Key Health Care Issues to Track in 2023 in the Carolinas

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As 2023 begins, we are tracking several key legal and regulatory issues that are sure to impact the health care industry in North and South Carolina in the coming year.

1. Consolidation among health care providers

Consolidation of health care providers through mergers and acquisition activity is expected to rebound in 2023 from slightly lower numbers in 2022 which were a result of a lingering impact from COVID-19 and slow-downs and uncertainties in the economy. While the number of transactions slowed in 2021 and 2022, deal values in the Carolinas remained strong with both MUSC and Atrium making large plays which increased their operations.

The markets are still reacting to MUSC's $75 million purchase of KershawHealth and Providence Health from Tennessee based company LifePoint Health in 2021.[1] The deal included three hospitals, one freestanding emergency room center, and all affiliated physician practice locations throughout the Midlands of South Carolina.

On December 2, 2022, Atrium Health and Advocate Aurora Health confirmed a $27 billion merger deal, creating a 67-hospital system to be named Advocate Health and headquartered in Charlotte.[2] Atrium Health will continue to operate under the Atrium Health brand in the Carolinas. The impact of this very large transaction remains to be seen as Atrium Health was already one of the largest health systems in the Carolinas.

Looking forward, major deals are already being announced in the southeast for 2023. In Georgia, Augusta University Health System, the Medical College of Georgia at Augusta University, and Wellstar Health System have signed a letter of intent to begin the process of creating a statewide health system. The deal is set to provide key investment into existing facilities and provide funding for a new hospital and office space in

Columbia County.[3]

We are currently following several other health system consolidations in the Carolinas that will likely be announced sometime in 2023.

In the Carolinas, we expect to see the continued trend of acquisition of independent physician practices by health systems on private equity buyers. While many, if not most, independent practices have already been acquired by health systems or other entities, there are still potential buyers looking to acquire independent practices. Independent physician practice ownership continues to be the minority structure for physician practices in the Carolinas. It has been reported that 70% of physicians in the U.S. are employed by hospitals, health systems, or other corporate entities.[4] Market-wide projections for the coming year expect transaction activity to trend back towards 2021 highs with divestiture deals and physician practice acquisitions once again driving up total transaction values.[5] We may also expect to see some limited examples of physician practices spinning out of hospital or health system ownerships back into independent practice status.

2. Continued trend towards transparency and impact on the market

Following the federal rule requiring hospitals to publicly disclose the rates that they charge for their services and other information, we saw the first public fine for enforcement of these rules.[6] On June 7, 2022, CMS imposed civil monetary penalties of $1 million collectively on two Georgia hospitals for failure to comply with hospital price transparency rules.[7] These substantial penalties serve as some of the first examples that the federal government is serious about the enforcement of the federal transparency rules and that the trend of price transparency will continue from a federal regulatory perspective. As a result of the increased penalties and these fines, hospitals are taking a closer look at their compliance with these rules. There has not yet been any enforcement on insurance companies who had similar transparency rules imposed on them in 2022.

To avoid similar penalties in the coming year, it is crucial that health care providers seek advice on what is required of them under another transparency related initiative, the No Surprises Act. The No Surprises Act became effective on January 1, 2022. Pursuant to the No Surprises Act, health care providers are restricted from balance billing patients for out of network emergency services, unplanned out of network surgeries and air ambulance costs.[8] The No Surprises Act requires out-of-network providers to negotiate a price for the services that the insurance company will pay. If there is no agreement, the matter can go to a special arbitration. In addition, all health care providers are required to provide a comprehensive good faith estimate to uninsured or self-pay individuals that includes the cost of the primary item or service as well as costs reasonably expected to be provided in conjunction with the primary item or service. The good faith estimate requirement imposed on co-providers and co-facilities, such as ambulatory surgery centers, was set to begin January 1, 2023, but recent guidance suggests that HHS will be extending its enforcement discretion on the obligation for co-providers and co-facilities to provide good faith estimates, pending future rulemaking, to allow for the development of technical infrastructure that will improve the exchange of data between those entities.[9]

In the coming year, we expect technology companies to begin using the price transparency data provided by hospitals and insurance companies to create opportunities for the market to more meaningfully access and use this data. These independent third party companies will likely set the standard for price transparency and comparison models to be used in the Carolinas and throughout the rest of the country. This technology could become an important tool for health providers to quote clear prices and allow individuals with high deductible health plans to lower their total costs by shopping around on an easy to navigate software platform. It remains to be seen as to whether these transparency initiatives will actually reduce the cost of health care but it is clear that the transparency trend will continue.

3. Significant regulatory changes in the Carolinas

Changes to Certificate of Need (CON) laws could make a big impact in the Carolinas in 2023. For the last several years, CON laws have been under fairly intense legislative review by the General Assemblies in North and South Carolina.

The South Carolina Department of Health and Environmental Control (DHEC) has proposed the first substantive amendments to the CON regulations in over a decade. Most importantly, the amendments to these regulations will increase the threshold for capital expenditures that require a CON to more than $5 million and will increase the threshold for equipment acquisitions that require a CON to more than $2 million. For the first time since 2001, these thresholds will be indexed in the future to account for inflation. Additionally, CON applications will be submitted electronically and it appears that previous application requirements, found in former section 202, have been stricken from the amended regulations entirely. The DHEC Board considered public comments to the proposed amendments and adopted final versions during a regularly scheduled meeting on December 8, 2022. The final amendments now sit idle, awaiting the South Carolina General Assembly to take action. If the General Assembly neither votes to approve nor reject the proposed amendments within 120 days after receipt, the amendments will take effect.

In 2021, North Carolina made significant amendments to their CON laws increasing the capital expenditures threshold that require a CON from $2 million to $4 million and raising the threshold for equipment acquisitions that require a CON from $750,000 to $2 million.[10] The amendments also allow for future indexing of these numbers as a result of inflation. In August 2022, North Carolina Treasurer, Dale Folwell, filed an amicus brief in a case by physicians challenging the legality of N.C. CON law requesting that the North Carolina Supreme Court examine how existing CON laws exclude others from entering the market.[11] If government officials in North Carolina continue raising concerns over their state's CON structure and are successful in obtaining a Supreme Court review, it is possible that 2023 could turn in to a crucial year of legislative debate over the future of the program as a whole.

In South Carolina's last legislative session, the South Carolina Senate passed a bill that would have repealed CON but the bill ultimately died in the House. We expect there to be another attempt to rescind or significantly modify the CON program in 2023.

For South Carolina, regulatory changes in 2023 could also result in a complete restructuring of DHEC. South Carolina Senate Bill No. 2 aims to divide DHEC into two separate state agencies, the Department of Behavioral and Public Health and the Department of Environmental Services. Proponents hope that the divide will increase overall efficiency within the departments. The Bill was unanimously passed by the State Senate on March 17, 2022, and was referred to the House of Representatives where it received favorable treatment from the Committee on Ways and Means. When the state legislature reconvenes on January 10, 2023 to begin their session, the fate of DHEC is likely to be an important topic of their debate. This will be a key issue to track in 2023, as changes to the current DHEC structure will have sweeping effects on the existing regulatory relationship between the South Carolina health care industry and our State agencies.

4. Shortage of certain types of providers

Because of the COVID-19 pandemic and other factors, physicians, nurses and other providers are experiencing "provider burnout", increased retirement rates and departures from the profession over the past two years. The average age of physicians across the country is rising and higher retirement rates are creating shortages in key health care specialties. From 2019-2022, both North and South Carolina experienced a net reduction in the total number of physicians practicing within the state.[12]

As it turns out, physicians are not the only providers electing to step away from their respective professions. The entire country is currently facing one of the largest nursing shortages in history. Like physicians, age and retirement undoubtedly contribute to the declining nurse numbers, but many leaving the profession cite the feelings of "burnout" mentioned above and a high stress work environment that was exacerbated by the COVID-19 pandemic. Recent reports suggest that South Carolina could face shortages as high as 10,000 positions by 2030.[13] To combat the issue, the U.S. Department of Labor is distributing $80 million in grant money to support nursing faculty and nursing programs.[14] At the state level, Prisma Health has invested $5 million dollars into college nursing programs across the state to reduce the growing nursing shortage.[15] In 2023, the promise of grant money and investment from health care systems will likely encourage health care systems and nursing programs to begin proposing viable strategies to slow the nursing shortage in the Carolinas and across the country.

Provider burnout and shortages of multiple types of providers will be a challenge that the industry will face in 2023 and beyond.

5. Increased government enforcement on fraud and abuse issues

The old adage is largely true: When the government gives something, it often takes it away as well. Since March of 2020, roughly $5 trillion has been approved in COVID-19 relief aid from the federal government.[16] Sources project that between $80 billion - $100 billion of the dispersed relief aid was procured by individuals or businesses by fraudulent means.[17] For individuals or businesses ultimately charged for fraud by the federal government, penalties include treble damages for violations of the False Claims Act, as well as criminal liability. In the coming year, the enforcement of fraud and abuse related to COVID-19 relief aid will surely increase. The federal government already has plans and budgets in place to re-route funds directly to enforcement efforts. Essentially, the claw backs are coming and providers should be prepared to deal with potential audits or follow up questions by the federal government.

One of the reasons that the claw backs have not occurred sooner is that the Department of Justice has not had the resources to focus on this issue. In August, the New York Times published an article describing a "tidal wave of pandemic fraud" that the federal government was struggling to catch up with.[18] According to the article, the Small Business Administration's fraud hotline received 148,000 calls during the first year of the COVID-19 pandemic. As a result, a relatively small number of about 50 agents at the Small Business Administration are attempting to review roughly two million loan applications for potential fraud.[19] Additionally, unemployment fraud numbers increased 1,000% from pre-pandemic levels, with the Labor Department reporting 39,000 open cases.[20] It appears that help may be on the way for the federal government to address this issue. President Biden's 2023 budget includes $36.5 million for the U.S. Attorney's Offices and the department's Criminal division to combat pandemic-related fraud.[21] This translates to 120 additional attorneys solely devoted to investigating potential fraud. In addition, overall Health Care Fraud and Abuse Control (HCFAC) funding in FY 2023 is increased by $92 million above FY 2022 budget numbers.[22]

These data points show, rather clearly, that the federal government is making a pointed effort to combat fraudulent activity in the coming year. When the federal government hires more lawyers to investigate a particular issue, enforcement and prosecutorial activity usually follows. Put simply, health care providers must be prepared for this and ensure that their existing compliance plan is protecting them and they are complying with all applicable federal regulatory and legal requirements whether it is related to COVID relief or not. As we evolve out of the COVID-19 pandemic, there will be more fraud and abuse activity and we must be prepared for it.

6. Continued growth of Life Sciences industry

Growth of the life sciences industry in the Carolinas only seems to be gaining more momentum as we enter into the new year. South Carolina continues to lead the Southeast in life science employment gains with a 7.7% increase compared to a 4.6% increase in life science employment across the Southeast as a whole. As of February 2022, the life sciences industry in South Carolina generated a $25.7 billion annual economic impact. Investment into the industry continues at a rapid pace. On December 2, 2022, Nephron Pharmaceuticals held a grand opening ceremony for a $100 million nitrile glove manufacturing facility that will bring an estimated 250 new jobs to the Midlands of South Carolina. The overall outlook for 2023 is very strong in South Carolina as key investments continue to propel life science employment gains.

North Carolina boasts its own impressive numbers for life science growth in recent years. Since 2018, the state has increased its total life science employment numbers by 13% and announced more than 60 expansion and relocation growth projects. A report prepared for the North Carolina Biotechnology Center in November found that growth of the life sciences industry has resulted in $2.4 billion in state and local government revenues.[23] Throughout 2022, the North Carolina life sciences industry has been busy securing deals that will make an impact on the State far into the future. Thirty-two life science-related companies announced 33 projects that will add over 2,700 new jobs and bring in more than $2.1 billion in total investments to North Carolina[24]. As a result, strong expectations of growth ring true for North Carolina as well in 2023 as large investments into the state's life sciences industry continue to create jobs and increase overall economic impact.

Nexsen Pruet will be following these and other important health care and life sciences issues as we move into 2023.

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