

Part 1 – Health Care Reform: Physicians and Patients’ Right to Freedom of Choice of Providers

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To date, only hospitals are required to present lists of some types of providers to patients so that they can choose which providers they want to render services to them. Likewise, statutes in some, but not all states, require physicians and other types of providers to give notice to patients if they have financial/ownership interests in providers to which they make referrals. As a result of health care reform, the “picture,” with regard to physicians and patients’ right to freedom of choice, is about to change.

Specifically, physicians who make referrals for certain types of imaging services are required to inform patients in writing at the time referrals are made that patients may obtain services from providers of their choice. Physicians are also required to provide patients with a list of providers who supply such services in areas in which patients reside. **It appears that the Secretary of the U.S. Department of Health and Human Services (DHHS) may also have the discretion to apply this requirement to other designated health services (DHS) under the so-called Stark laws, including home health and HME services.**

The Patient Protection and Affordable Care Act (PPACA) provides as follows:

(a) In General – Section 1877(b)(2) of the Social Security Act (42 U.S.C. 1395nn(b)(2)) is amended by adding the following new sentence: ‘Such requirements shall, with respect to magnetic resonance imaging, computed tomography, positron emission tomography, and any other designated health services specified under subsection (h)(6)(D) that the Secretary determines appropriate, include a requirement that the referring physician inform the individual in writing at the time of the referral that the individual may obtain the services for which the individual is being referred from a person other than a person described in paragraph (A)(i) and provide such individual with a written list of suppliers (as defined in section 1861(d)) who furnish such services in the area in which such individual resides.’

(b) Effective Date – The amendment made by this section shall apply to services furnished on or after January 1, 2010.

Although there is a lack of clarity about whether the above criteria related to imaging services require immediate compliance or compliance only after the Secretary has published final regulations implementing this section, it is clear that physicians will be required to present lists of imaging providers to their patients and to inform of their right to choose.

Physicians are currently required to abide by patients' right to freedom of choice of providers. In addition to the state statutes described above, there are two sources of this right that apply to physicians:

All patients have a common law right, based upon court decisions, to control the care provided to them, including who renders it. Thus, when patients voluntarily express preferences for certain providers, their choices must be honored regardless of payor source or type of care.

Federal statutes of the Medicare and Medicaid Programs guarantee Medicare beneficiaries and Medicaid recipients the right to freedom of choice of providers. (Medicaid recipients may have waived this right if they participate in waiver programs.) Consequently, when Medicare patients and non-waiver Medicaid patients voluntarily express preferences for providers, these choices must be honored. If patients voluntarily express preferences or choose providers other than those ordered by their attending physicians, then patients' choices "trump" physicians' orders and must be honored.

Practitioners may view these new requirements with skepticism. After all, as a practical matter, many patients are likely to choose providers recommended by their physicians. Some practitioners may also view the presentation of lists to patients as promotional opportunities for providers required to present such lists. Comments to the preamble of "safe harbor" regulations published by the Office of Inspector General (OIG) seem to reinforce this point:

Comment: Commenters overwhelmingly supported requiring health care providers to disclose to patients any financial relationships with sources of referral. They argued that such disclosure would not be burdensome, and that many codes of professional ethics, as well as many state statutes, already mandate such disclosure.

Response: With one exception, we have decided not to require such disclosure to qualify under a particular safe harbor provision. First, the activities covered under each safe harbor provision are by definition activities that we deem to have a low potential for abuse. Second, disclosure in and of itself would not provide a significant additional assurance that abuse would not occur, even though disclosure may reduce the potential for abuse somewhat by increasing consumer awareness of the relationship between health care providers. Finally, it is possible for a health care provider to cast a disclosure to fit that provider's promotional objective, which is exactly the opposite result from that which we would want to achieve.

Despite such skepticism, it is clear that competition among providers continues to "heat up," and that legislators and regulators are determined to address the issue of patients' right to freedom of choice. It is also clear that, despite fierce competition among providers, the rights of patients cannot be trampled.