

HEALTH CARE
&
HUMAN
SERVICES

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Expanded Enforcement and Liabilities Under Healthcare Reform

While the main focus of the recently adopted federal Healthcare Reform legislation is the scope and availability of health insurance, the legislation also provides increasing funding for federal fraud and abuse investigations and recoveries from providers, additional criminal penalties, and expanded liability under the federal False Claims Act. Additional and enhanced civil monetary penalties are also provided for improper actions and false statements. A comprehensive and effective Medicare & Medicaid Compliance Plan that addresses potential vulnerabilities in your organization is essential to protect your organization from potential liability in this enforcement-oriented environment.

The federal Fraud Enforcement and Recovery Act of 2009 established as a basis for False Claims Act liability failure to return to the government an overpayment received by a provider and expanded the liability for false records to cover contractors of a provider. Healthcare reform further expands the reach of the False Claims Act. Under the Act, overpayments now must be returned by a provider within 60 days of discovery, or be subject to recovery under the Act. The False Claims Act is amended to relax the “public disclosure” threshold issue which barred suits where there had been previous disclosure of the false claim unless the party bringing the suit met an “original source” test. Now, that bar would only apply to previous disclosures in a federal forum, not a state forum or private litigation. Further, the requirements to qualify as an “original source” are relaxed. In addition, where the public disclosure bar would still apply, the government may oppose dismissal of a suit and essentially overrule dismissal. This will make it easier for people to bring false claims act cases and more difficult for providers.

The federal anti-kickback statute is amended to eliminate the requirement that a specific “intent” to violate the law be established that courts have applied in interpreting this law. This will make it far easier to charge providers with violations. In addition, the anti-kickback law is amended to clearly provide that a claim related to a violation under the anti-kickback law is subject to recovery under the False Claims Act. However, the beneficiary inducement prohibition is relaxed to now exclude remuneration that promotes access to care and poses a low risk of harm to patients and to the healthcare programs.

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Further, to address fraud, waste and abuse in the Medicare program, the time limit to file a claim for services provided after January 1, 2010 is reduced to one calendar year after the date of service.

Hiscock & Barclay's Health Care and Human Services Practice Area has substantial experience in helping providers in the development and implementation of Compliance Programs and the training of Boards of Directors, executive team members, and staff of providers. Our attorneys also have extensive experience in defending Medicaid and Medicare provider audits, investigations and sanctions and in the defense of matters brought by the State Attorney General. Should you have any questions regarding this Legal Alert, feel free to contact Eugene Laks, David Glasel, Robert Tengeler or Melissa Zambri at (518) 429-4200 or any member of the Health Care and Human Services Practice Area. ■

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