and institutional healthcare providers for engaging in illegal kickbacks even though no government third-party payor was involved.

### III. Travel Act (cont'd)

- Thus, the federal government is using the “Travel Act” as a way to prosecute healthcare providers who seek to avoid federal jurisdiction by not participating in government third-party payment programs.
- It can even be used against providers who do participate in government third-party payment programs but where the illegal acts involved patients whose care was reimbursed by a non-federal or other government third-party payment program.

### III. Travel Act (cont'd)

- Therefore, you need to make sure when having your contracts with other entities reviewed for compliance with federal and state laws, that counsel is aware of the Travel Act's requirements.

## IV. Electronic Health Record Templates

- While the templates that are available in your electronic health record software can reduce the documentation burden, they can also inadvertently be used inappropriately resulting in liability on a number of fronts.
- This is especially the case where the templates merely contain “yes” or “no” questions. Depending on who is completing the template, the repeated use of answers which result in higher than appropriate reimbursement can raise an innuendo of fraud.

## IV. Electronic Health Record Templates (cont'd)

- Templates used improperly can sometimes trigger default billing.
- Where notes are made and the software allows a stock answer to respond to a question, those “cloned notes” can raise an innuendo of fraud.
- Sometimes templates, when utilized improperly, can provide either too little or too much information again resulting in billing errors or subjecting the billing practices to costly audits.

## IV. Electronic Health Record Templates (cont'd)

- Certain templates allow auto-population of fields which can produce inconsistent entries.
- For procedures which have time limits, random audits should be made to make sure that those entries are consistent with other independent appointment records.
- The improper use of templates can create an incomplete, inaccurate or false medical record which can affect patient care raising the risk of malpractice claims.

# V. Unclaimed Property Audits

- If states find themselves in increasing need of finding general revenue dollars from whatever source might be available, they are beginning to do unclaimed property audits to attempt to recover amounts held by companies that have not been claimed by proper owner. This includes healthcare providers who may find themselves with uncashed payroll checks, patient credits or healthcare plan overpayments.
- The state will hold the escheated property for a period of time, advertise the names of the persons who are eligible to claim the property and then if the property is unclaimed, it then can be taken by the state and brought into general revenue.

## V. Unclaimed Property Audits (cont'd)

- While this process does not produce immediate revenue for the state, a consistent stream of revenue to the state allows it on an annual basis to realize substantial money, hence the need to audit.
- Many states outsource the auditing process to third parties which are then entitled to a percentage of what they recover.
- Healthcare providers may be particularly vulnerable because of the complexity of the payment system involving many third-party payors for many patients who may actually have more than one payor paying for their care, which sometimes results in overpayments.

## V. Unclaimed Property Audits (cont'd)

- The following steps will assist providers, if audited:
  - Seek help from an experienced accountant or attorney and make sure your compliance officer is involved.
  - Especially in cases where a third party auditor is being used, attempt to obtain a non-disclosure agreement from that auditor to avoid this information being shared with other states prompting additional audits.
  - When presented with a request to audit, obtain an official audit notification letter from the state that has authorized the audit.
  - Make sure you understand the scope of the audit so that more information than what is requested is not disclosed.

## V. Unclaimed Property Audits (cont'd)

- Make sure that any information disclosed is in response to a written request.
- Come to an agreement on reasonable timelines to be covered by the audit. Statutes of limitations may apply and the timeline should not exceed those.
- If the audit requires the disclosure of protected health information, make sure that disclosures comply with HIPAA and state privacy laws and, when possible, de-identify the name of the patient.
- If the auditor is acting on behalf of more than one state, make sure that you have your accountant or attorney become familiar with the requirements of each state as they differ.

## V. Unclaimed Property Audits (cont'd)

- To avoid situations that might result in an audit, the following steps can be taken:
  - Keep track of unclaimed property and make an effort to return it.
  - Document any efforts to return funds owed and of reports filed concerning those funds.
  - If the money being held is from a private payer, such as an insurance company, ask them how they want the return of the payment handled. Not infrequently, especially if the amount is not large, the insurance company will tell you to keep it which then removes it from the escheat laws.

## V. Unclaimed Property Audits (cont'd)

- If you find from a self audit that you have been holding money for a longer period of time than when you are required to report it, discreetly inquire whether there is a voluntary disclosure program available to avoid penalties.
- Make sure that periodic audits for unclaimed property are part of your compliance and ethics program.

## VI. Co-Payment Waivers

- The Office of Inspector General of the U.S. Department of Health and Human Services recently put out a special fraud alert on waiving co-payments. Improper waiving of co-payments can constitute a “kickback” in violation of the Federal Anti-Kickback Statute. The following behavior is noted by the Office of Inspector General and should be avoided:
  - Either public or in-office advertisements with language that indicates the practice does not require a co-payment with statements such as “Medicare accepted as payment in full” or “No out-of-pocket expense”.

## VI. Co-Payment Waivers (cont'd)

- The practice runs advertisements that promise discounts to Medicare beneficiaries.
- The practice routinely uses financial hardship forms which state that the beneficiary is unable to pay co-insurance or deductible without any further process or explanation.
- The practice gives co-payment waivers without a good faith attempt to determine the beneficiary's ability to pay.
- The practice does not collect co-payments or deductibles unless the patient has Medicare supplemental insurance such as Medigap coverage, resulting in the patient not paying for certain items and services.

## VI. Co-Payment Waivers (cont'd)

- The practice waives co-payment and charges more for services to Medicare patients than it does for other patients to offset the waiver.
- The practice fails to collect co-payments or deductibles for a specific group of Medicare patients for reasons unrelated to financial need. A real life example is where a practice waived co-insurance or deductible for all patients from a particular primary care practice in order to get referrals.

## VII. CMS Proposed Bundled Payment Model for Radiation Oncology

- This summer, the Centers for Medicare & Medicaid Services (“CMS”) proposed a “Radiation Oncology Model” that would use episode-based payments for radiotherapy treatment provided to cancer patients.
- Under this model, providers and suppliers furnishing radiotherapy treatment services would receive prospective payment amounts for a 90-day episode of care instead of the Medicare fee-for-service payments.

## VII. CMS Proposed Bundled Payment Model for Radiation Oncology (cont'd)

- The model would apply in a site-neutral manner, that is whether in a physician office, a hospital outpatient department or a free-standing radiation therapy center for 17 different cancer types.
- The model episodic payment would be split into a professional component for physicians and a technical component for non-physician services which includes the provision of equipment, supplies, personnel and costs related to radiotherapy treatment.

## VII. CMS Proposed Bundled Payment Model for Radiation Oncology (cont'd)

- CMS would withhold a percentage of the episodic payment amount which the model participants could earn back based on clinical data reporting, quality measure reporting, and performance.
- Recent announcements by ACR of changes in the evaluation and management payments in the calendar year 2020 Medicare Physician Fee Schedule proposed rule that would cut radiology reimbursement by 9% or \$450 million a year is another attempt by the Congress to balance the federal budget on the backs of healthcare providers.

## VIII. 2019 Legislation

- Senate Bill 7 – The following relevant provisions were enacted:
  - Venue changes
  - Joinder
  - Place of residence
  - Products liability cases
  - Specific effective date

## VIII. 2019 Legislation (cont'd)

- Senate Bill 224 – This legislation effected changes in the following:
  - Discovery in civil cases including request for production of documents, interrogatories, and depositions

## VIII. 2019 Legislation (cont'd)

- Senate Bill 275 – This legislation effected the following relevant changes:
  - Opioid prescribing and dispensing practices for dentists
  - Creation of the “Joint Task Force on Radiologic Technologists Licensure”