



COVID-19 recovery: Legal considerations for hospitals and health systems planning for post-pandemic operations

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While health care providers continue to focus on the challenges of treating COVID-19 patients and complying with newly-issued state government "reopening" orders, now is the time to begin planning for a successful transition to post-pandemic operations. Below is a list of action items for legal departments to consider as they help their organizations prepare for and navigate the health care landscape once the public health emergency ends and various enforcement waivers expire.

HIPAA

- Bring non-compliant arrangements and practices that have relied on enforcement waivers into compliance.
- Assess and analyze uses and disclosures that occurred during the public health emergency.
- Address residual risks of noncompliance/breaches that are not covered by the enforcement waivers.

Employment

- Review potential discrimination claims that may result if all employees that were furloughed or laid off are not recalled to work at the same time.
- Assess workplace health and safety issues.
- Manage employees who are reluctant to return to work or challenge the efficacy of the organization's health and safety measures.

- Assist with flexible scheduling and continuity of remote work arrangements.

Antitrust

- Review and analyze cooperative conduct with competing health systems that may have occurred during the public health emergency (some such conduct was permissible, as the COVID-19 crisis provided a procompetitive basis for appropriate cooperative activities).
- Revert to pre-crisis standards for considering any activity involving a competitor, and remind individual employees who have been involved in recent cooperative conduct of such standards in order to avoid noncompliance.

CMS blanket waivers

- Prepare for compliance with “normal” regulations and guidance once the CMS blanket waivers expire at the end of the emergency declaration.
- Cease services and/or unwind arrangements that rely on CMS blanket waivers.
- Keep detailed records of waivers utilized during the emergency declaration.

Stark Law and Anti-Kickback Statute compliance

- Restructure and/or terminate arrangements entered into during the public health emergency in reliance on the waivers of the Stark Law and Anti-Kickback Statute.
- Consider compliance and reimbursement of telemedicine services after the public health emergency has ended.

Telehealth

- Review setting of care issues, and evaluate whether patients’ homes will remain viable sites for reimbursable services.
- Consider mode of communication issues (provision of services via FaceTime, Skype, etc.).
- Reinststitute prescribing limitations and physician/patient relationship requirements that were relaxed during the public health emergency.

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