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New Legal Exposure When You Fail to Repay Overpayments.

Overview

On May 20, 2009, President Barack Obama signed into law the Fraud Enforcement Recovery Act (FERA). The legislation expands the federal government's ability to investigate and prosecute financial fraud. FERA primarily focuses on fraud within the mortgage and security industries; however, the legislation contains amendments to the Federal False Claims Act (FCA), which have serious implications for health care industry.

What is the FCA?

Under the FCA, individuals or organizations that knowingly submit or cause others to submit false claims for federal funds are subject to civil liability. The FCA is increasingly being used against health care organizations to address health care fraud. Examples of FCA violations by health care providers include performing unnecessary or inappropriate medical procedures, billing for services and supplies that were not furnished, and using false diagnoses to justify claims. In the event fraud is proven, FCA violators are liable for treble damages as well as a civil penalty between $5,000 and $10,000.

> The False Claims Act is "an extraordinary civil enforcement tool used to recover funds lost to fraud and abuse."
>
> \- Senate Judiciary Committee

What is the Expansion?

Prior to the enactment of the FERA, the FCA's "reverse" false claims[1] provision prohibited individuals and organizations from creating or using "a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the Government." For example, a health care provider renders and bills the Medicare program for medically unnecessary services provided to Medicare beneficiaries. Additionally, the health care provider falsifies medical records to support unnecessary services. This might constitute a FCA violation.

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[1] "Reverse" false claim refers to Government money or property that is knowingly retained by a person even though they have no right to it."

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The FERA modifies and expands on the concept of a "reverse" false claim by clearly defining the term "obligation." An obligation is now defined as "an established duty, whether or not fixed, arising from an express or implied contractual, grantor-grantee, or licensor-licensee relationship, from statute or regulation, or from the retention of any overpayment." As a result, the liability of health care providers is broadened to cover the retention of overpayments. Consequently, health care organizations that identify federal overpayments (e.g. Medicare overpayments) from ongoing monitoring and audits and fail to return the funds in a timely matter may be found to be in violation of the FCA.

The FERA also expanded retaliation protection for whistleblowers. Under the "qui tam" provisions of the FCA, individuals are encouraged to report fraud in return for a percentage of money recovered by the government. Organizations are required to develop and implement appropriate policies and procedures to ensure non-retaliation against the employee reporting the violation. Prior to the FERA, the retaliation protection was limited to employees and not contractors or agents. Subsequent to the enactment contractors and agents have retaliation protection.

What Impact Does the Expansion Have on Billing Personnel?

The enactment of FERA poses increased legal exposure for the health care industry. Although, hospitals receiving Medicare payments were always required to return overpayments; the retention of overpayments may not only result in exclusion from the federal programs, but also a liability under the FCA. As noted above, FCA violations are subjected to a civil penalty between $5,000 and $10,000 per false claim, and three times the amount of damages resulting from the misconduct. Thus, it is imperative for billing personnel to conduct due diligence on all claims submitted to Federal health care programs, and understand the repayment process for Government third party payers.

Furthermore, hospitals may wish to review and address the following questions to reduce the risk of non-compliance:

- Have the appropriate policies and procedures been developed and implemented to reduce FCA liability? Particularly, are the policies and procedures specific to billing personnel with respect to the handling of Medicare overpayments and non-retaliation?

- Are contracted employees and/or agents qualified to detect fraud and report violations to management?

- Has the adequate compliance training been presented to encourage employees, contractors, and/or agents to report violations to management without the fear of retaliation? Moreover, has training been provided with respect to returning overpayments?

- Are individuals that are acting on the organization's behalf being supervised? The expansion of FCA liability raises the risk of a health care organization. Therefore, organizations are

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encouraged to supervise the conduct of individuals acting on their behalf. An example includes the use of a contractor to provide billing services. Although, the health care organization may not directly submit the claim, the organization still would be liable for fraudulent bills submitted by the contractor.

In the past, the federal government has been able to recover substantial amounts under the FCA. As a result, the federal government has characterized the FCA as "one of the most successful tools for combating waste and abuse in [g]overnment spending." The expansion of the FCA is anticipated to enhance the Federal government's efforts to address health care fraud and abuse. Thus, billing personnel should be encouraged to not only correctly report and file claims but also identify, correct and adjust errors when appropriate.

Official Resources

- Fraud Enforcement Recovery Act of 2009, S. 386 (FERA).
- False Claims Act, 31 U.S.C. § 3729 et seq.

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