

Employment of Excluded Providers: The Long Reach of the CMP

Oct 01 2001

Practice Area: Health Law

On October 5, 2001, the Office of Inspector General (OIG) of the US Department of Health and Human Services released a new advisory opinion relating to the employment of an individual who is excluded from participation in Medicare, Medicaid, and other federal health care programs. This advisory opinion serves as a reminder of the need to verify the exclusion status of all employees and contractors, regardless of the remoteness of their connection to patient care, administration, or management services.

Overview of Exclusion/Payment Prohibition

Individuals and entities may be excluded from participating in federal health care programs for a number of reasons, ranging from patient abuse to improper billing to failure to repay student loans. Providers or entities receiving federal health care program funding may only employ an excluded individual under limited circumstances. Excluded individuals or entities may not be employed for the provision of health care services, utilization review, medical social work, or administrative services. Providers also may not contract for those services with an entity that uses an excluded person or entity for those services.

The consequences of violating this prohibition may be severe. OIG has the authority to impose civil monetary penalties (CMP) against excluded individuals and entities that seek reimbursement from federal health care programs, as well as against health care providers that employ or enter into contracts with excluded individuals to provide items or services to federal program beneficiaries. Penalties may be imposed up to \$10,000 for each item or service that is furnished by an excluded individual. In addition, the responsible party may have to pay three times the amount claimed for each item or service.

Summary of AO 01-16

The advisory opinion related to a not-for-profit HMO's employment of an excluded psychologist in the position of a Senior Program Developer. OIG concluded that this employment could constitute grounds for sanctions against the HMO, but determined that sanctions would not be imposed under the circumstances. While this conclusion is not entirely surprising, the opinion's analysis is instructive.

At first blush, the employee's job responsibilities seemed far removed from the types of services that would be subject to OIG's CMP sanction and exclusion authority. The employee had responsibility for leadership development, performance improvement counseling, diversity training, and non-professional course development. The employee was not involved in providing or developing any training, education or consulting relating to clinical or administrative matters; in the delivery of health care services, or in compliance, billing or reimbursement matters; or in utilization review, medical social work, or administration of health care. The employee had no contact with the HMO's members.

While recognizing the remoteness of the connection, OIG nevertheless concluded that "employee training is an integral part" of the HMO. OIG presumed that the in-house training services provided by the excluded psychologist were factored into administrative costs as reported to CMS via the HMO's Adjusted Community Rate. To the extent that those services were reimbursed in part by capitation payments made by Medicare or Medicaid, OIG concluded that the HMO could be subject to sanctions.

Nevertheless, OIG exercised its administrative discretion in determining that it would not impose sanctions, given that the psychologist's duties were "so far removed" from the delivery of health care services, that the services are not an "ordinary and necessary component of providing items and services" (even though OIG elsewhere described such services as "integral" to the operation of the HMO), and that the services were not the subject of any identifiable federal funding or regulatory mandates.

Lessons

As OIG noted in a *Special Advisory Bulletin* on the subject in September 1999, "the practical effect of an OIG exclusion is to preclude employment of an excluded individual in any capacity by a health care provider that receives reimbursement, indirectly or directly, from any Federal health care program." Although OIG ultimately approved the employment of an excluded individual in AO 01-16, this opinion serves as a reminder of the risks associated with such employment. Providers should keep the following in mind:

- The employment prohibition and penalties apply to excluded individuals, regardless of the reason for exclusion.
 - The prohibition applies not only to excluded individuals or entities that would be directly involved in the delivery of patient services, but also to those involved in administrative or management services.
 - The connection to administrative and management services maybe remote. The prohibition is not limited to services involving compliance, billing, or reimbursement.
 - The ban on payment applies to all methods of federal program reimbursement, whether from itemized claims, cost reports, fee schedules, or prospective payment system.
 - A provider that receives federal health care funding may only employ an excluded individual in very limited circumstances. These include circumstances where the provider is both able to pay the individual exclusively with private or other non-federal funds, and where the services furnished by the excluded individual relate solely to non-federal program patients.
 - The exclusion remains in effect until the individual or entity has been reinstated. Reinstatement does not automatically occur at the end of the term of exclusion; the excluded party must apply for reinstatement.
 - Employment, independent contractor, and other service agreements should include standard language that (1) warrants the current non-exclusion status of the employee/provider; (2) requires notification of any future exclusion from participation in federal health care programs; and (3) provides for the termination of the agreement in the event of exclusion, or the right to terminate the individual or entity subject to the exclusion.
-

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.