

Healthcare Law UPDATE

FEDERAL UPDATE

Criminal Charges Brought Against 345 Defendants Nationwide for Over \$6 Billion in Fraudulent Healthcare Claims

On September 30, 2020, the U.S. Department of Justice [announced](#) an historic nationwide enforcement action criminally charging 345 defendants across the country, including more than 100 doctors, nurses, and other licensed medical professionals. The defendants were charged with submitting more than \$6 billion in false and fraudulent claims to federal healthcare programs and private insurers, involving schemes related to telemedicine, substance abuse treatment facilities, illegal opioid distribution, and other healthcare fraud schemes. The enforcement actions were the result of a massive cooperative effort among multiple federal, state, and local agencies. In New Jersey alone, 17 defendants were charged for their alleged roles in schemes to defraud insurance programs out of more than \$1.2 billion.



The telemedicine-related charges were the most significant of the nationwide actions, with \$4.5 billion in allegedly false and fraudulent claims by more than 86 criminal defendants. The illegal schemes varied, and included alleged payments by telemedicine executives to doctors and nurse practitioners to order unnecessary durable medical equipment (DME), genetic and other diagnostic testing, and pain medications, either without any patient interaction or with only a brief telephone conversation with patients they had never seen. The DME companies, laboratories, and pharmacies then allegedly purchased the items ordered in exchange for kickbacks and submitted false and fraudulent claims to Medicare and other government insurers. In addition to criminal charges, the Medicare billing privileges of 256 medical professionals were revoked as a result of their involvement in the telemedicine schemes.

In This Issue:

OSHA Prosecutes COVID-19 Violations

DCA Announces Telemedicine Rules

NJ Legislative Update

Brach Eichler in the News

HIPAA Corner

The charges involving substance abuse treatment facilities were brought against more than 12 defendants, including physicians, owners, and operators of the facilities, and patient recruiters, for submitting more than \$845 million in allegedly false and fraudulent claims to private insurers for tests and treatments. The schemes allegedly involved kickback payments to patient referral sources, and medically unnecessary drug testing and therapy sessions often not provided. The medical providers were also charged with prescribing medically unnecessary controlled substances and other medications, often to entice patients to remain at the facility. The patients were then often discharged and admitted to other treatment facilities, or they were referred to other laboratories and clinics, in exchange for more kickbacks.

The cases relating to illegal prescriptions and distribution of opioids, as well as to traditional healthcare fraud schemes, involved more than 240 defendants allegedly submitting more than \$800 million in false and fraudulent claims to federal healthcare programs and private insurers for medically unnecessary treatments or treatments that were never provided. Patient recruiters and other co-conspirators were allegedly paid cash kickbacks in exchange for supplying beneficiary information to providers, who in turn submitted fraudulent bills. Charges were also brought against providers and others involved in the distribution of more than 30 million doses of opioids and other narcotics.

Links to the publicly available court documents of the defendants charged can be viewed [here](#).

For more information, contact:

Riza I. Dagli | 973.403.3103 | rdagli@bracheichler.com

Keith J. Roberts | 973.364.5201 | kroberts@bracheichler.com

Susan E. Frankel | 973.364.5209 | sfrankel@bracheichler.com

Hospital Patient Access to Clergy During COVID-19

On October 20, 2020, the U.S. Department of Health & Human Services, Office for Civil Rights (OCR) [announced](#) the resolution of religious discrimination complaints against two hospitals concerning clergy access to patients for religious purposes during the COVID-19 pandemic. The OCR enforces HIPAA as well as various federal civil rights and non-discrimination laws, including religious non-discrimination through its Conscience and Religious Freedom Division (CRFD).

BRACH EICHLER

With respect to the first hospital, a mother who was separated from her newborn after giving birth in the hospital due to the mother's diagnosis of COVID-19 requested visitation by a Catholic priest in order for the priest to baptize the infant. When the hospital denied the request due to its COVID-19 visitor exclusion policy, the mother complained to the CRFD. The second complaint was filed by the Diocese of Arlington which alleged that a hospital would not permit a priest to provide Catholic religious sacraments to a COVID-positive patient who was in an end-of-life situation and whose family requested that the priest visit the patient to provide the religious sacraments. The Diocese further alleged the hospital would not permit a priest to visit a non-COVID patient in the hospital's intensive care unit.

Upon receiving technical assistance from the OCR regarding CMS guidance, the subject hospitals agreed to amend and update their visitation policies to ensure clergy access to patients in non-COVID units and clergy access to patients in COVID units with certain restrictions concerning infection control and self-quarantine in certain circumstances. Among other things, the [CMS guidance](#) includes information on screening visitors and patients for COVID-19 and restrictions on visitations of hospital patients. As to the latter, the guidance states that "facilities must ensure patients have adequate and lawful access to chaplains or clergy in conformance with the Religious Freedom Restoration Act and Religious Land Use and Institutionalized Persons Act."

For more information, contact:

Joseph M. Gorrell | 973.403.3112 | jgorrell@bracheichler.com
Carol Grelecki | 973.403.3140 | cgrelecki@bracheichler.com
Erika R. Marshall | 973.364.5236 | emarshall@bracheichler.com

OSHA Continues its Push to Issue Citations for COVID-19 Violations

Since early in the COVID-19 pandemic, the U.S. Department of Labor, Occupational Safety and Health Administration (OSHA) has been receiving a large number of complaints concerning COVID-19 workplace safety issues. Although initially publicly [criticized](#) for its slow start in issuing citations for COVID-related violations, as of October 16, 2020, OSHA has issued [citations](#) to 85 establishments, totaling over \$1.2 million in fines. Violations include failures to:

- Implement respiratory protection programs;
- Provide a medical evaluation, respirator fit test, training on the proper use of a respirator and personal protective equipment;
- Report or record an injury, illness, or fatality; and
- Comply with the general requirement to furnish a safe workplace and comply with OSHA requirements under the Occupational Safety and Health Act's [General Duty Clause](#).

After receipt of a complaint, OSHA will conduct an inspection. OSHA has [six months](#) to determine whether to close the matter or issue citations. By October 16, 2020, there were 9,464 complaints filed at the federal level and 29,671 at the

state level since the pandemic began. Of those complaints, 8,931 have been closed at the federal level and 23,206 have been closed at the state level. To date, most [complaints](#) have been against general medical and surgical hospitals, postal service providers, and nursing homes, in that order. Employers that face the highest fines out of the list of 23 most recent citations include health facilities and nursing homes located in New York and New Jersey.

For more information, contact:

Riza I. Dagli | 973.403.3103 | rdagli@bracheichler.com
Lani M. Dornfeld, CHPC | 973.403.3136 | ldornfeld@bracheichler.com
Jocelyn Ezratty | 973.364.5211 | jezratty@bracheichler.com

STATE UPDATE

The Division of Consumer Affairs Announces Proposed and Adopted Telemedicine Rules

On October 19, 2020, Attorney General Gurbir S. Grewal and the Division of Consumer Affairs (the Division) [announced](#) rule proposals and adoptions for several licensing boards and committees that provide healthcare services through telemedicine. Rules were adopted for the following licensing boards and committees: [Acupuncture Examining Board](#), [Audiology and Speech-Language Pathology Advisory Committee](#), [Board of Nursing](#), [Board of Physical Therapy Examiners](#), [Board of Psychological Examiners](#), [Board of Social Work Examiners](#), and [Genetic Counseling Advisory Committee](#). Rules were proposed for the following licensing boards and committees: [Board of Marriage and Family Therapy Examiners](#), [Electrologists Advisory Committee](#), [Physician Assistant Advisory Committee](#), and the [Professional Counselor Committee](#). Comments to the proposed rules must be submitted by December 18, 2020.

In summary, both the adopted and proposed rules permit the applicable New Jersey licensee to provide telemedicine services (i) if he/she is located in New Jersey and provides healthcare services to any patient/client located in or out of New Jersey by means of telemedicine or telehealth, or (ii) if he/she is located outside of New Jersey and provides healthcare services to any patient/client located in New Jersey by means of telemedicine or telehealth. The rules contain requirements for (a) the standard of care; (b) establishing the licensee-patient relationship or licensee-client relationship, as applicable, for telemedicine and telehealth services; (c) the provision of telemedicine and telehealth services; (d) recordkeeping requirements; (e) protocols for prevention of fraud and abuse; and (f) privacy policies and practices. In addition to the above, the proposed rules set forth by the Physician Assistant Advisory Committee and the adopted rules for the Board of Nursing contain requirements for prescribing through telemedicine or telehealth.

For more information, contact:

John D. Fanburg, Chair | 973.403.3107 | jfanburg@bracheichler.com
Carol Grelecki | 973.403.3140 | cgrelecki@bracheichler.com
Cynthia J. Liba | 973.403.3106 | cliba@bracheichler.com

Community Providers Eligible For Reimbursement Of COVID-19 Expenses

The Commissioners of the New Jersey Department of Human Services (DHS) and the Department of Children and Families (DCF) jointly announced on October 19, 2020 that each of the departments will use federal coronavirus relief resources to provide up to \$25 million to help community providers remain open during the current public health emergency and assist with reimbursement of COVID-19-related costs. Community providers eligible to apply include licensed developmental disability and traumatic brain injury group homes, Family Success Centers and Home Visiting Programs, non-residential programs supporting victims of domestic abuse and their families, and personal care assistance agencies that participate in the New Jersey Medicaid program. DCF is providing this relief to all existing DCF contracted providers that are not providing congregate or residential care. The relief will provide reimbursement of COVID-19-related expenses dating from March 9, 2020 (the date Governor Murphy declared a public health emergency) to November 13, 2020. Items eligible for reimbursement include personal protective equipment, cleaning and infection control products, and HIPAA-compliant technology to assist with providing remote services.

To receive reimbursement, DHS- and DCF-eligible providers must submit applications to DHS or DCF by November 13, 2020, including documentation demonstrating costs expended between March 9, 2020 and November 13, 2020. Such costs must not have been previously budgeted for, paid for using previously budgeted monies, paid for with reimbursement from other state or federal relief programs, or pending a reimbursement decision from another state or federal relief program at the time of submission for this relief. Eligible providers also must submit an attestation within their applications for reimbursement. [DHS](#) and [DCF](#) have each provided a voucher worksheet for providers to complete in conjunction with their application and attestation. Reimbursement is anticipated for December 2020 through the New Jersey Department of Treasury.

For more information, contact:

Joseph M. Gorrell | 973.403.3112 | jgorrell@bracheichler.com
Carol Grelecki | 973.403.3140 | cgrelecki@bracheichler.com
Erika R. Marshall | 973.364.5236 | emarshall@bracheichler.com

New Jersey Legislative Update

2020-2021 State Budget Increases Medicaid Reimbursements – On September 29, 2020, Governor Phil Murphy signed into law the New Jersey State budget for the fiscal year ending June 30, 2021 (the [Budget](#)). Included in the Budget are increases in Medicaid reimbursement for personal care assistants, registered nurses, and licensed practical nurses. The reimbursement rate for personal care assistants is being increased by \$2 to \$20 per hour. With regard to nursing, the minimum reimbursement rates for early and periodic screening, diagnosis, and treatment/private duty nursing services are being increased by \$10 to \$60 per hour for registered nurses and \$48 for licensed practical nurses.

New Jersey Legislature Approves Bill to Permit Authorization of Medical Cannabis via Telemedicine – On September 24, 2020, the New Jersey Assembly approved a [Bill](#) which would permit the use of telemedicine and telehealth to authorize patients for medical cannabis and to issue written instructions for dispensing medical cannabis. The Bill, which had previously been approved by the New Jersey Senate, now awaits Governor Phil Murphy’s signature. Specifically, the Bill provides that for a period of 270 days following the effective date of the Bill, a healthcare practitioner would be permitted to authorize a patient who is a resident of a long-term care facility, has a developmental disability, is terminally ill, is receiving hospice care from a licensed hospice care provider, or is housebound as certified by the patient’s physician, for the medical use of cannabis using telemedicine and telehealth. After the 270-day period, a healthcare practitioner would be permitted to initially authorize any patient for the medical use of cannabis using telemedicine and telehealth, provided that, except in the case of a patient who is a resident of a long-term care facility, has a developmental disability, is terminally ill, is receiving hospice care from a licensed hospice care provider, or is housebound as certified by the patient’s physician, the patient has had at least one previous in-office consultation with the healthcare practitioner prior to the patient’s authorization for the medical use of cannabis. Following the initial authorization, the patient would be required to have at least one in-office consultation with the practitioner on an annual basis in order for the patient to receive continued authorization for the use of medical cannabis.

Board of Psychological Examiners to Require Opioid Education – Effective September 21, a new [regulation](#) was adopted by the New Jersey State Board of Psychological Examiners to require licensed psychologists to complete one continuing education credit in topics concerning prescription opioid drugs, including the risks and signs of opioid abuse, addiction, and diversion, during each biennial reporting period.

For more information, contact:

John D. Fanburg | 973.403.3107 | jfanburg@bracheichler.com
Keith J. Roberts | 973.364.5201 | kroberts@bracheichler.com
Ed Hilzenrath | 973.403.3114 | ehilzenrath@bracheichler.com

Brach Eichler In The News

Healthcare Law Member **Lani M. Dornfeld** was quoted in [Modern Healthcare](#) on October 8 on the resources needed by entities in the wake of cyberattacks.

Managing Member and Healthcare Law Chair **John D. Fanburg** writes in the current issue of the [Group Practice Journal](#) about how private equity is still an attractive option for provider groups seeking to monetize their practices.

On October 6, the Healthcare Law Practice issued two alerts, [“HHS Releases Reporting Requirement Details for Provider Relief Fund Recipients”](#) and [“HHS Announces a Phase 3 Distribution of Provider Relief Fund Payments.”](#)

BRACH EICHLER

Brach Eichler In the News (continued)

Brach Eichler's fourth and final [Cannabis Poll](#) received wide coverage in the press. Poll results were covered on [nj.com](#), [Politico](#), [101.5 Radio](#), [1010 WINS](#), and [PIX11 News](#), among other outlets.

In the wake of the Universal Health Services, cyberattack, Healthcare Law Member **Lani M. Dornfeld** commented on [FastCompany.com](#) about the prevalence of such attacks.

HIPAA CORNER

OCR Is Serious About its Right of Access Initiative – The Department of Health & Human Services, Office for Civil Rights (OCR) (HIPAA enforcement agency) has announced two additional settlements—its 8th and 9th—relating to the failure of a healthcare provider to timely provide copies of requested medical records to an individual. These announcements come on the heels of the OCR's September announcement of five settlements under what the OCR calls its "Right of Access Initiative." As explained in our September [Healthcare Law Update](#), under HIPAA, individuals have a "right of access" to the protected health information (PHI) about them held by a covered entity (e.g., a healthcare provider) in a "designated record set." Generally, a designated record of a healthcare provider includes the medical and billing records maintained for an individual, as well as other records used, in whole or in part, by the covered entity to make decisions about individuals. Covered entities must provide individuals, upon request, with access to PHI about them in a designated record set maintained by or for the covered entity. This includes the right to inspect or obtain a copy, or both, of the PHI, as well as

to direct the covered entity to transmit a copy to a designated person or entity of the individual's choice. Covered entities must respond to such requests within 30 days (with certain exceptions), and may charge only a reasonable, cost-based fee for copies in paper or electronic format.

The [8th settlement under the initiative](#) relates to allegations against an Arizona-based hospital for its alleged failure to provide copies of medical records to a parent after multiple requests and follow-up requests. Ultimately, the hospital sent all of the requested records more than 22 months after the parent's initial request. The resolution agreement reached includes a resolution payment of \$160,000 and a corrective action plan, with monitoring, for a period of two years. The [9th settlement under the initiative](#) involves a private medical practice specializing in neurology and pain management with offices in Manhattan and Miami Beach. OCR's investigation resulted from a patient complaint regarding multiple requests for medical records for over a year. The resolution agreement provides for a \$100,000 resolution payment and a corrective action plan, with monitoring, for a period of two years.

According to OCR Director Roger Severino, "It shouldn't take a federal investigation to secure access to patient medical records, but too often that's what it takes when healthcare providers don't take their HIPAA obligations seriously. OCR has many right of access investigations open across the country, and will continue to vigorously enforce this right to better empower patients."

If you would like assistance with your HIPAA or 42 CFR Part 2 privacy and security program, in managing or reporting a breach incident, or in business associate analysis and contracting, contact:

Lani M. Dornfeld, CHPC | 973.403.3136 | ldornfeld@bracheichler.com

BRACH | EICHLER LLC
Counsellors at Law

Attorney Advertising: This publication is designed to provide Brach Eichler LLC clients and contacts with information they can use to more effectively manage their businesses. The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters. Brach Eichler LLC assumes no liability in connection with the use of this publication.

Healthcare Law Practice | 101 Eisenhower Parkway, Roseland, NJ 07068

Members

Riza I. Dagli | 973.403.3103 | rdagli@bracheichler.com

Lani M. Dornfeld, HLU Editor | 973.403.3136 | ldornfeld@bracheichler.com

John D. Fanburg, Chair | 973.403.3107 | jfanburg@bracheichler.com

Joseph M. Gorrell | 973.403.3112 | jgorrell@bracheichler.com

Carol Grelecki | 973.403.3140 | cgrelecki@bracheichler.com

Keith J. Roberts | 973.364.5201 | kroberts@bracheichler.com

Counsel

Shannon Carroll | 973.403.3126 | scarroll@bracheichler.com

Debra W. Levine | 973.403.3142 | dlevine@bracheichler.com

Jonathan J. Walzman | 973.403.3120 | jwalzman@bracheichler.com

Edward J. Yun | 973.364.5229 | eyun@bracheichler.com

Associates

Colleen Buontempo | 973.364.5210 | cbuontempo@bracheichler.com

Lindsay P. Cambron | 973.364.5232 | lcambron@bracheichler.com

Paul J. DeMartino, Jr. | 973.364.5228 | pdemartino@bracheichler.com

Jocelyn E. Ezratty | 973.364.5211 | jezratty@bracheichler.com

Susan E. Frankel | 973.364.5209 | sfrankel@bracheichler.com

Ed Hilzenrath | 973.403.3114 | ehilzenrath@bracheichler.com

Cynthia J. Liba | 973.403.3106 | cliba@bracheichler.com

Erika R. Marshall | 973.364.5236 | emarshall@bracheichler.com

Roseland, NJ | New York, NY | West Palm Beach, FL | www.bracheichler.com | 973.228.5700

Stay Connected! Follow us on [LinkedIn](#), [Twitter](#), and [Facebook](#).