



COMPLIANCE ISSUES AT THE INTERSECTION OF MLTC, HOME CARE AND HOSPICE

**HCANYS/HPCANYS
Corporate Compliance Symposium
Albany Capital Center
55 Eagle Street
Albany, New York 12207**

Brian T. McGovern, Esq.
Crowell & Moring LLP
590 Madison Avenue, 20th Floor
New York, NY 10022
(212) 895-4306
bmcgovern@crowell.com

October 17, 2018

I. Overview

- Care Coordination Responsibilities Between the MLTC Plan and Hospice and Home Care Agencies
- Billing and Reimbursement Guidance for End-Of-Life Care for MLTC Patients
- Issues Surrounding CDPAP and Personal Care Services
- Responsibility for Checking the Provider Exclusion Lists
- Emergency Preparedness Requirements

II. Care Coordination Responsibilities Between the MLTC Plan and Hospice and Home Care Agencies

- **2018-2019 Budget Bill Redux**

- *Recall:* DOH mandated MLTC enrollment for community-based long-term care services was to provide “care management for all” to certain dually eligible individuals over the age of 21, who need community-based long-term care services for more than 120 days.
- DOH also mandated enrollment of long-term nursing home residents into MLTC (with some exceptions).
- *2018-19 NYS Budget:* Required the disenrollment of long-term nursing home residents from MLTC “to eliminate duplication of care management services.”
- Unresolved Issue: Who is responsible for coordinating care of MLTC enrollees receiving home care or hospice?

II. Care Coordination Responsibilities Between the MLTC Plan and Hospice and Home Care Agencies (*cont'd*)

- ***MLTC Regulations (see 10 NYCRR § 98-1.13)***
 - An MLTC “shall promote continuity of care and integration of services” through:
 - ❖ designating a case manager for each enrollee, responsible for care management services;
 - ❖ coordinating covered health and long term care services with non-covered services and other community resources; and

II. Care Coordination Responsibilities Between the MLTC Plan and Hospice and Home Care Agencies (*cont'd*)

- **MLTC Regulations (see 10 NYCRR § 98-1.13) (*cont'd*)**
 - ❖ communicating clinical information among providers and maintaining a care management record, including:
 - assessments and reassessments;
 - a plan of care;
 - medical orders;
 - documentation of non-covered services arranged and coordinated by the plan;
 - advance directives;
 - signed enrollment agreement and disenrollment agreement; and
 - contacts with enrollees and representatives, providers of covered and non-covered services, physicians, local social service districts, and other agencies or facilities with whom the plan coordinates services.

II. Care Coordination Responsibilities Between the MLTC Plan and Hospice and Home Care Agencies (*cont'd*)

- ***MLTC Contractual Obligations***

- Written policies and procedures for care management, consistent with the coordination and continuity requirements of 42 CFR § 438.208 (governing managed care organizations; requires the MLTC plan to arrange for needed services and coordinate services between settings of care). *See* DOH MLTC Partial Capitation Contract (1/1/15-12/31/16) (“Model Contract”)
- ALL covered services must be directly provided or arranged for within the approved provider network pursuant to written contracts
- All contracts with network providers must specify any delegated activities and reporting responsibilities, including the amount, duration and scope of services to be provided.
- Nonetheless, the MLTC “maintains ultimate responsibility for adhering to and otherwise fully complying with all terms and conditions of its contract with the State.” *See* 42 CFR § 438.230(b).

II. Care Coordination Responsibilities Between the MLTC Plan and Hospice and Home Care Agencies (*cont'd*)

- ***Overlap between MLTC Regulations and Home Care and Hospice Regulations (See 10 NYCRR §§ 763, 793, and 794)***
 - Duplication of care coordination activities
 - ❖ Obtaining a physician order [all three]
 - ❖ Developing or maintaining a plan of care [all three]
 - ❖ Performing or maintaining assessments [all three]
 - ❖ Obtaining or maintaining advance directives [MLTC/Hospice]
 - ❖ Providing social work [all three]

II. Care Coordination Responsibilities Between the MLTC Plan and Hospice and Home Care Agencies (*cont'd*)

- ***Overlap between MLTC Regulations and Home Care and Hospice Regulations (See 10 NYCRR §§ 763, 793, and 794) (cont'd)***
 - Remedies for avoiding duplication
 - ❖ Legislative or Regulatory -- Eliminate duplication by statute or regulation
 - ❖ Contractual -- Negotiate and detail the division of responsibility for care coordination activities in the provider contract with MLTC
 - ❖ See also 4/14/2015 DAL (DHCBS 15-06)(homecare agencies) – “It is imperative that home care providers and entities they contract with for the provision of home health services understand what their individual responsibilities are related to patient care, case management and reporting to those entities during an emergency.”
 - ❖ “The contract should clearly delineate those responsibilities and roles...”

III. Billing and Reimbursement Guidance for End-Of-Life Care for MLTC Patients

- **Who Pays?**

- *MLTC member, eligible for hospice*

- ❖ MLTC Enrollee eligible for hospice care may remain in the MLTC plan and need not disenroll.
- ❖ Hospice is carved out of MLTC, so that the hospice agency bills Medicare (or Medicaid) for hospice services.
- ❖ The per diem room and board component of the hospice residence is covered by a MLTC plan and authorized as a respite service under the definition of social and environmental supports.

- Current hospice patient, not eligible to enroll MLTC

III. Billing and Reimbursement Guidance for End-Of-Life Care for MLTC Patients (*cont'd*)

- ***Compliance Risks***

- Kickback risks?
- OIG Fraud Alert 1998 -- OIG identified as a suspect practice, “hospice referring its patients to a nursing home to induce the nursing home to refer its patients to the hospice”

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (*see* 18 NYCRR § 505.28)

- ***What is CDPAP?***

- Consumers (the individuals receiving personal and home health care) have the freedom to choose their caregivers (a consumer directed personal assistant (“CDPA”).
- A CDPA may not be the consumer’s spouse, parent (unless acting as a CDPA for an adult child) or representative, but can be any other adult relative who does not reside with the consumer, or any other adult relative who resides with the consumer because of the greater amount of care the consumer requires.
- The consumer or the person acting on the consumer’s behalf (such as the parent of a disabled or chronically ill child) assumes full responsibility for hiring, **training**, supervising, and terminating the employment of persons providing the services. [Is the consumer always competent to train?]

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (see 18 NYCRR § 505.28) (cont’d)

- ***Consumer’s Responsibilities***

- Manages the plan of care, including recruiting and hiring the CDPA
- **Trains**, supervises, and schedules each CDPA
- Assures that the CDPA competently and safely performs the services included in the consumer’s plan of care
- Notifies the “Fiscal Intermediary” of any changes in the employment status of the CDPA
- Attests to the accuracy of the CDPA’s time sheets and transmits the time sheets to the Fiscal Intermediary
- Distributes the CDPA’s paycheck
- Arranges and schedules substitute coverage when a CDPA is temporarily unavailable
- Enters into a memorandum of understanding with the Fiscal Intermediary and the social services district describing the parties’ responsibilities

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (*see* 18 NYCRR § 505.28) (*cont’d*)

- ***Fiscal Intermediary (“FI”) Responsibilities:***

- The FI is an entity that has contracted with a social services district or an MLTC plan to process wages and benefits for the CDPA
- Beyond processing payment, the FI:
 - ❖ Ensures that the health status of each CDPA and is able to perform services.
 - ❖ Maintains personnel records for each CDPA, including the time sheets and other documentation needed for wages.
 - ❖ Maintains program records for each consumer.
 - ❖ Monitors the consumer’s ability to fulfill the consumer’s responsibilities.
 - ❖ Enters into a contract with the social services district or an MLTC plan for the provision of FI services.
 - ❖ *Note:* The FI is not responsible for fulfilling the responsibilities of the consumer. However, that fact would not absolve FI for its “failure to exercise reasonable care in properly carrying out its responsibilities under the program.”

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (*see* 18 NYCRR § 505.28) (*cont’d*)

- ***MLTC Plans:***

- CDPAP is included in the benefit package of MLTC plans (see SSL § 365-f) and is a qualifying service (see MLTC Policy 13.11).
- Per the Model Contract, MLTC plans must:
 - ❖ contract with FIs to provide payroll and other employer responsibilities for CDPAPs;
 - ❖ have an adequate network of FIs; and
 - ❖ be responsible for a comprehensive assessment and development of a person centered service plan for all MLTC services for its enrollees using CDPAP.

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (*see* 18 NYCRR § 505.28) (*cont’d*)

- **MLTC Plans (*cont’d*):**

- Model agreement between MLTC plans and FIs
 - ❖ Plan Responsibilities:
 - inform any enrollee in need of home care of the CDPAP program as an option
 - determine that the consumer is eligible for long term care services and to participate in CDPAP
 - notify the FI in the event the plan changes the authorization of the amount, duration, or scope of the services
 - monitor the FI’s performance
 - monitor the consumer’s ongoing eligibility
 - pay the FI within thirty days
 - ❖ *Compliance Certification*: The FI shall, upon request of the plan, “certify, based on its best knowledge, information and belief, that all data and other information directly or indirectly reported” to the plan is “accurate, complete and truthful.”

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (*see* 18 NYCRR § 505.28) (*cont’d*)

- ***Compliance Issues:***

- FIs

- ❖ Scope of services provided by FI vs. those provided by Consumer/CDPA

- ❖ FI’s oversight of consumer:

- As noted, the FI has to ensure that the CDPA is healthy and is fulfilling his or her responsibilities
 - In discharging its responsibilities, FI must “exercise reasonable care”
 - What must FI do to meet the “reasonable care” standard, if the FI suspects that the CDPA is not performing or cannot perform responsibilities?
 - Withhold CDPA’s payment? Anything else?
 - In that circumstance, who has the responsibility or authority to either: (a) terminate the FI’s services; or (b) report to OMIG or other regulatory/law enforcement?

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (*see* 18 NYCRR § 505.28) (*cont’d*)

- ***Compliance Issues (cont’d):***

- ❖ *OMIG’s Audit Protocols of FI (released January 2018):*

- OMIG will be auditing FIs on the following:
 - ✓ missing documentation of services, authorization of services, and personnel records;
 - ✓ billing for more units than documented;
 - ✓ services performed by an ineligible individual;
 - ✓ failure to complete health assessment of CDPA; and
 - ✓ failure to FI process CDPA wages and benefits;
 - Focus is on FI’s responsibilities to maintain or complete the proper documents and process CDPA payments.

IV. Issues Surrounding Consumer Directed Personal Assistance Program (“CDPAP”) and Personal Care Services (*see* 18 NYCRR § 505.28) (*cont’d*)

- ***Compliance Issues (cont’d):***

- ❖ *OMIG’s Audit Protocols of FI (released January 2018):*

- OMIG will be auditing FIs on the following:
 - ✓ missing documentation of services, authorization of services, and personnel records;
 - ✓ billing for more units than documented;
 - ✓ services performed by an ineligible individual;
 - ✓ failure to complete health assessment of CDPA; and
 - ✓ failure to FI process CDPA wages and benefits;
 - Focus is on FI’s responsibilities to maintain or complete the proper documents and process CDPA payments.

- MLTC plans

- ❖ Oversight of FI
 - ❖ Oversight of Consumer
 - ❖ Oversight of CDPA, including number of hours and services provided

V. Responsibility for Checking the Provider Exclusion Lists

- **Exclusions:**

- The Office of Inspector General (“OIG”) of the U.S. Department of Health & Human Services has the authority to exclude individuals and entities from being employed by federally funded health care programs.
- The NYS Medicaid Exclusion List also identifies individuals or entities who have been excluded from participating in the NYS Medicaid program for unacceptable practices (e.g., submission of false claims, providing bribes or kickbacks, employing sanctioned persons). See 18 NYCRR § 515.3 and/or 18 NYCRR § 515.7.
- An excluded individual or entity cannot be involved in any activity relating to furnishing, billing, or receiving payment for care, services or supplies to Medicaid recipients during the period of exclusion. See 18 NYCRR §§ 504.7; 515.5
- The OMIG recommends that providers perform exclusion screenings on a monthly basis.

V. Responsibility for Checking the Provider Exclusion Lists (*cont'd*)

- **MLTC Plan's Responsibilities (per Model Contract)**

- ❖ The MLTC plan shall, upon learning of an exclusion or termination, immediately terminate the Provider Agreement with the Participating Provider, and no longer utilize the services of the subject provider, as applicable.
- ❖ The MLTC plan shall access information pertaining to excluded Medicaid providers through the Department's Health Commerce System ("HCS") -- the MLTC plan shall be deemed to constitute constructive notice of exclusion if the provider appears on the exclusion list.
- ❖ The MLTC plan shall also self-report within 60 days of identifying a payment to an excluded provider, when and how the payment to an excluded provider was identified, and the date on which the encounter data was adjusted to reflect the recovery.
- ❖ With respect to "participating providers," the MLTC plan must check the exclusion lists no less than monthly.
- ❖ Bottom Line: MLTC is not responsible for checking for possible exclusion of employees of home care agencies or hospices that contract with the MLTC.
- ❖ Note regarding FIs: The FI is required to check its staff and the CDPAs against the excluded provider lists.

V. Responsibility for Checking the Provider Exclusion Lists (*cont'd*)

- **Home Care Agencies' Responsibilities**

- *Check Home Care Worker Registry.* Prior to the employee's providing home care services. See 10 NYCRR § 403.5
- *Check Prospective Employees' Criminal History.* See 10 NYCRR §§ 402; 763.13
- *Check Exclusions List for Excluded Employees.* Per OMIG, the applicable exclusion lists must be checked monthly for excluded employees, prospective employees, and contractors

- **Hospices' Responsibilities**

- Check Employees' Criminal History. See 10 NYCRR § 794.3
- Check Exclusions List for Excluded Employees.

- **Division of Labor to Check Exclusion List**

- Participating Providers (MLTC)
- Employees of Home Care Agencies and Hospice Programs in MLTC network (Agencies)

VI. Emergency Preparedness Requirements

- **MLTC Plans**

- Are the MLTC plans in the best position to coordinate emergency preparedness for providers and patients within the network? What do the regulations require? _____

- **Home Care and Hospice Responsibilities**

- Must develop (i) a written emergency plan for patients and (ii) plan for orienting all employees as to their responsibilities in the case of an emergency. See 10 NYCRR §§ 763.11(a)(10) [home health agency]; 794.1(m) [hospice]
- Mandated components of a home care agency or a hospice emergency preparedness plan:
 - ❖ Patient Roster
 - ❖ *“Call Down List”*: a staff roster that is used to notify staff
 - ❖ *Community Partner List*: a list of community partners, including the health department, local emergency department, and law enforcement
 - ❖ *Request for Information*: the procedures for responding to requests for information by community partners
 - ❖ *Participation in Community Drills*: a procedure for participation in community-wide disaster drills

VI. Emergency Preparedness Requirements (*cont'd*)

- **Home Care and Hospice Responsibilities (*cont'd*)**

- *CMS*: must have an (i) emergency plan, (ii) policies and procedures based on a risk assessment, (iii) communication plan, and (iv) training and testing program. *See* 42 CFR §§ 418 [hospice], 484 [home health agency].
- *DOH* (4/14/2015 DAL) (DHCBS 15-6) (home care agencies):
 - ❖ Must make sure their contract with MLTC plans addresses emergency preparedness and response
 - ❖ Must make MLTC plans aware of *DOH* framework for emergency preparedness per 5/10/2005 DAL (directed to hospice and home care agencies)
 - ❖ “May” be required in the MLTC contract to provide daily updates, given that home care agencies and hospices are required to have an effective communication system via HCS for emergencies.
 - ❖ *Key*: “[C]ontract requirements with Managed Care Organizations do not waive the provider’s regulatory requirements including reporting to the Department in an emergency.”
 - ❖ *See also* 12/1/2016 DAL (DHCBS 16-11)(Emergency Preparedness Requirements for Home Care and Hospice Providers)

Questions





crowell.com

Crowell & Moring LLP is an international law firm with more than 500 lawyers representing clients in litigation and arbitration, regulatory, and transactional matters. The firm is internationally recognized for its representation of Fortune 500 companies in high-stakes litigation, as well as its ongoing commitment to *pro bono* service and diversity. The firm has offices in Washington, D.C., New York, Los Angeles, San Francisco, Orange County, London, and Brussels.

© Crowell & Moring LLP 2018

Attorney advertising. The contents of this briefing are not intended to serve as legal advice related to any individual situation. This material is made available by Crowell & Moring LLP for information purposes only.