

How Institutional Healthcare Providers Can Navigate Pandemic Responses That Turn Into Crises

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The COVID-19 public health emergency has posed unique challenges for hospitals and health systems, which have been pulling double duty caring for a wave of critically ill patients while also navigating seismic shifts in the regulatory environment. Decisions made during the chaos of the pandemic will be reviewed with the clarity only hindsight can provide. Whether in the form of Department of Justice (“DOJ”) or state Attorney General (“AG”) inquiries, congressional hearings, or unflattering news coverage, some healthcare providers will find their pandemic decision-making under the microscope. The strategy these providers implement to respond to the scrutiny can play an important role in mitigating reputational and financial damage.

Early Scrutiny of Pandemic Decision-making Previews Future Media and Enforcement Interest

Careful inspection of pandemic decision-making already has begun. Newspapers have criticized hospitals for sending “surprise bills,” for example in the form of facility fees associated with the COVID-19 tests they perform, or for the price of the COVID-19 test itself.¹ Other reports have condemned hospitals for failing sufficiently to utilize and inform uninsured patients about a hospital’s ability to receive reimbursement from the Department of Health and Human Services (“HHS”) for treating uninsured COVID-19 patients.² Meanwhile, HHS has begun referring providers who did apply for and receive reimbursement from this fund for the uninsured to the HHS Office of Inspector General (“HHS-OIG”) for potential fraud.³ HHS-OIG has announced the addition of several COVID-19-specific projects to its Work Plan, including “Audits of Medicare Part B Laboratory Services During the COVID-19 Pandemic” and “Use of Medicare Telehealth Services During the COVID-19 Pandemic.”⁴

Media reports can trigger a chain reaction of attention, sometimes culminating in law enforcement or Congress initiating an investigation using an array of tools at their disposal. DOJ, HHS, and HHS-OIG can pursue fraud relating to federal healthcare program beneficiaries using a variety of vehicles, including criminal fraud and conspiracy charges, the federal False Claims Act (“FCA”) and civil monetary penalty authorities. State AGs have increasingly expressed a willingness to supplement federal enforcement by invoking laws such as state FCAs for Medicaid patients or deceptive or unfair trade practice laws to address billing relating to commercial or uninsured patients. Politicians at the state and federal level have already committed to launching investigations into pandemic-related fraud.

¹ <https://www.nytimes.com/2021/03/30/upshot/covid-test-fees-lenox-hill.html>

² <https://www.npr.org/sections/health-shots/2020/10/22/925942412/hospital-bills-for-uninsured-covid-19-patients-are-covered-but-no-one-tells-them>

³ <https://www.wsj.com/articles/hhs-flags-covid-19-aid-paid-to-california-clinic-11617047884#:~:text=Federal%20officials%20have%20flagged%20to,familiar%20with%20the%20matter%20said.>

⁴ <https://oig.hhs.gov/reports-and-publications/workplan/>

Response Strategy

Healthcare providers should not wait to receive a subpoena or to become the subject of unflattering front page news to prepare to respond to the potential storm. Lessons learned through guiding industry players through similar moments of crisis demonstrate the need to be proactive, including through the following steps:

- Have a plan in place
 - Do not wait for a crisis to form a crisis management plan. Proactively identify potential crises that your organization could experience and begin to develop a plan of response. This exercise should also allow you to identify potential vulnerabilities and begin to take steps, including compliance auditing and monitoring, to buttress potential trouble spots.
 - Form a crisis management team, comprised of business, PR, and legal leadership. The ultimate composition of the team may vary based on the need to include particular crisis-specific subject matter experts, but the core team should understand their roles in advance.
- Take strategic initial steps
 - Issue a holding statement while moving quickly to gather the facts. The holding statement should express your organization's empathy and confirm the organization is taking actions to investigate and address the situation. In the meantime, your organization must quickly mobilize to understand the facts on the ground, recognizing that initial allegations and reports are sometimes accurate and other times critically flawed.
 - Empower the crisis management team to move quickly by authorizing it to issue necessary press communications and confer directly with the Board of Directors or a designated Board committee.
- Manage the crisis
 - As your organization begins to understand the facts, you will need to develop a corporate position on the situation. This will entail discussion and negotiation among relevant internal stakeholders.
 - Continue to keep key external and internal stakeholders, including the Board of Directors, appropriately apprised of developments. Public communications must balance transparency with the risk that comes from sharing uncertain or evolving information.
 - Engage in remediation. If law enforcement has become involved, work cooperatively and affirmatively to share facts and determine the best pathway forward. If law enforcement has not become involved, careful consideration should be given to proactive engagement to confront and potentially to resolve any liability. In either event, your organization likely will need to engage in reputation repair strategies with both regulators and the public. Such strategies can only be effective if based on demonstrated steps to remediate gaps that contributed to the issues and a robust compliance program.

- Learn from the crisis
 - Identify the root cause of the crisis and implement safeguards to prevent similar crises from occurring in the future.
 - Continue to keep stakeholders updated on any outstanding remediation efforts.
 - Analyze potential follow-on areas of third-party litigation.
 - Assess your organization's crisis management response to identify areas for improvement — while each crisis is unique, no crisis is likely to be your organization's last.
 - Enhance internal auditing and monitoring to improve your organization's ability to identify issues internally, before they become a public-facing crisis.