Medicare Revocation Actions for Failure to Provide Access to Documentation are on the Rise!

(September 25, 2020): In recent years, many individuals (especially younger members of our work force) have embraced the chance to supplement their income through short-term engagements in the ***"gig economy."*** Notably, both professionals and non-professionals alike have found flexible, part-time opportunities online, allowing them to work remotely as independent contractors. A number of physicians, nurse practitioners and physician assistants have taken advantage of the chance to participate in the gig economy, working virtually and providing telemedicine services for patients. Unfortunately, many of these licensed professionals have conducted little or no due diligence into the companies engaging them to conduct evaluations by phone, video or asynchronously. In some cases, the company engaging these licensed professionals to provide telemedicine evaluations has been alleged to have illegally funneled prescriptions issued by these professionals to third-party durable medical equipment (DME) suppliers. Associated physicians, nurse practitioners and physician assistants (collectively referred to as "Telemedicine Providers") have then found themselves subject to administrative sanctions, civil liability, and, in some case, criminal prosecution. ***This article examines the Medicare revocation actions that have resulted from a Telemedicine Provider's failure to provide access to documentation related to telemedicine services that are currently being pursued by Medicare Administrative Contractors (MACs) around the country.***

I. Overview of Statutory and Regulatory Concerns When Providing Telemedicine Evaluations:

With the advent of COVID, both governmental and private payors alike have supported the expansion of telehealth / telemedicine services. Coverage and payment rules have been expanded by most payors and patients have welcomed the opportunity to be evaluated remotely by their caregiver. Generally, the current wave of telemedicine related enforcement actions has been unrelated to the coverage expansions resulting from the spread of COVID. The vast majority of Medicare revocation actions associated with improper telemedicine business practices have been related to pre-COVID conduct. An overview of these actions is provided below:

- **Intermediary Marketing Companies.** Over the last few years, licensed providers with prescribing authority have been actively recruited by an intermediary company[1] ***OR*** have

responded to an online advertisement seeking to hire physicians, nurse practitioners or physician assistants to perform remote telemedicine evaluations. These companies essentially serve as middlemen – they are not typically participating providers or suppliers in the Medicare program.

- **Lists of Beneficiaries to be Evaluated Remotely are Assembled by the Intermediary Marketing Companies.** Using a variety of patient recruiting and screening methods, representatives of the intermediary marketing company will work to assemble a list of prospective beneficiaries who have expressed an interest in being evaluated for DME. The intermediary marketing company then provides these beneficiary lists to Telemedicine Providers who have been engaged to conduct remote assessments and evaluations[2] of these individuals. After completing an evaluation, the Telemedicine Provider then decides whether it is medically necessary and appropriate to order DME for the beneficiary. Typically, the licensed providers have been paid a fixed amount of $25 -- $30 for each telemedicine evaluation conducted.
- **Beneficiaries Have No Control of Where an Order or Prescription is Referred.** In the cases we have handled, orders for DME have ***NOT*** been issued to a supplier, pharmacy or testing laboratory selected by the patient. Instead, the order has been directed by the intermediary marketing company to a particular supplier, pharmacy or testing laboratory with whom the company has a business relationship.[3]
- **Unified Program Integrity Contractors (UPICs) are Using Data Mining to Identify Potentially Fraudulent Telemedicine Business Relationships.** Through an analysis of billing data, UPICs have noted that some DME suppliers have billed Medicare for items based on orders issued by a physician, nurse practitioner or physician assistant who did ***NOT*** bill Medicare for an associated Evaluation and Management (E/M) service, either directly or through an appropriate reassignment relationship.
- **UPIC Requests for Medical Records Have Often Gone Unanswered or Unfulfilled.** Both UPICs and a variety of state and federal law enforcement agencies around the country have been investigating questionable telemedicine related business relationships. One of the essential steps in investigating the propriety of these claims has included an assessment of the beneficiary's medical records, along with the telemedicine evaluation conducted. These medical records and intake documents are often maintained by the intermediary marketing company and have not been downloaded or maintained by the ordering physician, nurse practitioner or physician assistant. Moreover, the contracts between the parties often prohibit the physician from retaining copies of documents. In several cases we have handled, the licensed provider's relationship with the intermediary marketing company was terminated long ago and the provider no longer has access to the beneficiary records now being requested.
- **Telemedicine Providers are Often Unaware that a Marketing Company is Engaging in Illegal Kickback Activities.** Licensed providers are not usually privy to the terms of any business relationship between an intermediary marketing company and an associated DME supplier. Both UPICs and law enforcement agencies around the country are investigating these telemedicine related business relationships.

II. Medicare Revocation Actions Based on a Provider's Failure to Provide Access to Documents are Being Pursued by CMS Around the Country:

The failure to respond or comply with a UPIC request for records is one of the many bases[4] that CMS may assert to revoke a provider's enrollment in the Medicare program, along with any corresponding provider agreement. As provided by 42 C.F.R. § 424.535(a)(10):

> ***"§ 424.535 - Revocation of enrollment in the Medicare program.***
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> ***(10) Failure to document or provide CMS access to documentation.*** *(i) The provider or supplier did not comply with the documentation or CMS access requirements specified in § 424.516(f). . .*"
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> As 42 C.F.R. § 424.516(f) provides:
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> - ***424.516 - Additional provider and supplier requirements for enrolling and maintaining active enrollment status in the Medicare program.***
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> ***"(f) Maintaining and providing access to documentation.*** *(1)(i) A provider or a supplier that furnishes covered ordered, certified, referred, or prescribed Part A or B services, items or drugs is required to –*
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> *(A) Maintain documentation (as described in paragraph (f)(1)(ii) of this section) for 7 years from the date of service; and*
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> *(B) Upon the request of CMS or a Medicare contractor, to provide access to that documentation (as described in paragraph (f)(1)(ii) of this section).*
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> *(ii) The documentation includes written and electronic documents (including the NPI of the physician or, when permitted, other eligible professional who ordered, certified, referred, or prescribed the Part A or B service, item, or drug) relating to written orders, certifications, referrals, prescriptions, and requests for payments for Part A or B services, items or drugs.*
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> ***(2)(i) A physician or, when permitted, an eligible professional who orders, certifies, refers, or prescribes Part A or B services, items or drugs is required to –***
>
> ***(A) Maintain documentation (as described in paragraph (f)(2)(ii) of this section) for 7 years from the date of the service; and***
>
> ***(B) Upon request of CMS or a Medicare contractor, to provide access to that***

documentation (as described in paragraph (f)(2)(ii) of this section).

(ii) The documentation includes written and electronic documents (including the NPI of the physician or, when permitted, other eligible professional who ordered, certified, referred, or prescribed the Part A or B service, item, or drug) relating to written orders, certifications, referrals, prescriptions or requests for payments for Part A or B services, items, or drugs." **(emphasis added).**

III. Medicare Revocation Actions for the Failure to Provide Medical Records Have Typically Sought a 10-Year Re-Enrollment Bar.

CMS extended the maximum re-enrollment bar that can be applied after a revocation from three years to ten years through a Final Rule, which was published on September 10, 2019 and became effective November 4, 2019.[5] Although a 10-year re-enrollment bar is supposed to be reserved for cases involving serious misconduct, CMS has been actively seeking a 10-year re-enrollment bar in cases where the basis for exclusion is the failure to provide access to documentation.[6]

- **What is the Impact of a Medicare Revocation Action?** The imposition of a 10-year re-enrollment bar can effectively destroy a health care provider's practice. Moreover, it will likely limit a provider's employment options. The potential consequences of having your Medicare enrollment revoked include, but are not limited to the following:
- **Depending on the facts, the role you played in a telemedicine fraud case may result in a referral to the U.S. Department of Justice (DOJ) for investigation and possible prosecution.** Since 1994, CMS has participated in an interagency agreement with the DOJ which allows CMS program integrity contractors (in this case, UPICs) to send health care fraud referrals directly to the DOJ without having to first route the referral through the Office of Inspector General (OIG). Your involvement in a telemedicine related fraud case will be carefully evaluated. For instances, did you actually conduct evaluations by phone, video or asynchronously OR did you perform an evaluation based solely on the medical information and intake documents provided to you by an intermediary marketing company?
- **You will be likely be barred from enrolling in the Medicare program for a period of 10 years.** In light of the cases we have handled since the issuance of the November 4th Final Rule, it appears to be CMS's policy to seek to impose a 10-year enrollment bar in revocation cases based on a violation of 42 C.F.R. § 424.535(a)(10).
- **You will likely be placed on Medicare's "Preclusion List."** Individuals and entities that have been revoked from Medicare, are under an active reenrollment bar, ***AND*** CMS has determined that the underlying conduct that led to the revocation is detrimental to the best interests of the Medicare program may qualify to be placed on the Medicare Preclusion

List. The Preclusion list is made available to Medicare Advantage and Part D plans. If placed on the Preclusion List, an individual or entity will not be permitted to enroll in the Medicare Part C or Part D programs.

- **A Medicare revocation action may result in the revocation of your enrollment as a provider in your state's Medicaid program.** Using Texas as an example, Rule § 371.1703(a) of the Texas Administrative Code provides that:

  "(a) The OIG may terminate the enrollment or cancel the contract of a person by debarment, suspension, revocation, or other deactivation of participation, as appropriate. The OIG may terminate or cancel a person's enrollment or contract if it determines that the person committed an act for which a person is subject to administrative actions or sanctions. . . .

  (b)(7) a provider that is terminated or revoked for cause, excluded, or debarred under Title XVIII of the Social Security Act or under the Medicaid program or CHIP program of any other state;"[7]

- **A Medicare revocation action will result in a report being sent to the National Practitioner Databank (NPDB).** As the NPDB Guidebook[8] notes, *"formal or official actions such as revocation of suspension of a license, certification agreement, or contract for participation in government health care programs; reprimand; censure; or probation,"* is considered to be a final adverse action and must be reported by a Federal agency.
- **A report to the NPDB may result in an investigation by your State Medical Board.** A revocation action based on your failure to provide records to a UPIC may generate a collateral investigation by your state licensing board since you are likely required to maintain adequate patient records. For instance, under Rule § 165.1(a) of the Texas Administrative Code, a licensed physician is required to maintain an "adequate medical record" for each patient that is complete, contemporaneous and legible. Your failure to maintain a copy of the records you reviewed when making a telemedicine evaluation may constitute a violation of your obligations under the Texas Medical Practice Act. As such, you may be subject to disciplinary action.
- **A Medicare revocation of your billing privileges may result in the termination of your hospital credentialing.** Many hospitals require that a physician, nurse practitioner or physician assistant be enrolled in the Medicare program (or at the very least, be eligible to enroll in the Medicare program), in order to be credentialed and granted privileges. If you have been barred from enrollment in Medicare, you may not be eligible to obtain privileges at a hospital.
- **Termination from commercial payor agreements.** Unfortunately, Medicare revocation actions are often used by commercial payors as a basis for terminating a provider from their plan.
- **Loss of employment.** The collateral consequences of a Medicare revocation action can

greatly limit your ability to work for a practice or entity that treats Medicare and Medicaid patients. As a result, you may be terminated from employment.

IV. Responding to a UPIC Request for Records:

We cannot overemphasize the seriousness of a UPIC request for records, especially when those records are related to your telemedicine evaluation of a patient's DME needs. Remember – UPICs are tasked with identifying suspected cases of fraud and abuse being committed against the Medicare and Medicaid programs. Should you fail to provide records requested by a UPIC, the proposed revocation of your Medicare billing privileges may be the least of your problems. Therefore, it is essential that you engage qualified health law counsel to represent you and guide you through this administrative process. Liles Parker attorneys have extensive knowledge of the Medicare revocation process and have successfully represented multiple physicians and nurse practitioners in the appeal of a proposed revocation action, including those involving failure to respond to a records request. **For a free consultation, give us a call. We can be reached at: (202) 298-8750.**

Robert W. Liles serves as Managing Partner at the health law firm, Liles Parker, Attorneys and Counselors at Law. Liles Parker attorneys represent individuals and entities around the country in connection with administrative audits (UPIC audits / private payor audits), civil False Claims Act cases, and criminal violations of the Federal Anti-Kickback Statute and EKRA. Are you currently being audited or under investigation? We can help. For a free initial consultation regarding your situation, call Robert at: 1 (800) 475-1906.

[1] Often the companies identify themselves as "locum tenens" agencies, or "telemedicine providers." Most have a contract the physician signs that (1) doesn't permit the physician to retain any patient records, and (2) requires the physician to agree not to file any claims or bill the patient.

[2] A variety of telemedicine compliance issues arise at this stage of the agreement. Many times, the physician does not directly speak with the patient. The physician's agreement with the intermediary may say that the physician is supposed to conduct their telemedicine services "in compliance with their state licensing law" but most physicians have no idea what their state law requires.

[3] Licensed providers are not usually privy to the terms of any business relationship between a telemedicine marketing company and an associated DME supplier, compound pharmacy or testing laboratory.

[4] For an overview of the various reasons that a provider's Medicare enrollment and billing privileges may be revoked, please see our **article** titled ***"42 CFR Sec. 424.535(a) Medicare Revocation Actions — Your Medicare Billing Privileges Can be Revoked For a Host of New Reasons. Are You Facing a Medicare Revocation Action? If so, You Must Act Fast to Preserve Your Appeal Rights."*** (March 9, 2020).

[5] *See Medicare, Medicaid, and Children's Health Insurance Programs; Program Integrity Enhancements to the Provider Enrollment Process*, 84 Fed. Reg. 47794 (Sep. 10, 2019).

[6] See 42 C.F.R. § 424.535(a)(10).

[7] **Title 1, Part 15, Rule § 371.1703(a)** of the Texas Administrative Code, *"Termination of Enrollment or Cancellation of Contract."*

[8] **NPDB Guidebook** (October 2018), (Page E-81).