

## Teds talk: Transitioning from the PHE to 2023

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The decorations are down. The trees are at the curb. The Menorahs are in storage. “All I Want for Christmas is You” is back in mothballs until next November (fingers crossed, no earlier). Families have returned to the corners of the country from whence they came. The holidays are done, and the season of transition and self-reflection is upon us. We got our New Year’s Resolutions out of the way early (more exercise for Ted C.; diet starts Monday for Ted T.!)

The upcoming year for the healthcare industry presents different challenges in resolution-making than the last few. From the rapid-fire Executive Orders of March and April 2020 to the Healthcare Worker Bonus program of late 2022, the last few years required providers to navigate quick pivots, government orders, constantly-evolving guidance, and increased “flexibilities” designed



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to address immediate challenges and (theoretically) make life easier. While we are not fully out of the woods, the expectation is that we’ll leave behind some of the immediacy dictated by the past few years. It’s time to start charting the path forward. To assist, we’ve identified some things health care providers across the spectrum should have on their radar for 2023.

**1. OMIG regulations:** In its last breath, 2022 saw the adoption of long-awaited new regulatory changes relating to provider compliance programs, Medicaid managed care plan fraud, waste and abuse prevention programs, and the obligation to report, return and explain Medicaid overpayments through the Office of Medicaid Inspector General’s (OMIG) Self-Disclosure Program. These regulations (initially proposed in July 2022 and formally adopted on December 28, 2022) make sweeping changes to the regulations codified at 18 NYCRR Part 521. Most enforcement is set to begin March 28th. With that deadline in mind, all Medicaid providers should review their compliance plan, policies and procedures

as soon as possible to identify where gaps exist and revisions are required.

- 2. Compliance effectiveness:** With the new OMIG regulations and the 25th anniversary of the first OIG compliance program guidance in February 2023 (make your celebratory plans now before all the good venues fill up!), this is an ideal time to have an independent assessment of your compliance program’s effectiveness. This can be an exceptionally valuable learning experience and protect the organization and its leadership from health care compliance risk.
- 3. Public health emergency wind down:** The time is also ripe to assess the changes your organization has experienced due to the waivers the Center for Medicare and Medicaid Services (CMS) granted under the public health emergency, and to begin to plan for what comes next once that emergency mercifully ends. For example, consider whether it remains appropriate to schedule patients for telehealth visits twelve months from now when some of the

geographic, place of service and provider restrictions that apply to Medicare telehealth may soon return.

**4. Waiver check:** Although the federal Public Health Emergency continues, some CMS waivers and many state law waivers ended during 2022. We recommend looking at the services you are providing under waivers and confirm you're not relying on expired waivers. As an example, while telehealth waivers and flexibilities exist at the federal level, most states have ended flexibilities that allowed providers licensed in other states to provide services to in-state patients. A conversation with providers to ensure they understand that these limitations have been reinstated is highly recommended.

**5. Emerging interstate practice issues:** State laws regarding abortion care, gender affirming services and controlled substance prescriptions are changing rapidly and differ significantly by state. Practitioners need to consider these differences and the potential enforcement climate before providing care in these spaces. Since an area code is no longer a reliable way to determine where a patient is located, providers should consider documenting the patient's reported location before providing services.

**6. Labor law changes:** An amendment to Labor Law 201 now requires employers to provide employee-rights posters and notices electronically through "the employer's website or email." Providers should verify they are in compliance with this requirement. They should also confirm they are posting copies of Labor Law §§ 740 and 741 – which protect healthcare workers and others from retaliation for voicing concerns – in places accessible to employees and prospective employees. While this requirement was new in early 2022, we're finding that the legal notice services many employers use are not aware of it. It's also important for Medicaid participating providers to have policies in their employee handbook that explain these and other healthcare laws related to fraud, waste, and abuse.

**7. Telehealth expansion:** Expanded access to telehealth services was perhaps the singular hallmark of care during the COVID-19 pandemic. Payors and providers continue to look for ways to leverage telehealth to serve patients. Guidance at the State and federal level has been geared towards more flexibility for telehealth, not less. For example, in June 2022, the Department of Health and Human Services (HHS) issued guidance clarifying how and when HIPAA

covered entities can utilize audio-only telehealth services in a compliant manner. That said, while telehealth is no doubt a continuing cornerstone of care, there is no certainty that the flexibility offered during the pandemic will remain, particularly around the modalities of telehealth, as well as the geographic and place of service considerations regarding where services can be performed.

**8. New federal regulations:** The last quarter of 2022 alone has seen the HHS announce proposed changes to the Confidentiality of Substance Use Disorder (SUD) Patient Records under 42 CFR Part 2 to enhance privacy protections for patients and increase coordination of care between SUD providers. In addition, in the days leading up to Christmas, CMS surprisingly issued a proposed rule that, if adopted, would greatly reduce the grace period providers have to quantify and return Medicare overpayments. While this rule faces a long road to adoption (public comments are due February 13, 2023), this provides a crystal-clear example of the types of significant changes that could occur in 2023.

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