

# Top Health Law Issues for 2010

*The year 2010 brings heightened healthcare focus on compliance, reform efforts, and enforcement.*

Some of the legal issues of this year that can have a critical impact on the revenue cycle include compliance program effectiveness, increased enforcement, health insurance industry reform, and health IT.

## Compliance Program Effectiveness

A series of important recent and evolving developments in the healthcare compliance environment highlight the need for a scrupulous emphasis on effective corporate compliance programs. One example: The recent expansion of the False Claims Act and the further expansion of fraud enforcement expected to be included in health reform legislation will have a significant impact on the newest generation of physician-hospital integration initiatives. This comes in the wake of the ever-expanding connection being drawn by regulators between the quality of care and false claims liability.

The focus on these matters is borne out by government activity, such as the formation of the Health Care Fraud Prevention and Enforcement Action team (HEAT) to combat Medicare fraud. HEAT is an interagency program of the U.S. Department of Justice (DOJ) and the U.S. Department of Health and Human Services (HHS).

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Moreover, there is increasing emphasis on hospital board compliance oversight obligations. For example, the New York State Medicaid Inspector General has expressed a willingness to pursue sanctions against governing board members of Medicaid providers if compliance problems and violations are attributable to their failure to exercise effective compliance plan oversight.

In the federal arena, the HHS Office of Inspector General recently republished a three-part series on healthcare compliance, and the DOJ has attempted to apply “Responsible Corporate Officer” and similar theories to assert liability to executives in fraud actions. In addition, compliance program effectiveness is an essential element of the Federal Sentencing Guidelines’ compliance program criteria.

Developing the right approach for assessing compliance effectiveness is an art rather than a science, and no tried-and-true approach exists. Further, the route chosen will likely differ depending upon the program’s stage of development and implementation. In any case, it should be conducted in large part relative to the standards established by the OIG compliance guidance, Federal Sentencing Guidelines, and the DOJ Guidelines for the Federal Prosecution of Corporations.

## Increased Enforcement—Complex RAC Audits and Survey Activity

Enhanced Recovery Audit Contractor (RAC) audits, called “complex reviews,” are taking RAC concerns to entirely new

heights starting in 2010. Although routine RAC audits are time-consuming for the subject hospitals, the process is largely automated. In contrast, complex reviews are far more labor- and time-intensive for audited hospitals. For those facilities already dealing with increased demands on individuals in administrative roles, the effort and resources required to respond to a comprehensive review could be crippling.

Complex reviews focus heavily on coding errors with a more “complex” review featuring a team of specialists (including coders and clinical professionals) that assess information on a retrospective basis. Given that RAC auditors can keep between 9.0 and 12.5 percent of payments identified as improper, the more complex the review, the more likely it seems that the RAC auditors will be able to take a hospital’s audit results straight to the bank.

The pressures of RAC audits come on top of increased survey and enforcement activity by state departments of health and the Centers for Medicare & Medicaid Services (CMS) of all types of healthcare facilities. From Federal Monitoring Surveys of skilled nursing facilities to ordinary course complaint surveys, healthcare facilities have perceived an upswing in survey activity and the number and type of deficiencies cited during such surveys. The resources required to respond to survey findings, particularly the costs of remediating Life Safety Code-related deficiencies, places an additional burden on healthcare facility staff and budgets.

## Health Insurance Industry Reform

Even with healthcare reform legislation on a slower track than anticipated at the

start of 2010, the health insurance market is likely to face significant changes affecting all participants—health insurers, managed care organizations, employer/union group plans, and individuals alike. The potential establishment of premium rating limitations, the elimination of lifetime coverage limits, and the regulation of medical loss ratios (MLRs) are likely to affect the pricing of insurance products in a material way.

Even if Congress fails to act, states may enact reforms related to the small group market and take their own steps to expand access for uninsured and underinsured individuals. Medicare Advantage organizations already are experiencing payment reductions, and the debate over changes to the current payment methodology is likely to continue. These changes would likely affect premium rates and plan benefit packages, including the availability of supplemental benefits.

### Health IT

The Health Information Technology for Economic and Clinical Health Act (HITECH Act), enacted in February 2009, included about \$20 billion allocated over five years to health IT projects, including incentive payments, beginning in 2011, to eligible professionals and eligible hospitals to acquire electronic health record (EHR) technology. In 2015, however, the incentives turn into penalties by way of reduced Medicare reimbursements if “meaningful use” is not demonstrated. It is critical, therefore, for eligible professionals and eligible hospitals to understand what constitutes meaningful use.

On Jan. 13, 2010, CMS published a proposed rule setting forth the first of three stages of criteria defining *meaningful use*.

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The HHS Office of the National Coordinator for Health Information Technology simultaneously published an interim final rule, effective Feb. 12, 2010, which sets standards, implementation specifications, and certification criteria for EHR technology. A third proposal is expected from HHS in the short term, which will provide further guidance about the process for becoming an EHR technology certifying organization. This year will bring significant activity from all stakeholders in analyzing whether EHR is qualified and meets certification criteria, and whether eligible professionals or hospitals have demonstrated meaningful use.

The HITECH Act also expanded the reach of the Health Insurance Portability and Accountability Act (HIPAA), extending it to business associates effective Feb. 17, 2010, and imposing nationwide notification requirements for breach of unsecured protected health information (PHI). Business associates will also now be directly obligated to comply with the security rule of HIPAA and implement security policies to safeguard electronic PHI.

Increased enforcement of HIPAA, as expanded by the HITECH Act, around breaches of unsecured PHI are anticipated, as foreshadowed by the

Connecticut Attorney General's recent suit against Health Net over the company's loss of a hard drive holding information on almost 450,000 enrollees. This is the first time a state attorney general has invoked new authority under the HITECH Act to pursue breaches of PHI. It is likely not the last.

### Plan for Increased Regulation and Enforcement in 2010

Increased regulation and enforcement in 2010 will affect healthcare facilities at the bottom line and beyond, with the need to fund preparation, response, and potentially make payments for any penalties that are imposed. Revenue cycle leaders should familiarize themselves with the nature of the potential liabilities related to these matters and consider them as part of their facility's financial planning, as appropriate. ☞

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