Thursday, March 26, 2020

As the Coronavirus (COVID-19) pandemic continues to impact the healthcare industry and the global economy, ambulatory surgery centers (ASCs) should be mindful of federal and state guidance impacting their daily work and revenue streams, employee activities and offering potential avenues for financial relief. This On the Subject summarizes key guidance and recommendations for ASCs navigating these unprecedented challenges.

IN DEPTH

Elective Surgeries and Procedures and COVID-19 Response Support

- **Elective Surgeries and Procedures.** On March 18, 2020, the Centers for Medicare & Medicaid Services (CMS) recommended that all non-essential procedures be postponed until further notice. While CMS recommendations are
not yet mandatory, several states have mandated that elective surgeries and procedures be postponed. Additional states are likely to take similar actions as the Coronavirus (COVID-19) pandemic continues to stress the healthcare system throughout the country.

- **ASCA Guidance.** On March 19, 2020, the Ambulatory Surgery Center Association (ASCA) released new guidance for ambulatory surgery centers (ASCs) with respect to what might constitute a “necessary surgery” during the COVID-19 pandemic. The guidance states that “[a] surgery may be deemed urgent and necessary if the treating physician decides that a months-long delay would increase the likelihood of significantly worse morbidity or prognosis for the patient,” and provides examples of cases that might need to proceed with surgery during the COVID-19 pandemic.

The ASCA noted that ASCs should be prepared in case hospitals need to shift necessary surgeries to ASCs or ASC resources otherwise become necessary to support community efforts to address the COVID-19 pandemic. The ASCA cautioned that the effects of the pandemic could create situations in which ASCs must temporarily suspend services, such as when an individual who has been in an ASC facility is suspected or diagnosed with COVID-19, or when a significant shortage of personal protective equipment prevents the safe practice of surgical cases. ASCA is also tracking state activity affecting ASCs.

On March 20, 2020, the ASCA released a message to ASCs instructing them to strictly adhere to federal and state guidance to immediately postpone all surgeries that can be delayed for six to eight weeks and to use personal protective equipment sparsely and wisely. The ASCA encouraged all ASCs to communicate with their local hospitals to ensure a coordinated response in the best interest of their communities.

The ASCA also released a checklist for ASCs to be prepared to share essential information about the resources and capacity they can contribute to a community-wide COVID-19 response.

**Financial and Employee-Related Matters**

- **Small Business Relief.** ASCs may be eligible for relief that is available to small businesses in response to the COVID-19 pandemic. Our team prepared this summary of the Small Business Relief in an earlier version of the Cares Act and is in the process of reviewing any changes to the proposal in the final bill.

- **Paid Time Off Under the Families First Coronavirus Response Act.** The Families First Act mandates that employers with fewer than 500 employees provide two weeks of paid sick leave (subject to certain caps and in addition to any other leave already provided) for employees who are affected by COVID-19 and unable to work or telework. Such employers must provide an additional 10 weeks of Family and Medical Leave Act leave, paid at two-thirds the employee’s regular pay rate, subject to a cap. The legislation also provides payroll tax credits to offset the costs of providing paid leave, and provides certain exemptions for employers of healthcare workers and some flexibility for
employers with 50 or fewer employees.

- **Frequently Asked Questions for US Employers.** Like all US employers, ASC operators and management companies are struggling to cope with various issues arising from the COVID-19 pandemic that affect their workforces. Click [here](#) for guidance on some of the most common questions.

**Accreditation Survey Suspensions.**

- On March 4, 2020, CMS directed all accreditation agencies and state licensing agencies to suspend non-emergent survey inspections to allow inspectors to prioritize the most serious health and safety threats, such as infectious disease and abuse. On March 13, 2020, CMS issued additional [FAQs](#) on this suspension. The Joint Commission, the American Association for Accreditation of Ambulatory Surgery Facilities, the Accreditation Association for Ambulatory Health Care and the Healthcare Facilities Accreditation Program have each issued communications to their members that all routine re-survey activities are suspended. Emergent surveys will continue, including in response to complaints related to infection control and patient safety. Surveys for initial accreditation also may continue. All postponed surveys will resume once normal operations restart, and CMS has indicated that Medicare payment status will not be affected. Any centers with upcoming re-certification surveys should submit relevant applications so that the survey will be scheduled once normal operations resume.

**Relief for Facilities Participating in Quality Reporting Programs.**

- On March 22, 2020, CMS [announced](#) that it will grant “extreme and uncontrollable circumstances policy exceptions and extensions” from reporting requirements for clinicians, providers and facilities participating in Medicare quality reporting programs to ease the burden imposed by the COVID-19 pandemic. For example, CMS will not count data from January 1, 2020, through June 30, 2020, for performance or payment programs, and data does not need to be submitted to CMS for the first two quarters of 2020.

© 2020 McDermott Will & Emery