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Published weekly by the Hunton Andrews Kurth Health Care Practice Group, *Three Key Things in Health Care* offers snapshots of three significant issues in health care that we believe merit your attention. Our goal is to provide actionable ideas that will benefit your organization. We welcome your feedback!

- **Health systems should be thoughtful when cutting costs in their compliance and legal departments.**
  - In a prior issue we noted that having knowledgeable counsel running the traps on financial arrangements with physicians was a bit like buying fire insurance – you may not like the premiums, but no one wants the risk of going bare or a cut-rate policy.
  - Health systems across the country are engaging in significant cost-cutting efforts to address the significant financial pressures flowing from the COVID-19 crisis, including staffing reductions focused on corporate and administrative departments.
  - Despite the fact that health care is one of the most highly regulated industries, recent surveys indicate that health care organizations often have legal budgets that are already at or below all-industry medians (averaging around 0.3% of total revenue).
  - Notwithstanding the foregoing, many health system legal departments have been pushed to reduce budgets even further as part of system-wide cost-cutting efforts.
  - Imposing mandatory percentage reductions on legal departments yields relatively low incremental cost savings given the average legal spend is such a small portion of total expenditures, but could result in material increases in risk if under-resourced legal departments are not able effectively to monitor and manage the significant regulatory and compliance issues that health systems face.
  - For an average health system with $3 billion in revenue and a legal spend of $9 million (or 0.3% of revenue), a mandated system-wide cost reduction of 3% would yield savings of $85 million, but legal department savings would be just $270,000.
  - The average system has a 1.3% annual risk of a False Claims Act ("FCA") settlement based on Stark Law violations, with an average settlement amount of $27.5 million.
    - If mandated legal department "savings" increased the risk of a Stark Law settlement by just 1%, this equates to an increased risk of $275,000 per year.
  - **Key takeaway:** As system-wide cost cutting efforts are implemented, health systems must consider the potential for enhanced risk from understaffed legal and compliance departments and confirm the benefits outweigh this increased exposure before imposing percentage reductions on those departments.
- **A new FAQ published by HHS creates confusion about permitted uses of Provider Relief Fund payments.**
  - The CARES Act includes funds to "reimburse … eligible health care providers for health care related expenses or lost revenues that are attributable to coronavirus."
  - Under the statute's plain language, if a hospital lost revenue due to coronavirus (e.g., suffered a reduction in revenue due to canceled elective procedures) the hospital would be permitted to reimburse itself for such lost revenues from a Provider Relief Fund payment.

- A new FAQ published by HHS on June 2 muddies the waters considerably:

  *The term "lost revenues that are attributable to coronavirus" means any revenue that you as a healthcare provider lost due to coronavirus. This may include revenue losses associated with fewer outpatient visits, canceled elective procedures or services, or increased uncompensated care. Providers can use Provider Relief Fund payments to cover any cost that the lost revenue otherwise would have covered, so long as that cost prevents, prepares for, or responds to coronavirus. Thus, these costs do not need to be specific to providing care for possible or actual coronavirus patients, but the lost revenue that the Provider Relief Fund payment covers must have been lost due to coronavirus. HHS encourages the use of funds to cover lost revenue so that providers can respond to the coronavirus public health emergency by maintaining healthcare delivery capacity, such as using Provider Relief Fund payments to cover: Employee or contractor payroll; Employee health insurance; Rent or mortgage payments; Equipment lease payments; [or] Electronic health record licensing fees.*

- CMS appears to be imposing a new use test related to lost revenues that imposes additional tracking and recordkeeping requirements that seem wholly unnecessary under the statute when reliable quantification of lost revenue should suffice; moreover, how providers would be expected to show that costs prevent, prepare for or respond to coronavirus is unclear at best.

- **Key takeaway:** In the absence of further clarification, providers will need to be prepared to demonstrate the amount of their lost revenue, that the revenue was lost due to coronavirus, and that the associated amount of Provider Relief Fund payments was used to cover costs that (i) the lost revenue otherwise would have covered, and (ii) prevented, prepared for or responded to coronavirus.

- **A greater emphasis on the health of our most vulnerable populations is needed.** This is hardly new thinking, but the effects of the pandemic (particularly viewed in light of the events of the past several weeks) brings this important goal back to the fore.

  - Our most vulnerable populations, including the elderly and those with serious underlying health conditions, have shouldered the brunt of COVID-19.

  - Some of this can be traced to institutional roots (nursing homes as the perfect breeding/transmission ground for the coronavirus). Other aspects flow from access issues (both to care for COVID-19 and for pre-existing conditions) as well as a system that places its greatest emphasis (at least in terms of research and reimbursement) on treating the ill rather than prevention of chronic disease.

  - In addition to the population health benefits that have been written about at length elsewhere, consider the advantage our country would have had in fighting the pandemic if nursing homes had been better equipped (with staff, supplies and funding) to address the spread of the virus and if we had devoted greater resources to addressing chronic disease issues in our population (e.g., less diabetes, cardiac disease and chronic lung disease).

  - **Key takeaway:** A renewed emphasis on caring for each other (at every level) and heading off chronic disease will pay huge dividends in terms of population health and the overall well-being of our society.


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