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New Idaho Laws Affecting Healthcare Providers – Effective July 1

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In our prior alert, we discussed the Idaho Patient Act and its impact on medical debt collection after January 1, 2021 (see https://www.hollandhart.com/the-idaho-patient-act-and-its-impact-on-medical-debt-collections). Idaho healthcare providers should also be aware of several other new state laws that take effect July 1, 2020:

1. Revised Licensing Standards for Idaho Hospitals (S1354). Last year, the Department of Health and Welfare ("DHW") promulgated new patient rights regulations that, while well-intentioned, conflicted with Medicare conditions of participation and imposed significant burdens on Idaho hospitals. (See https://www.hollandhart.com/new-patient-rights-rules-for-idaho-hospitals). In response, the Idaho legislature amended IC § 39-1307 to provide that Idaho hospital licensure regulations that are more restrictive than the Medicare conditions of participation shall not apply to hospitals that are certified by Medicare through accreditation, survey or otherwise. (S1354, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1354.pdf). The changes are a boon to Medicare participating hospitals that may have been struggling to identify, reconcile, and comply with conflicting federal and state regulations. It is not entirely clear whether the new law will apply if there is no corresponding Medicare regulation addressing a specific rule; presumably the participating hospital may still need to comply with the state regulation. Idaho hospitals that do not participate in Medicare will need to comply with the more restrictive state regulations.

2. Prescriber Review of Opioid History (S1348). In an attempt to curb improper prescriptions of opioids, the legislature amended IC § 37-2722 to require prescribers to review the patient's prescription drug history from the prescription drug monitoring program for the preceding twelve months for possible indicators of diversion or misuse before issuing a prescription for outpatient use for an opioid analgesic or benzodiazepine listed in schedules II, III or IV. The review requirement does not apply to patients receiving treatment (1) in an inpatient setting; (2) at the scene of an emergency or in an ambulance; (3) in hospice care; or (4) in a skilled nursing facility. Also, no review is required for a prescription for a quantity that lasts no more than three days. (S1348, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1348.pdf).

3. Telehealth Clarification (H0342). The legislature clarified and made it easier for healthcare providers to engage in telehealth services. Providers

wishing to render telehealth in Idaho or for Idaho patients must comply with the Idaho Telehealth Access Act, IC § 54-5701 *et seq.* and associated licensing board regulations. (*See, e.g.*, IDAPA 22.01.05.201 *et seq.*; *see generally* https://www.hollandhart.com/telehealth-practicing-across-the-idaho-border). As amended, IC § 54-5703 clarifies that "telehealth services" include:

> the use of synchronous or asynchronous telecommunications technologies by a provider to deliver patient health care services, including but not limited to assessment of, diagnosis of, consultation with, treatment of, and remote monitoring of a patient; transfer of medical data; patient and professional health-related education; public health services; and health administration.

(H0342, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0342E1.pdf). Notably, "telehealth services" do not include "audio in isolation without access to and review of the patient's medical records, electronic mail messages that are not compliant with the health insurance portability and accountability act (HIPAA), or facsimile transmissions." (IC § 54-5703(6)).

If a provider does not have an established treatment relationship with a patient, IC § 54-5705 generally required the healthcare provider to establish such a relationship via a two-way audio **and** visual interaction. As amended, however, the statute now allows the provider to establish the relationship by "use of two-way audio **or** audio-visual interaction." Thus, the prerequisite relationship may be established through an audio phone call as well as an audio-visual call (*e.g.*, FaceTime, Skype, Google Hangouts, Zoom, or other similar platform). Providers must, of course, ensure that any platform used complies with HIPAA security rules.

The amendment also confirms that telehealth may be rendered anywhere the patient is located, including but not limited to the patient's home. (IC § 54-5703(3)). To that end, providers must ensure that they comply with the telehealth laws that apply where the **patient** is located, not just the laws that apply where the **provider** is located.

4. Simon's Law (Parental Notice of DNRs) (H0578). Like other states, Idaho enacted a new statute requiring parental notice before implementing a do not resuscitate ("DNR") order. (IC § 39-4516; H0578, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0578.pdf). Under the statute, hospitals and health facilities must make reasonable efforts to notify the parents or legal guardians at least 48 hours before instituting a DNR, an order to withhold artificial life-sustaining procedures, or an order to withhold artificial nutrition and hydration for a patient who is an unemancipated minor. The notice must be provided both orally and in writing to at least one parent or guardian unless the physician believes the urgency of the situation requires only oral notice. The provider must make reasonable efforts to notify both parents or other legal guardians. If despite diligent efforts the provider is not able to notify at least one parent or guardian after 72 hours, the provider may proceed with the DNR without

the required notice.

The notice must advise the parent or guardian that if they object to the DNR, they have 48 hours to request a transfer to another facility. If a transfer is requested, the hospital or health facility must forego the DNR and continue providing artificial life-sustaining procedures, nutrition and hydration for at least 15 days to give the parents or guardians time to transfer the patient. If the parents or guardians fail to transfer the patient within the 15-day period, the facility may implement the DNR and/or withhold artificial life-sustaining procedures.

The notice must be contemporaneously documented in the medical record and specify who gave the notice, to whom it was given, the date and time of the notice, and whether the notice was given in writing as well as orally. If only one parent or guardian is notified, the provider must document in the medical record the reasonable attempts to notify the other parent or guardian and/or explain why no such attempts were made.

As is often the case with such bandwagon bills, the new statute is somewhat imprecise and does not fit well with existing Idaho law. For example, it is not entirely clear when the required time periods begin to run, or what constitutes sufficiently "reasonable attempts" or "diligent efforts" to provide the notice. The statute defines "unemancipated minor" as "a minor who is not married or is not in active military service." (IC § 39-4516(3)). What about other situations in which Idaho law has recognized that minors are emancipated, *e.g.*, if the minor was married in the past but is now divorced, or has been judicially declared as emancipated, or is living on their own and is self-sufficient—will the new statute apply to or negate those other situations as emancipating events? By its express terms, the new statute only applies to "physician orders" (see IC § 39-4516(2)(a), (3)); however, Idaho law also allows physician assistants and advanced practice registered nurses acting within the scope of their licensure to issue advance directives; does the new statute also apply to them? Idaho Code § 39-4514(6) states that nothing in chapter 39 (which includes the new statute) requires medically inappropriate or futile care; how does the new statute jibe with this provision?

Perhaps most troubling, the new statute explicitly states that it does not limit the rights of persons pursuant to IC §§ 39-4504, 39-4509, and 39-4510, all of which generally allow one parent or guardian to deny or withdraw care; does the new law effectively require both parents and other guardians to consent to such actions? Idaho Code § 39-4512A allows one parent or guardian to execute a POST; does the new law effectively prohibit POSTs unless executed by all parents and guardians? Idaho Code § 39-4514(3) specifically allows a parent, guardian, or other surrogate decisionmaker to deny or withdraw care; does the new law prohibit such unless the other parent or guardians agree? Given Simon's Law, it would appear that hospitals and other healthcare facilities should now ensure they have the consent of both parents or all guardians before implementing a POST, DNR or other directive to withhold or withdraw artificial life-sustaining procedures for unemancipated minors.

5. Nursing Home Administrator Qualifications (S1242). The legislature

modified the requirements for nursing home administrators in IC § 54-1610 to permit a person to forego burdensome on the job training requirements if the applicant has (1) a master's degree from an accredited institution in health administration related to long-term care; or (2) a master's degree from an accredited institution that includes an emphasis on health care and has one (1) year of management experience in a health care facility that provides inpatient care. (See S1242, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1242.pdf).

6. Authority of APRNs to Provide Legal Certifications (S1240). In Idaho, advanced practice registered nurses ("APRNs") may practice without physician supervision, but many statutes still require a physician to sign for or certify certain matters, *e.g.*, parking permits, jury exemptions, athletic physicals, mental health declarations, etc. New IC § 54-1420 allows APRNs (including nurse certified practitioners, certified nurse midwives, CRNAs, or clinical nurse specialists) to sign or make such certifications or verifications that are otherwise required by law or rule to be signed or made by a physician so long as doing so is within the scope of practice of the APRN. (See S1240, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/S1240.pdf). Significantly, the statute only applies to situations in which a law or rule requires a physician's affirmation; presumably private parties and payors may still require physician signatures or certifications if they so choose.

7. Use of Medical Students in Free Clinics or Community Screening Events (H0392). Idaho Code § 39-7701 *et seq*. provides qualified immunity to volunteer healthcare providers participating in free medical clinics and community health screening events. The legislature has now extended the immunity to students enrolled in an accredited medical education or training program so long as (1) the student is providing services under the direct supervision and scope of practice of a physician or other person licensed under Title 54 of the Idaho Code, and (2) the patient is notified that the individual is a student. (See H0392, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0392.pdf). As with other providers, the immunity only applies if the patient executes a written waiver in advance of the services specifying that such services are provided without the expectation of compensation and that the health care provider shall be immune from liability pursuant to the statute. (IC § 39-7703(2)).

8. "Recklessness" Defined in Cap on Non-Economic Damages (H0582). Idaho's $250,000 cap on noneconomic damages generally does not apply to conduct that constitutes a felony or actions arising out of "willful or reckless misconduct." (IC § 6-1603(4)). This year, the legislature defined "willful or reckless" misconduct to mean "conduct in which a person makes a conscious choice as to the person's course of conduct under circumstances in which the person knows or should know that such conduct both creates an unreasonable risk of harm to another." (H0582, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0582.pdf). The clarification resolves uncertainty concerning the appropriate standard and may help providers cap their liability in malpractice or other cases.

9. PBM Regulation (H0386). Idaho has enacted a new law regulating pharmacy benefit managers ("PBMs"). Under the new statute, persons may not perform, offer, or advertise any pharmacy benefit management services unless they register by April 1 of each year with the Idaho Department of Insurance. (H0386, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0386.pdf). Other persons may not use a PBM service if they know the PBM has failed to register. The statute imposes certain other requirements on PBMs. For example, PBMs may not prohibit pharmacies from providing individuals with information about cost shares or the efficacy of more affordable alternative drugs. The statute also imposes certain conditions before PBMs may place a rug on a maximum allowable cost list, and limits the PBM from retroactively denying or reducing claims for reimbursement after the claim has been adjudicated. It may be that the Department of Insurance will issue additional regulations relevant to PBMs.

Aside from the foregoing, the legislature also laid the foundation for Medicaid payment reform for hospitals, nursing homes and other providers, including new reimbursement methodologies and value-based purchasing. (See H0351, https://legislature.idaho.gov/wp-content/uploads/sessioninfo/2020/legislation/H0351.pdf). Stay tuned….

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