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Urgent Care Centers: Corporate Practice of Medicine, State Licensure, EMTALA, Reimbursement Compliance

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- **Per the American Academy of Urgent Care Medicine:**

  "Urgent Care Medicine is the provision of immediate medical service offering outpatient care for the treatment of acute and chronic illness and injury. . . . Urgent care does not replace your primary care physician. An urgent care center is a convenient option when someone's regular physician is on vacation or unable to offer a timely appointment. Or, when illness strikes outside of regular office hours, urgent care offers an alternative to waiting for hours in a hospital Emergency Room."

- **Per the Urgent Care Association of America, Urgent Care is differentiated from other delivery models by providing:**
  - No appointment necessary / walk-in care;
  - Evening and weekend operating hours;
  - X-ray on site; and
  - Capability to perform procedures like suturing, splinting and IV

The phenomenon of the development of urgent care centers is due to the oversupply of physicians, some of whom have opted to engage in a new level of entrepreneurship by expanding the types of services they offer including clinics treating minor medical problems without an appointment

US New & World Report
1983

Urgent care centers are one of the innovative alternatives methods that will render hospital emergency departments vulnerable to replacement

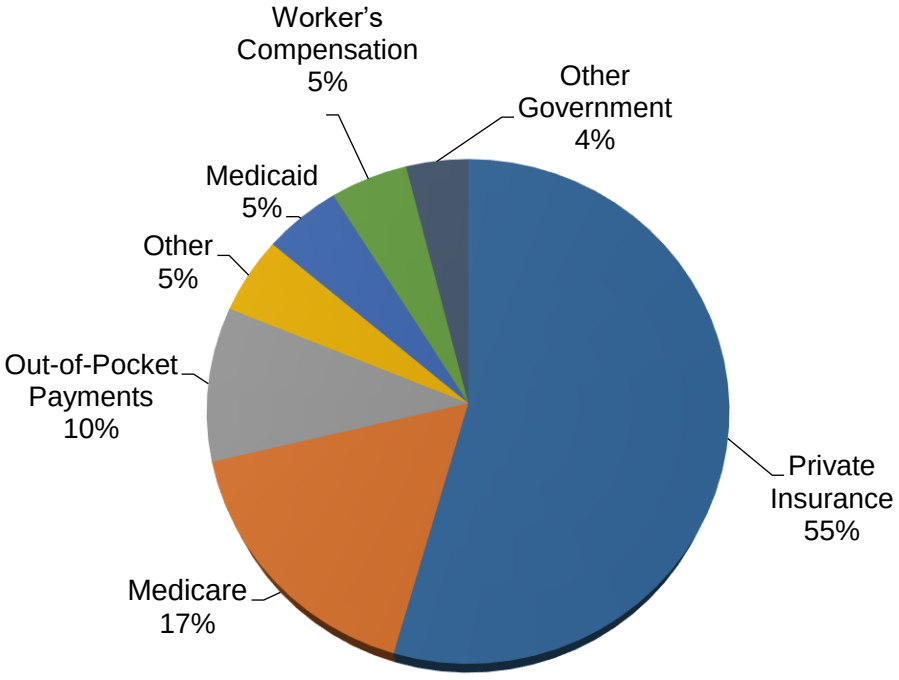
Harvard Business Review 1980

- Average emergency room (ER) wait time; Nationally takes an average of:
  - 135 minutes before being sent home
  - 53 minutes to receive pain medication when presenting with a broken bone
  - 96 minutes after being admitted to get to a room
- More healthcare cost is shifted to the patient
  - Average ER bill is estimated between $1,250 to $2,000
  - Average urgent care bill is <$500
  - 1/3 to ½ of all ER visits are for non urgent care and the CDC estimates that moving these cases to urgent care could save $18 billion in healthcare costs

The Urgent Care Center Model

- Locations staffed by mid-level practitioners (nurse practitioners and physician assistants) and physicians
- Often located in retail centers or other similar locations
- Level of physician supervision of mid-levels varies by state.
- At a minimum, physicians are usually required to review certain records but not required to be present at all times.

- **Commercial insurance is most prominent payor**
  - Case rates are common
  - Patient out-of-pocket higher compared to primary care visit (i.e. 30%-50% of total visit reimbursement from patient)
- **Low government payors**
  - Reimbursement generally through Medicare Part B – bill via the Physician Fee Schedule on a fee-for-service basis
  - Medicare patients do not have time pressure
  - Some clinics do not accept Medicaid
- **Discounts (typically 15-20%) available for patients without insurance**



M&A activity in the Urgent Care market continues at a feverish pace.

Seller Interest

- Historically high transaction multiples
- Narrow Networks
- Increased and Stronger Competition
- Increase complexities and cost
- Need to invest in growth or align with a larger operator
- Growth Capital
- Add sophistication

Buyer Interest

- The Affordable Care Act/Healthcare reform
- Highly Fragmented market
- Scalability and industry growth
- Overcrowded Emergency Rooms
- Lack of Access to primary care
- Access to Patients-New Patients into system/Networks
- Consumerism
- Low cost of debt
- Competitive Landscape
- Shift in healthcare cost burden

Urgent Care in 2020- The Year of Living Dangerously

- Urgent care clinics shut down in most states due to COVID19
- CMS and managed care organizations adapted by increasing availability of telemedicine
- Telemedicine is the practice of caring for patients remotely when the patient and the provider are not physically present but connected by HIPAA-compliant video-conferencing tools.

Telemedicine Changes in Response to COVID19

- Medicare paid for 144 services performed via telemedicine
- CMS also supported states in expanding access to telemedicine for Medicaid and CHIP patients.
- CMS is proposing changes to expand telehealth permanently pursuant to Executive Order.

Telemedicine Under Private Health Insurance

- The largest commercial payors do cover telemedicine services, but whether they will reimburse a particular service may be plan-dependent.
- Private plans follow CMS guidance on telemedicine
- Most payors extending cost-sharing waivers through the end of 2020.

The universe of urgent care clinics

- Pure play players- all they do is urgent care
- Insurance companies
- Pharmacies- either by themselves or through joint ventures with health systems (CVS, Walgreens)
- JV example- Walgreens and Vanderbilt University Medical Center in Nashville, TN area.

Hospital Health Systems

HCA

CHRISTUS Health

Select MEDICAL

Dignity Health

Pure Play Consolidators

urgent team

afc

NextCare URGENT CARE

MedExpress

CareSpot

Private Equity

ABRY PARTNERS

COMVEST PARTNERS

ElmCreek Partners

petra CAPITAL PARTNERS

LLR partners

Welsh, Carson, Anderson & Stowe

Commercial Insurance Payors

BlueCross BlueShield

OptumHealth

UnitedHealth Group

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Concentra®

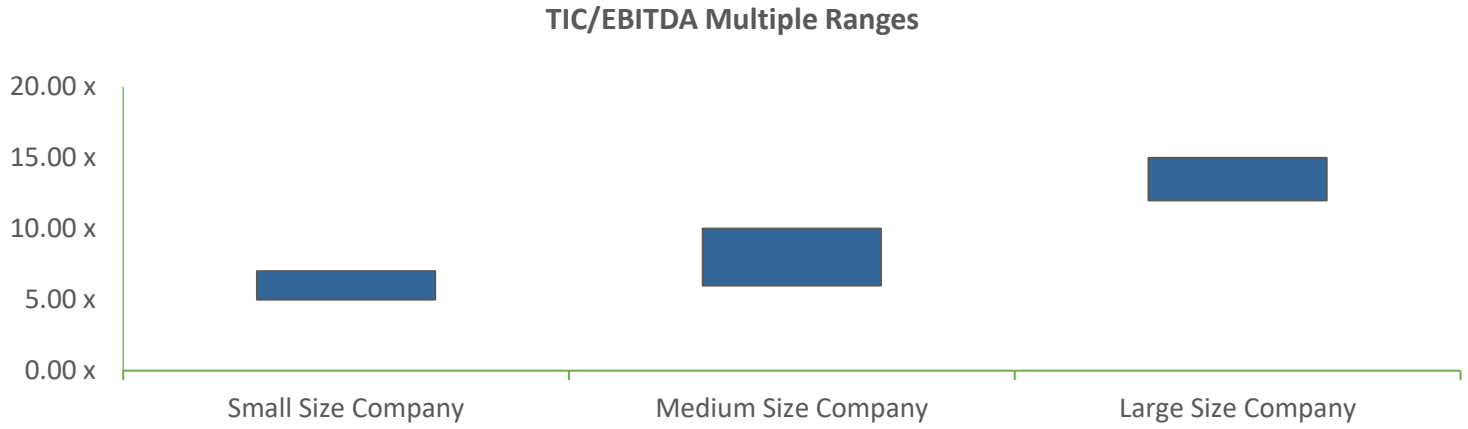

U.S. HealthWorks™


GoHealth
URGENT CARE


FRESENIUS
MEDICAL CARE


ZoomCare®
HEALTHCARE ON DEMAND

- Private Equity investment in UC has remained strong
  - Higher than average number of PE-backed start ups and growth equity
    - ❖ More than 15 Private Equity investments in Urgent Care since 2007 and more wanting in
  - Demand for bolt on deals have skyrocketed over the last few years and will continue for the long term
    - ❖ The 1-3 center ownership comprises about 65% of the market and represents the greatest opportunity
- Hospital systems are now leading the charge
  - Since 2014 hospitals have been aggressively pursuing urgent care
- Managed Care is making their move
  - Historically payors have made minority investments but that has changed



Multiples	➢ Record high multiples of trailing earnings for platform acquisition ➢ Buyers are typically paying for earnings rather than revenue
Types of Buyers	➢ Strategic buyers are more common today than in previous years ➢ M&A has historically been dominated by private equity firms ➢ Hospitals and health systems are exhibiting growing of interest and presence in the space
Drivers of Value	➢ Growth opportunities and factors affecting demand ➢ Competitive environment and regional density ➢ Stage in business cycle and profitability ➢ Infrastructure and support (platform vs. stand-alone) ➢ Reimbursement and payor mix

- Healthcare is evolving from fee-for-service medicine toward value-based reimbursement — and toward population health management.
- Hospitals are financially incentivized to reduce admissions
- Payors are looking for providers that can provide high-quality, cost-effective care
- Payors are demanding lower-cost settings of care
- Providers and Payors are becoming more involved in patient management and care delivery
- Patients are seeking more convenient access to healthcare services
- Access, cost and convenience is overriding the once-sacred patient-physician relationship

- Full Price Transparency- flat straightforward pricing for medical services
- On-Demand injury, illness and well care. Rx on-site 365 days a year
- On-Demand worldwide video visits for minor injury and illness
- Convenient labs On-Demand
- Primary, Chronic and Episodic care at one location
- On-Demand access to specialist such as orthopedics and cardiologist
- ER doctors On-Demand with Onsite X-Ray/CT/Ultrasound
- Prescriptions filled at the clinic
- Contracting with businesses for employee health programs

Transaction Planning

- Confidentiality/Non-Disclosure Agreements
  - Material Covered?
    - "Competitively Sensitive" or
    - "Confidential Information"?
  - "Confidential Information" Definition
    - Exclusions
  - Prohibited Use/Disclosure
    - limit to evaluate for the transaction
    - not use for any other purpose
    - not disclose to 3rd parties
  - Time Period to keep Confidential?
  - Return or destruction (with certification) of information on termination
  - Non-solicit
  - Standstill

Transaction Planning

- Due Diligence
  - Assets
  - Liabilities
  - Agreements
  - Liens/Guarantees
  - Regulatory Issues
  - Stimulus Money
    - PPP Loan
    - CARES Act
  - Third Party Consents
    - State License
    - CMS
    - PPP Lender

Transaction Planning

- Letter of Intent/Term Sheet
  - Structure
    - Asset Sale
    - Stock or Membership Interest sale
    - Joint Venture
  - Price
    - Payment Terms
    - Collateral
  - Standstill
  - Non-Solicit
  - Break-up Fee
  - Contingencies to Closing

What is the Corporate Practice of Medicine (CPOM) Doctrine?

- A doctrine that bars unlicensed persons (lay persons) from:
  - engaging in the practice of medicine or holding oneself out as practicing medicine
  - Controlling a physician's practice of medicine in the clinical aspects of the practice and in some states, the business aspects
- Applies not only to physicians, but also to other professions

What is the Corporate Practice of Medicine Doctrine?

***Absent an exception*:**

- CPOM states limit the practice of medicine to persons duly licensed in their states
- Business entities are not licensed persons
- Corporations do not have professional rights or powers
- Therefore, business entities and other non-licensed persons cannot provide services within the scope of medicine, as defined by a state

What is the Corporate Practice of Medicine Doctrine?

- This means that unlicensed persons and entities cannot:
  - Employ physicians
  - Share in physicians' fees earned for physicians' provision of professional services
  - Share in ownership of physicians' practices

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What is the Corporate Practice of Medicine Doctrine?

- CPOM Doctrine exists in some form in a majority of the states
- Significant variance in the type of authority used to enforce
  - Statutes
  - Regulations
  - Case law
  - Attorney general opinions
  - Administrative rulings
  - Board or agency guidance and interpretations

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What is the Corporate Practice of Medicine Doctrine: Rationale

- Goals of corporation are often not aligned with physicians' primary ethical responsibilities
- Prevents the commercial exploitation or a division of loyalty between the physicians' patients and the physicians' corporate employers
- Concern about negative health impact corporate owners could have on the care rendered by physician employees
- Concern that corporations may utilize patient information for corporate gain

How is the Doctrine Applied by the Different States?

- CPOM is state specific
  - Professional practice laws
  - Corporate regulations
  - Licensing regulations
  - Advertising regulations
- Often evolves through a mixture of opinions, complaints and guidance of the state's attorney general, legislative counsels, regulatory boards, and case law

Violations and Penalties Applied by the Different States

- Penalties vary by state
  - Criminal misdemeanors
  - Monetary penalties
  - Imprisonment – typically up to one year
  - Injunctive authority - order redress to consumers through refunds of fees or other costs
- Professionals are at risk of loss or suspension of their licenses

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Violations and Penalties Applied by the Different States

- Enforcement mechanisms
  - States: Professional licensing boards and agencies, attorneys general
  - Private litigants - class action suits alleging violations of public policy, unfair business practices and deceptive advertising
  - Payors – attempt to deny reimbursement alleging void provider contracts due to CPOM violations
    - Depends on type of violation, policy and particular case facts
    - Unjust enrichment where services provided if no patient harm
    - Knowingly violation may void contract with denial of reimbursement for the provider's services

Urgent Care Center Structures

- Physician Owned
- Management Services Agreement
- Friendly or Captive PC
- State Licensure
- Foundations
- HMOs and Health Plans

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Management Services Agreements and MSOs

- MSO: an organization that provides practice management and administrative services to physicians and other health care entities; generally owned by laypersons and/or health care professionals
- MSO services often include billing, purchasing, accounting, office space, supplies, inventory control, equipment leasing, human resources services, managed care contracting, administrative staffing

Management Services Agreements and MSOs

- Professional pays the MSO to perform operational functions to the extent that those services do not interfere with the professional's medical judgment or otherwise result in MSO control over the medical practice
- Management services agreements need to be carefully drafted to comply with how “control” interpreted in various states

Friendly or Captive PC

- One or more licensed professionals who are friendly with the lay entity set up a PC where they own all of the equity
- The lay entity then enters into one or more contracts with the PC such as an administrative or management services agreement, whereby the lay entity can exercise certain financial and operational controls over the PC
- Often established in conjunction with the friendly professional's contract as a medical director of a hospital or other facility, which may restrict the medical director's sale of shares of the PC only with the lay entity's prior approval
  - Stock transfer restrictions may be disallowed in certain states

Friendly or Captive PC

- Frequently used by hospitals and physician groups who seek alignment and integration where employment is disallowed
- The professional's medical judgment is preserved while the physician group gets operational assistance through the management services it purchases
- In the retail context, the professional may operate a practice on the premises of a lay entity's store, thereby allowing patients to obtain prescriptions from the professional, which are necessary for the purchase of goods from the lay corporation
- Consider anti-referral and anti-kickback laws

State Licensure

- Licensed entities may be an exception to CPOM
  - Stand-alone urgent care center
  - Hospitals
  - Health clinics
  - Primary care facilities
- Varies by State

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Foundations

- Lay corporations also may establish or partner with clinics that are specifically exempt from the corporate practice bar
- For instance, non-profit tax exempt organizations, including hospitals, seeking to integrate and align with medical practices may be able to use non-profit foundations to contract directly with professionals for medical services or themselves enter into direct contracting arrangements with the professionals

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HMOs and Health Plans

- Health care service plans can employ or contract with licensed professionals to provide services to their members
  - Suitable for organizations that wish to assume risk for patient health on a group, capitated basis or through the sale of individual health plan contracts
- Often used in the retail and big-box setting to establish stand-alone health plan offices that can contract with and provide medical services directly to consumers – even on a walk-in basis
- Licensed professionals must retain their control over clinical decision-making
- Establishment and operation of an HMO or health plan is costly due to state financial requirements
- Ongoing regulatory burdens and agency oversight can also be hefty

Legal and Compliance Issues for Urgent Care Centers

- Tac classification- Employees or independent contractors
- EMTALA- necessity of providing medical screening examination prior to transfer
- Stark Law and self-referral Issues
- The Anti-Kickback Statute- illegal inducements for referrals
- False Claims Act- upcoding, lack of medical necessity and quality

- Misclassification of Personnel
  - Employees versus Independent Contractors
  - The form of agreement does not control
  - Many urgent care operators contract with personnel as independent contractors despite treating them like employees under IRS guidance:
    - Behavioral: Does the company control or have the right to control what the worker does and how the worker does his or her job?
    - Financial: Are the business aspects of the worker's job controlled by the payer? (these include things like how worker is paid, whether expenses are reimbursed, who provides tools/supplies, etc.)
    - Type of Relationship: Are there written contracts or employee type benefits (i.e. pension plan, insurance, vacation pay, etc.)? Will the relationship continue and is the work performed a key aspect of the business?
    - No one factor is determinative and must examine each case

- Misclassification of Personnel (cont.)
  - Tax liability for employer withholdings and penalties
  - Potential liability for overtime (if personnel at issue are not exempt)
  - Independent Contractors may not want to transition to employment
  - Can create a Stark Law issue…

- Stark Law Compliance
  - DHS (typically X-ray and lab in urgent care space, occasionally may be others)
  - If DHS referring physicians own the urgent care provider, then need to meet "in-office ancillary services" exception
    - This will often require that the entity meet the group practice definition under Stark
    - Group practice definition has a number of requirements, including that Independent Contractor physicians cannot provide 25% or more of total patient encounters.

- Stark Law Compliance (cont.)
    - Where physicians are not owners, can rely on employment or personal services arrangements exceptions
    - However, ownership of MSO can trigger Stark as well, particularly if not relying on the in-office ancillary services exception (and arguably, even then)
  - Good news for urgent care: DHS revenue is often a small component of overall revenue
  - Bad news:
    - It is not uncommon for Stark issues to be found in urgent care providers
    - To avoid what are often technical errors from becoming false claims, must complete a timely investigation and voluntary repayment
    - In certain circumstances, a formal self-disclosure under the CMS SRDP may be needed

Anti-Kickback Statute

- Federal statute prohibits offering or receiving anything of value in exchange for the referral of a patient for the delivery of health services covered by a federal health program
- Broad prohibition which can lead to fines and imprisonment.
- Safe Harbors attempt to define conduct which the government will not prosecute under AKS.
- Examples include investment interest safe harbors and professional services agreements.

False Claims Act

- Federal law that makes it a crime to submit a false record or file a false claim regarding any federal health program
- Whistleblowers can use the FCA to report violations and receive a share of the recovery
- Violations can result in significant fines and penalties- treble damages and per claim penalties
- In 2019, the Department of Justice recovered over $3 billion in settlements and judgments in civil cases

False Claims in Urgent Care

- Upcoding of visits
- Billing for services not provided or medically unnecessary services
- Carewell Urgent Care Centers-$2 million settlement for false claims relating to upcoding of E/M encounters and failing to identify providers of service (2019)
- Urgent Care Extra (AZ) paid $12.5 million in a billing fraud case in 2020. Overstated the medical complexity of medical services and encouraged staff to order medically unnecessary tests and procedures.

- EMTALA imposes medical screening examination requirements on hospitals “with dedicated ED” for patients who present to Emergency Department who may be suffering from Emergency Medical Condition
- If an urgent care center is “held out to the public” by a hospital as a place that provides care for emergency medical conditions on urgent basis without appointment, EMTALA applies
- If emergency medical condition exists, facility must provide further examination and treatment or transfer to another facility

Conclusions

- Urgent Care Centers continue to expand and promote access to care
- Without proper planning and diligence to legal and financial risks, urgent care centers can provide quality care and consistent financial return
- Without attention to financial and legal risks, urgent care centers can be the focus of government investigation and prosecution.

Thank You

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