



FEDERAL HEALTHCARE LAW UPDATE



New Jersey Pharmacy Operators and Pharmacist Charged in Healthcare Fraud Scheme

On September 18, 2023, the U.S. Attorney's Office, District of New Jersey, [announced](#) two pharmacy executives and a pharmacist were arraigned on charges of defrauding Medicare and TriCare of \$33 million dollars. Each of the three defendants was charged with conspiracy to commit health care fraud and wire fraud. Additionally, the CEO/owner of Apogee Bio-Pharm LLC in Edison, New Jersey (the Pharmacy) and the director of operations of the Pharmacy were charged with wire fraud, conspiracy to violate the federal anti-kickback statute, and payment of illegal kickbacks.

Pursuant to the [indictment](#), the defendants allegedly worked with marketing companies that pressured Medicare and TriCare beneficiaries to try expensive medications that were medically unnecessary. The marketing companies then sent pre-marked prescription pads for particular drugs that would produce high reimbursement to telemedicine companies. The telemedicine companies then paid doctors to approve prescriptions. The marketing companies paid the telemedicine companies kickbacks for every beneficiary referred for a prescription. The marketing

companies then directed the prescriptions to the Pharmacy and the Pharmacy filled the prescriptions and sought reimbursement from federal health care benefit programs. The Pharmacy paid a portion of the reimbursement to the marketing companies as a kickback.

The defendants face the following penalties if convicted: (i) the health care fraud and wire fraud conspiracy charges carry a maximum potential penalty of 20 years in prison; (ii) the health care fraud charges carry a maximum potential penalty of 10 years in prison; (iii) the wire fraud charges carry a maximum potential penalty of 20 years in prison; (iv) the charge of conspiracy to violate the Anti-Kickback Statute carries a maximum potential penalty of five years in prison; (v) and the charges of payment of illegal kickbacks are punishable by 10 years in prison. Each count is punishable by a fine of \$250,000, or twice the gain or loss from the offense, whichever is greatest.

For more information, contact:

Isabelle Bibet-Kalinyak | 973.403.3131 | ibibetkalinyak@bracheichler.com

Riza I. Dagli | 973.403.3103 | rdagli@bracheichler.com

Edward J. Yun | 973.364.5229 | eyun@bracheichler.com

OIG Opines that Physician Bonuses May be Tied to ASC Facility Fees

On October 10, 2023, the Department of Health and Human Services Office of Inspector General (OIG) issued [Advisory Opinion No. 23-07](#), concluding that a medical practice may pay bonuses to physician employees that are tied to profits from facility fees attributable to procedures performed by the employed physicians at an ambulatory surgical center (ASC) owned by the medical practice. The requestor of the Advisory Opinion is the operator of a multi-specialty medical practice with 11 physician employees that owns and operates two ASCs. The requestor proposed a bonus system whereby physician employees of the medical practice would

receive a bonus equal to 30% of the medical practice's net profits from facility fees collected by the medical practice attributable to surgical procedures performed by the employed physicians at one of the medical practice's ASCs. The medical practice certified that the physician employees were bona fide employees of the medical practice within the definition of "employee" under Federal law.



The OIG determined that while payment structures connecting compensation to profits from patient referrals may be problematic under the Federal Anti-Kickback Statute (AKS), since the physician employees are bona fide employees of the medical practice, the bonus compensation in this case is protected by the statutory exception and regulatory safe harbor for employees under the AKS and therefore would not constitute prohibited remuneration under the AKS, notwithstanding the potential risks of fraud and abuse these types of compensation arrangements may generally present. The OIG noted that similar arrangements involving bonus payments to independent contractors or other non-employees, or under a different corporate structure, might raise fraud and abuse concerns. The OIG also noted that the medical practice certified that the proposed arrangement did not implicate the Federal physician self-referral law, known as the Stark Law, and therefore the OIG was not offering any opinion regarding whether the proposed arrangement violates the Stark Law.

For more information, contact:

John D. Fanburg, Chair | 973.403.3107 | jfanburg@bracheichler.com
Isabelle Bibet-Kalinyak | 973.403.3131 | ibibetkalinyak@bracheichler.com
Caroline J. Patterson | 973.403.3141 | cpatterson@bracheichler.com

FTC Sues Anesthesia Group and Its Private Equity Backers for Anticompetitive Practices

On September 21, 2023, the Federal Trade Commission (FTC) [sued](#) U.S. Anesthesia Partners, Inc. (USAP) and its private equity owner, Welsh, Carson, Anderson & Stowe (Welsh Carson), alleging the two engaged in an anticompetitive scheme to monopolize the Texas anesthesiology market.

The complaint details that over the course of a decade, USAP and Welsh Carson engaged in a three part strategy to eliminate competition and generate profits. First, USAP and Welsh Carson executed a roll-up scheme where they would consolidate small, competing anesthesiology practices in Texas, resulting in USAP becoming the dominant anesthesia provider in the market. Second, USAP and Welsh Carson increased Texas anesthesia prices through price setting agreements with the remaining independent anesthesia practices. Third, USAP eliminated a significant competitor by entering into an agreement where that competitor would refrain from providing services in



USAP's territory. The FTC estimates that this strategy has cost Texans "tens of millions of dollars" more each year for anesthesia services than before USAP was created in 2012. The FTC alleges that USAP and Welsh Carson's conduct amounts to: unlawful monopolization, unlawful acquisitions, a conspiracy to monopolize, unfair methods of competition, and unlawful restraints of trade in violation of the FTC Act (15 U.S.C. § 53(b)) and the Clayton Act (15 U.S.C. § 18).

For more information, contact:

Isabelle Bibet-Kalinyak | 973.403.3131 | ibibetkalinyak@bracheichler.com
Carol Grelecki | 973.403.3140 | cgrelecki@bracheichler.com
Joseph M. Gorrell | 973.403.3112 | jgorrell@bracheichler.com



Medicaid and CHIP Coverage for Half a Million Children and Families Reinstated Following System Issue

The U.S. Department of Health and Human Services has revealed that it has assisted approximately 500,000 children and families in regaining their Medicaid and Children's Health Insurance (CHIP) coverage. This assistance was prompted by an August 30, 2023 [call to action](#) from the Centers for Medicare and Medicaid Services (CMS) that highlighted an issue in state systems that wrongly disenrolled individuals, including children, from Medicaid or CHIP during their renewal process. Swift action by CMS has resulted in the reinstatement of coverage for these individuals and the prevention of further improper disenrollments.

To address the problem, CMS required all states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands to investigate and report whether they experienced this system issue. As of September 21, 2023, thirty states have [reported](#) encountering this problem, including New York, which reported between 50,000-99,999 affected individuals, New Jersey, which reported less than 10,000 affected individuals, and Pennsylvania, which reported over 100,000 affected individuals. All states were instructed to halt procedural disenrollments for affected individuals unless they could ensure that eligible individuals would not be improperly disenrolled. CMS stressed the importance of states addressing the system issues to help eligible individuals maintain their coverage through the renewal process. CMS continues to offer technical assistance to states as they work to resolve these system issues and streamline the renewal process.

For more information, contact:

Carol Grelecki | 973.403.3140 | cgrelecki@bracheichler.com

Edward J. Yun | 973.364.5229 | eyun@bracheichler.com

Edward Hilzenrath | 973.403.3114 | ehilzenrath@bracheichler.com

HIPAA CORNER

October is Cybersecurity Awareness Month

The U.S. Department of Health & Human Services and the Cybersecurity & Infrastructure Security Agency have partnered to provide information, videos, cybersecurity awareness posters and toolkits to assist organizations to improve their resilience against cyber attacks. Information is available on the [Section 405\(d\) Program website](#). According to the agencies:

The 405(d) Program is focused on providing the healthcare & public health (HPH) sector with impactful resources, products, and tools to raise awareness and strengthen the sector's cybersecurity posture against cyber threats. This action drives behavioral change and move towards consistency in mitigating the most relevant cybersecurity threats to the sector with resources like HICP (Health Industry Cybersecurity Practices: Managing Threats and Protecting Patients) and the Hospital Resiliency Landscape Analysis.



The 405(d) website offers a number of cybersecurity resources to the health and public health (HPH) sector, including information and publications to assist in combating the top 5 threats facing the HPH sector: social engineering, ransomware, loss or theft of equipment, insider, accidental, or intentional data loss, and attacks against network connected medical devices.

If you need assistance with your HIPAA compliance program, an OCR investigation, or a data breach incident, please contact:

Isabelle Bibet-Kalinyak | 973.403.3131 | ibibetkalinyak@bracheichler.com

Lani M. Dornfeld, CHPC | 973.403.3136 | ldornfeld@bracheichler.com

Caroline J. Patterson | 973.403.3141 | cpatterson@bracheichler.com

ATTORNEY SPOTLIGHT

Get to know the faces and stories of the people behind the articles in each issue. This month, we invite you to meet Member Shannon Carroll and Associate Paul DeMartino.



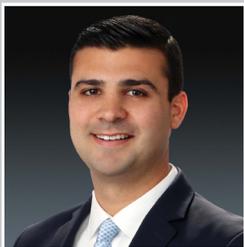
SHANNON CARROLL

What advice can you share with a client who might need your services?

The best advice is to be proactive to ensure compliance. Getting proper guidance at the outset of a project will put you in the best position to move forward successfully. Practices need to be thinking comprehensively about documentation, billing, coding, corporate structure and referral practices. These are areas where good doctors, who are focused on patient care can make costly mistakes.

What are some best practices for healthcare clients?

It is important to think ahead. Healthcare providers should be investing in themselves. This involves continuing education and investing in infrastructure to take their practices to the next level. If providers are expanding into a new area or working with new technology, it is important that they get proper training and guidance to avoid a misstep. Practices should take some time (and get help when needed) to be thoughtful about how they are moving forward.



PAUL DEMARTINO

What advice can you share with a client who might need your services?

When discussing a potential problem with counsel it is crucial to be organized and provide all relevant documentation and communications that relate to the issue at hand. Often times amongst health care practitioners, gathering relevant information tends to take a back seat but usually makes a difference in finding a resolution.

What are some best practices for healthcare clients?

From an individual standpoint it is important to understand your rights as an owner, member, shareholder, partner etc. in your medical practice. Depending on the clinician's practice structure, he or she should have a basic understanding of the applicable agreements that govern the practice and the rights afforded to members. It is important to understand that in addition to the applicable agreements, the common law provides members of limited liability companies, partnerships, corporations, etc. basic rights which includes access to the company's books and records, and financial information. It is imperative to have a handle on the business of healthcare in addition to clinical and regulatory responsibilities.

On October 18th, [TAPintoWestEssex](#) reported on Brach Eichler's participation in the 2023 Northern New Jersey Heart Walk on Saturday, October 14, 2023 in Roseland.

On October 10th, Brach Eichler conducted an informative webinar that reviews the [NJ Cancer Registry](#) from both a regulatory and legal perspective. Representatives from the New Jersey Department of Health, Taylor Hessler, BS, BA, CTR, Supervisory Cancer Registry Information Specialist and Suzanne Schwartz, MS, CTR, Supervising Public Health Representative, along with Healthcare Law attorney [Isabelle Bibet-Kalinyak, Esq.](#), discussed the latest NJ State Cancer Registry reporting obligations, processes, and legal regulations required for your practice to remain compliant.

On October 2nd, Brach Eichler was recognized and ranked by [NJBIZ](#) as a "2023 Best Places to Work" honoree. This program recognizes 50 women who have made a significant impact on New Jersey business and the community at large. Congratulations!!

If you were unable to attend The New Jersey Healthcare Market Review (NJHMR) or missed any sessions and would like to revisit the insights shared please click [here](#).



Attorney Advertising: This publication is designed to provide Brach Eichler LLC clients and contacts with information they can use to more effectively manage their businesses. The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters. Brach Eichler LLC assumes no liability in connection with the use of this publication.

HEALTHCARE LAW PRACTICE | 101 EISENHOWER PARKWAY, ROSELAND, NJ 07068

MEMBERS

Isabelle Bibet-Kalinyak, Vice Chair | 973.403.3131 | ibibetkalinyak@bracheichler.com
Shannon Carroll | 973.403.3126 | scarroll@bracheichler.com
Riza I. Dagli | 973.403.3103 | rdagli@bracheichler.com
Lani M. Dornfeld | 973.403.3136 | ldornfeld@bracheichler.com
John D. Fanburg, Chair | 973.403.3107 | jfanburg@bracheichler.com
Joseph A. Ferino | 973.364.8351 | jferino@bracheichler.com
Joseph M. Gorrell | 973.403.3112 | jgorrell@bracheichler.com

Carol Grelecki | 973.403.3140 | cgrelecki@bracheichler.com
Edward Hilzenrath, HLU Editor | 973.403.3114 | ehilzenrath@bracheichler.com
Caroline J. Patterson | 973.403.3141 | cpatterson@bracheichler.com
Keith J. Roberts | 973.364.5201 | kroberts@bracheichler.com
Richard Robins | 973.447.9663 | robins@bracheichler.com
Jonathan J. Walzman | 973.403.3120 | jwalzman@bracheichler.com
Edward J. Yun | 973.364.5229 | eyun@bracheichler.com

COUNSEL

Colleen Buontempo, CPC | 973.364.5210 | cbuontempo@bracheichler.com
Michael C. Foster | 973.403.3102 | mfoster@bracheichler.com

Debra W. Levine | 973.403.3142 | dlevine@bracheichler.com

ASSOCIATES

Vanessa Coleman | 973.364.5208 | vcoleman@bracheichler.com
Paul J. DeMartino, Jr. | 973.364.5228 | pdemartino@bracheichler.com
Emily J. Harris | 973.364.5205 | eharris@bracheichler.com

Cynthia J. Liba | 973.403.3106 | cliba@bracheichler.com
Erika R. Marshall | 973.364.5236 | emarshall@bracheichler.com
Harshita Rathore | 973.364.8393 | hrathore@bracheichler.com

Roseland, NJ | New York, NY | West Palm Beach, FL | www.bracheichler.com | 973.228.5700