

HEALTH CARE NEWS BEAT

AUGUST 2010

EXCLUDED INDIVIDUALS LIST: DO NOT HIRE!

Under the Civil Monetary Penalties Law, the Health Insurance Portability and Accountability Act of 1996, the Balanced Budget Act of 1997, and the False Claims Act, any person that arranges or contracts (by employment or otherwise) with an individual, that the person knows or should know is excluded from participation in a federal health care program, for the provision of items or services for which payment shall be made under such a program, may be subject to a civil monetary penalty (a "CMP") of \$10,000 for each item or service furnished during the period that the person or entity was excluded, as well as an assessment of up to three times the amount claimed, and possible program exclusion. Essentially, federal Medicare and Medicaid dollars cannot be used to pay for anything (in whole or in part) that an excluded individual or entity furnishes, orders, or prescribes. This payment prohibition applies to the excluded individual or entity, anyone who employs or contracts with the excluded individual or entity, and any hospital or other organization where the excluded individual or entity provides services. Moreover, the payment prohibition applies regardless of who submits the claims, and the payment prohibition applies to all administrative and management services furnished by the excluded individual or entity.

Practically anyone can be excluded from participation in a federal health care program - physicians, nurses, therapists and even unlicensed individuals, such as administrators, billers, secretaries, suppliers and janitors. The primary reasons for exclusion are licensing board actions, convictions for program-related fraud, patient abuse or neglect convictions, and default on Health Education and Assistance Loans. The exclusion remains in effect until an individual or entity is formally reinstated to the program. Even if, for example, a nurse excluded for a patient abuse conviction wants to be hired in a medical practice as a receptionist, the individual is still excluded even though the new job does not involve direct patient care or require a license. In that scenario, if the receptionist's wages are derived in part from Medicare and/or Medicaid revenue, the medical practice should not hire this individual. Health care providers also may seek an Advisory Opinion from the Office of Inspector General ("OIG").

In determining the amount of any penalty or assessment, the OIG will take into account the nature of the claim, the degree of culpability of the person or entity against whom a CMP is proposed, history of prior offenses, financial condition and such other matters as may be considered in the OIG's discretion.

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In light of the OIG's "knows or should have known" standard, health care providers have an affirmative duty to check the program exclusion status of individuals or entities prior to entering into employment or other contractual relationships (such as with contractors, manufacturers and/or suppliers of items or equipment that are used in the care or treatment of patients and that are reimbursed directly or indirectly by a federal health care program). The OIG is responsible for excluding individuals who have participated or engaged in certain impermissible, inappropriate, or illegal conduct. The OIG maintains a List of Excluded Individuals and Entities (the "LEIE") (www.oig.hhs.gov/fraud/exclusions.asp). The General Services Administration (the "GSA") is responsible for maintaining the Excluded Parties List System (the "EPLS") which is an index of individuals and entities that have been excluded throughout the U.S. Government from receiving federal contracts or certain subcontracts and from certain types of federal financial and non-financial assistance and benefits (www.epls.gov). Health care providers should have policies in place to require that Human Resources check the OIG's LEIE and the GSA's EPLS and other databases before hiring any employee or contracting with an individual or entity. If an individual is listed on just one database, the OIG may determine that the health care provider "should have known of the excluded status" even if the health care provider did not check that specific database, but checked another database on which the individual or entity was not listed. Some other helpful websites and databases are: www.emedny.org.info/disqualified.html; and the National Practitioner Data Bank and Healthcare Integrity and Protection Data Bank. Health care providers should perform an annual update of exclusion checks on all employees and contractors/vendors, and should implement a policy to retain copies of all exclusion checks and screening results for each individual hired or contractor/vendor engaged.

In the event a health care provider discovers that it has inadvertently hired or contracted with an excluded individual or entity, the health care provider should terminate the relationship and stop billing government payers for such individual's or entity's services immediately. The health care provider also should consult with legal counsel as soon as possible to determine what further actions need to be taken (such as voluntary disclosure) and to assess any potential penalties that could be assessed. Last year, the OIG collected over \$2 million in settlements in matters related to employing or contracting with excluded individuals or entities, which highlights how seriously the OIG takes this issue.

If you have any questions regarding the False Claims Act or the Civil Monetary Penalties Law in general, or the hiring of excluded individuals, or developing a compliance program to assist with monitoring these issues, please contact Leo Reichert or Jennifer Vaughan in our Atlanta office.



ATLANTA
1500 Marquis Two Tower
285 Peachtree Center Avenue
Atlanta, Georgia 30303
John H. Parker, Jr.
(404) 523-5300

TALLAHASSEE
118 North Gadsden Street
Suite 200
Tallahassee, Florida 32301
Karen A. Putnal
(850) 681-0191

SOUTH GEORGIA
2402 North Tift Avenue
Suite 101
Tifton, Georgia 31794
Patty S. Veazey
(229) 382-2652

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