New Federal Regulations Impose Fraud-Training Obligations on Health Care Providers

by ERR Members Vanessa M. Kelly and Ty Hyderally

In federal legislation adopted quietly without fanfare or publicity, health care providers who receive $5 million or more in revenue from Medicaid must now provide training for their employees on fraud detection. This means that health care employers, such as hospitals, nursing homes, and large physician groups, must teach their employees how to be "whistle blowers" and create policies for responding to employee reports of suspected Medicaid fraud and abuse. While President Bush signed the Deficit Reduction Act last February mandating such training, little attention has been drawn to this sweeping change that became effective January 1, 2007. As a result, many health care employers subject to this new requirement may be caught unaware. As compliance is a prerequisite to Medicaid reimbursement, employers who fail to comply or who are ignorant of these new requirements risk losing this funding. Additionally, as the law empowers individuals to sue as "whistle blowers," employers may find themselves defending claims of wrongful discharge or retaliation related to an employee's belief of Medicaid fraud.

Requirements

Specifically, the new law amends the Social Security Act, 42 U.S.C. 1396a(a), and requires employers to: (1) establish written policies for all employees informing them about the federal False Claims Act; (2) provide a mechanism for detecting, preventing and reporting any suspected fraud, waste or abuse; and (3) provide a discussion of these policies and the employees' rights as "whistle blowers" in employee handbooks.

Additionally, the Medicaid Integrity Program created by the Deficit Reduction Act is charged with the duty to audit, investigate, and educate health care providers for potential fraudulent activity. The Medicaid Integrity Program aims to pair with State agencies to coordinate a cohesive strategy to recognize and prevent fraud or abuse.

The implications of the new regulations are staggering. Paired with the Justice Department's focus on Medicaid fraud, health care providers have serious concerns. Indeed, the federal government has tagged several prominent health care providers in lawsuits or settlements relating to alleged Medicaid fraud. For example, Amerigroup, a managed care company, was found liable by a jury in Illinois for discrimination against high cost Medicaid patients, such as pregnant women. Tenet Healthcare, a national hospital chain, agreed to pay $900 million to resolve charges of over-billing Medicaid and paying kickbacks to physicians. Medco Health Solutions, a manufacturer of prescription drug benefits, agreed to pay $155 million to resolve charges that it submitted false claims and paid kickbacks to health care plans. And Omnicare, a national provider of pharmacy services to nursing homes, agreed to a $49.5 million settlement to avoid prosecution on claims of switching Medicaid patients to more

expensive drugs.[1]

From the Employee's Perspective : Enhanced Protection

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This is a wonderful statute that provides additional protection to those conscientious employees determined to do the "right thing" without risking job security. As the federal government turns its attention to combating Medicaid fraud, this statute enlists the help of a valuable resource — employees who are likely the most knowledgeable about the manner in which their employer addresses its Medicaid obligations. Coupled with whistle blowing protection, the law provides employees with an economic incentive to complain about perceived fraudulent activity. The False Claims Act authorizes individuals to act as private attorney generals and sue in the government's name in a *qui tam* action. Individuals who initiate *qui tam* actions may be eligible for a reward from ten to twenty-five percent of any settlement or judgment.

In corporate America, workers are all too often ill informed or uneducated about what statutes protect their rights. The Deficit Reduction Act furthers the goal of informing employees about their rights and provides a mechanism to address concerns, which can only help build stronger employers with a more empowered workforce leading to overall corporate health.

What this Means to Employers: Be Proactive

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Employers may legitimately fear that innocent mistakes may subject them to costly lawsuits. As with other employee rights statutes, prevention is the employer's best defense. Health care providers must be prepared to respond to audits or whistle blowing decisively and with confidence. The key to successfully managing an audit or internal complaint is having a thorough plan in place to prevent, identify, and remediate any Medicaid problems. Any compliance plan must focus on employee training.

Additionally, the regulations require employers to instruct their employees about the False Claims Act, which confers standing on an individual to sue in the government's name and provides a reward for successful fraud prosecution. While the regulations require employers to enact policies and update employee manuals to include provisions providing not only whistle blower protection, but "how to sue" instructions, the regulations do not expressly require employees to first exhaust their employer's internal complaint mechanisms. The specter that employees may be motivated to report by the hope of a financial windfall is chilling to an employer who in good faith seeks to comply with the myriad of regulations accompanying the receipt of Medicaid payments.

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[1] As reported in the NY Times, December 23, 2006.

Employers are left with critical unanswered questions: Will this spur litigation that could have been avoided by resort to internal reporting structures? Will an affirmative defense similar to the Faragher/Ellerth defense arise for employees who eschew their employers' internal process and head straight for the court house? It is likely that the answers to these and other questions of interpretation will be forged by the courts through what will undoubtedly be expensive litigation.

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Vanessa M. Kelly, Esq. is a founding partner of Schwartz Kelly, LLC located in picturesque Annandale, New Jersey. The focus of her practice is on the representation of employers in all facets of employment counseling and litigation. She is a member of the ABA's Labor and Employment Section, Employee Rights and Responsibilities Committee and the Law Practice Management Women Rainmakers Section. She has a special interest and expertise in the law of restrictive covenants, where she has contributed to the ABA's State by State Surveys concerning restrictive covenants and an employee's duty of loyalty, and in the representation of health care providers in employment related matters and litigation.

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