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The Only Thing Constant is Change:

HOSPITAL MEDICAID REIMBURSEMENT IN 2023 AND BEYOND

34th Annual Health Law Conference

Thursday, April 6, 2023

Presenters: Monica Leo & Carlos Zaffirini

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AGENDA

- I. CMS (Centers for Medicare & Medicaid Services) February 17, 2023
Informational Bulletin on Health Care-Related Taxes and Hold Harmless
Arrangements Involving the Redistribution of Medicaid Payments
- II. Disproportionate Share Hospital (DSH) Program Changes
- III. Outpatient Transition to EAPGs (Enhanced Ambulatory Patient Groups)
- IV. Changes to CHIRP (Comprehensive Hospital Increase Reimbursement
Program) for 2025
- V. Other Topics

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CMS INFORMATIONAL BULLETIN ON HEALTHCARE-RELATED TAXES AND HOLD HARMLESS ARRANGEMENTS

Background

- On February 17, 2023, CMS issued the Informational Bulletin on Health Care-Related Taxes and Hold Harmless Arrangements Involving the Redistribution of Medicaid Payments, available at <https://www.medicaid.gov/federal-policy-guidance/downloads/cib021723.pdf>
- In this Bulletin CMS takes issue with health care-related tax programs where taxpaying providers, without any government involvement, voluntarily contribute funds to support other taxpaying providers (i.e., a redistribution or pooling arrangement).
 - CMS asserts that such redistribution arrangements are impermissible under federal law.
 - But the federal law limits CMS authority to situations:
 - (1) where a governmental entity is involved and
 - (2) where some dollar return is guaranteed.

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CMS INFORMATIONAL BULLETIN ON HEALTHCARE-RELATED TAXES AND HOLD HARMLESS ARRANGEMENTS

Authorizing Statute 42 U.S.C. § 1396b(w)(4)

For purposes of paragraph (1)(A)(iii), there is in effect a hold harmless provision with respect to a broad-based health care related tax imposed with respect to a class of items or services if the Secretary determines that any of the following applies: . . .

(C)(i) The State or other unit of government imposing the tax provides (directly or indirectly) for any payment, offset, or waiver that guarantees to hold taxpayers harmless for any portion of the costs of the tax. . . .

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CMS INFORMATIONAL BULLETIN ON HEALTHCARE-RELATED TAXES AND HOLD HARMLESS ARRANGEMENTS

CMS' Interpretation Has Been Repeatedly Rejected

- The Bulletin specifically revives the agency's attempts to assert its jurisdiction over wholly private arrangements between hospitals, lacking any state involvement, which it has attempted and failed to do multiple times:
 - OIG rejected similar arguments while investigating a Missouri provider assessment in 2004, finding "no regulations precluding the [pooling] arrangement" between private Missouri providers that were designed to mitigate the effects of a provider tax.
 - The Missouri pooling arrangement continues to this day, and CMS has never disallowed federal matching funds based on Missouri's pooling arrangement.

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CMS INFORMATIONAL BULLETIN ON HEALTHCARE-RELATED TAXES AND HOLD HARMLESS ARRANGEMENTS

CMS' Interpretation Has Been Repeatedly Rejected (Continued)

- After strong, bipartisan opposition, CMS withdrew the 2019 proposed Medicaid Fiscal Accountability Regulation (MFAR), which, among other proposals, previewed the Bulletin's assertion that no governmental involvement is necessary to create a prohibited hold harmless and that "reasonable expectations" could result in a prohibited guarantee.
- CMS acknowledged that numerous commenters stated CMS "lacked statutory authority for its proposals and was creating regulatory provisions that were ambiguous or unclear and subject to excessive Agency discretion."
 - In the 2021-22 litigation with Texas over CMS' attempted withdrawal of Texas's 1115 Waiver Demonstration, a federal judge observed that CMS' interpretive position—very similar to that set forth in the Bulletin—was "distanced" from the text of the governing statute.

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