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"60 Day" Court Ruling Shocks Providers and Rings a Warning Bell to Compliance Officers

By Richard Kusserow | August 2015

Tips and Suggestions from Experts

The Affordable Care Act (ACA) mandated reporting and returning of overpayments within 60 days of being "identified" or create "reverse false claims." The problem with the 60-Day Rule is that Congress and the Centers for Medicare & Medicaid Services (CMS), in their rule making process, did not define the term identification, which triggers the clock. This left providers to interpret the 60-Day Rule themselves. Recently, the Department of Justice (DOJ) and State of New York intervened in a qui tam case where an employee was tasked to review a suspected problem. He reported 900 questionable claims to management, who failed to take action. He was subsequently terminated and filed the *qui tam* action. In the court case the defendants argued, in effect, that "identified" meant 'classified with certainty;' otherwise, it would "impose an unworkable burden" on providers. The Court sent shockwaves through the provider community when it rejected those arguments and ruled that notice only of potential violations was sufficient to start the 60-day clock, otherwise it would permit willful ignorance to delay the formation of an obligation to repay the government money that is due.

The legal community is all abuzz about this, but compliance experts note that this is also a warning bell to Compliance Officers and impacts on many elements of the compliance programs. Compliance experts remind Compliance Officers to take note of key elements in their programs to ensure they are complete and functioning efficiently and implemented with diligence, as any failures could trigger the "reverse false claim."

Infrastructure.
Al Bassett, JD, former Deputy Inspector General and FBI executive with 15 years healthcare compliance consulting experience notes that "The Compliance Officer must have direct access to the executive leadership and board to ensure that potential violations are acted upon and disclosed in a timely manner. They cannot languish for failing to make timely decisions."

Compliance Policies.
Jillian Bower of the Policy Resource Center stated that "The Court decision increases the importance of having written guidance already in place to address potential overpayments, including policies for conducting investigations, disclosure, as well as protocols between the Compliance Officer and Legal Counsel in handling complaints. Without such written guidance, matters could bog down and run out the clock."

Hotline.
Carrie Kusserow, a senior consultant with over a decade specialized experience with hotlines, observed that "Most questionable claims processing practices arise from employees. It is not

only critical to have a hotline and to encourage employees to use it to report issues without fear of retribution, but also for the compliance office to act promptly on any information provided. Failure to take timely action is a "ticking time bomb" under the 60-day Rule."

Investigation.
Jim Cottos, who has served as an Interim Compliance Officer for many organizations, along with his experience as former Chief Inspector for the Department of Health and Human Services (HHS) Office of Inspector General (OIG) advised that "Organizations must have available trained people to investigate potential violations of law or regulation." He warns that "Just because someone is an attorney does not mean they are qualified investigative experts. If such experts are not available on staff, then such experts should be identified in advance to be made available for prompt and efficient resolutions."

Claims Analysis.
Cornelia Dorfschmid, a nationally recognized expert on analyzing claims stated "The biggest challenge with "identification" of overpayment amounts is to do too little for too long. Hesitation can quickly turn into unreasonable delay and non-compliance. The Compliance Officer should not let that happen. Getting help from independent and objective experts with the determination of claims accuracy and statistical extrapolation, as well as secondary effects, e.g., such as on physician productivity and FMV compensation in RVU based models, is a good idea. It will carry a lot more weight with the government than if internal staff does the work. External review work in these cases is best done under direction of legal counsel."

Compliance Training.
Camella Boateng, a senior compliance consultant, says that "The old adage about 'an ounce of prevention is worth a pound of cure'. It is far better to avoid making billing errors than dealing with the consequences of failing to do so. As such it is worth remembering advice from the OIG to provide specialized compliance annual training regarding applicable billing rules for those involved in claims processing."