GARDNER SKELTON
ATTORNEYS AT LAW

LEGAL NEWS FOR YOUR BUSINESS

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Healthcare Provider Alert

NO SURPRISES ACT: WHAT HEALTHCARE PROVIDERS NEED TO KNOW

The No Surprises Act, effective January 1, 2022, is designed to protect patients from "surprise bills" – bills for services patients unexpectedly receive from out-of-network (OON) providers in an in-network facility. The law also promotes patient transparency by requiring providers to give good faith estimates of the total cost of expected care to uninsured and self-pay individuals. This law may materially increase administrative burdens on practices and inhibit their ability to bill patients for services. The following are some non-exhaustive examples of how physicians may be affected.

Physicians (and other healthcare providers) providing emergency services

If out-of-network physician provides emergency services at an in-network hospital, that physician may not balance bill the patient. The patient's payer is required to pay the physician a qualifying payment amount, which is often its median contract rate. If the parties disagree on the payment rate, the law created the Independent Dispute Resolution (IDR) process to assist payers and providers with determining the final payment amount for services. For the calendar year 2022, parties must pay a $50 administrative fee at the time of submission to the IDR, and an IDR entity fee that ranges from $200-$500 for single cases, and $268-$670 for batched cases, respectively.

Physicians providing services to non-emergency patients

If a physician provides services to a patient who is no longer receiving emergency services (the patient is stable, can travel to an available in-network provider, and can receive information and provide informed consent), and that physician is out-of-network at an in-network hospital or other covered facility, the physician must obtain consent from the patient to bill the patient for anything their payer does not pay. The government has provided a sample consent form which explains to the patient that they must provide

permission in order to be billed by that physician. Since the patient is in the hospital, non-hospital-based practices will have to determine who from their office can obtain this consent prior to the services being rendered.

Physicians providing services in the office

If a physician provides services to a self-pay or uninsured patient in the office, prior to the services being rendered (there is a schedule for how many days in advance this has to be given to patients) a "Good Faith Estimate" must be given to patients listing the services for their course of care they are expected to receive by CPT code and how much it will cost. If the estimate is more than $400 off, the patient may enter into a fee dispute process.

Practices must also post a notice of patients' billing protections on their website and in a conspicuous place at the practice. The government has provided a sample notice that can be used.

The No Surprises Act has spurred controversy. The American Medical Association (AMA) and the American Hospital Association (AHA) have filed a lawsuit asserting that certain aspects of the IDR favor payers over providers.

If you have questions about the No Surprises Act or how to comply with its requirements, please contact ***Heather Skelton*** *or* ***John Gibson****.*

General Business Alert

WHEN IS COVID-19 A DISABILITY?

On December 14, 2021, the Equal Employment Opportunities Commission (EEOC) released ***Guidance*** on when Covid-19 is considered a disability under the Americans with Disabilities Act (**ADA**). Under the ADA, an employee is considered an "individual with a disability" if (1) s/he has an actual disability, (2) s/he has a record of having a disability, or (3) if s/he is regarded as having a disability.

Covid-19 can be an **actual disability** if an employee has new, ongoing, or recurrent symptoms attributable to Covid-19 that lasts weeks or months after being infected with Covid-19 (known as "***Long Covid-19***"). In some cases, an employee can also have an actual disability if s/he has a sufficiently severe case of Covid-19 for a short period of time or if the initial case of Covid-19 substantially worsens an existing condition. Conversely, if an employee has Covid-19 and is asymptomatic or has mild symptoms (similar to the cold or flu) that subside in a few weeks – s/he does not have an actual disability under the ADA.

An employee has a **record of having a disability** if s/he has a history of having Long Covid-19. For example, an employee who had Long Covid-19 and recovered has a record

of having a disability. (Oddly enough, an employee could have a “record of” a disability even if s/he was misdiagnosed as having Long Covid-19.)

Finally, an individual can be **regarded as having a disability** if the employee is fired, not hired, harassed, or otherwise subjected to an adverse employment action because the employee has Covid-19, or even if employer *mistakenly* believes the employee has Covid-19. An employee can be regarded as having a disability if their actual or perceived impairment is a sufficiently severe case of Covid-19 or Long Covid-19. However, an employee is not regarded as having a disability if the employee’s actual or perceived impairment lasts, or is expected to last, six months or less and is minor.

An employer who takes an adverse employment action against an employee because the employee has Covid-19 will not violate the ADA if the employee poses a “direct threat.” For example, if an employee has symptoms of Covid-19 and wants to work at their desk, the company can lawfully prohibit the employee from coming to work because of their symptoms. In this instance the company has not violated the ADA because the sick employee poses a “direct threat” to coworkers.

If an employee qualifies as an individual with a disability because s/he has an **actual disability** or **has a record of having a disability**, the employer must provide the employee with reasonable accommodations. Employers should review their company policies to allow for accommodations likely to be requested by individuals suffering from Long Covid-19 or Covid-19-related disabilities (e.g., alternative schedules, remote work, or leave, if necessary). Employers should also be diligent about speaking to all employees who suggest they are struggling with the long-term effects of Covid-19.

Finally, employers should continue to train supervisors and managers on how to deal with Covid-19-related requests for accommodation.

If you have any questions about when you are required to accommodate employees with Covid-19, please contact ***Nicole Gardner*** *or* ***Erin Ball****.*

General Business Alert

NEW STANDARD FOR “EQUALITY” UNDER THE EQUAL PAY ACT

The Equal Pay Act (**EPA**) prohibits employers from discriminating “between employees on the basis of sex by paying wages to employees… at a rate less than the rate at which [it] pays wages to employees of the opposite sex.” Previously, courts determined that the EPA required companies to make sure the total compensation for employees of the opposite sex were equal. An employee’s total compensation consists of all payments a company makes to an employee. An employee’s salary, profit sharing, expense accounts, monthly minimums, bonuses, and any other form of reimbursement, payments, and earnings are all components of an employee’s total compensation.

On December 3, 2021, the U.S. Court of Appeals for the Fourth Circuit (whose decisions govern North Carolina, South Carolina, Virginia, West Virginia, and Maryland) decided in ***Sempowich v. Tactile Sys. Tech., Inc.*** that it is **not** total compensation that must be equal, rather the EPA requires employees to be equal on each component of their compensation. Why? The EPA places an emphasis on wage *rates*, so compensation cannot be combined into one lump sum when comparing earnings.

How does this apply to your employees? Take two employees: Employee A, a male employee, and Employee B, a female employee. Employee A and Employee B have the same qualifications, job title, job duties, and supervisors. Employee A receives $90,000 in salary and has a $5,000 expense account. Employee B receives $80,000 in salary and also has a $5,000 expense account. At the end of the year, Employee A receives a bonus of $5,000, bringing his total compensation to $100,000; and Employee B receives a bonus of $15,000, bringing her total compensation also to $100,000. Although Employee A and Employee B receive the same total compensation, Employee B can still sue the company for discrimination because her salary is lower than Employee A's salary.

It remains to be seen whether the decision will be followed outside of the Fourth Circuit. For now, employers should examine if any inequalities exist regarding the components of their employees' pay. Additionally, employers who distribute bonuses as a means of closing or remedying inequalities in base pay may be more vulnerable to lawsuits in the years that come.

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