



New Law Mandates More Documentation and Employee Education for Healthcare Entities

Insights

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Although many hospitals, clinics and other entities already have similar programs in effect, the Deficit Reduction Act of 2005 (DRA), signed by the President in 2006, imposes yet another oversight requirement that healthcare providers must soon fulfill.

Specifically, the DRA includes provisions mandating that states participating in the Medicaid program amend their State Plans to require certain providers and other entities to establish policies and procedures to educate employees, contractors, and agents on how to report false claims to the federal government and advise them of whistleblower protections.

Many hospitals currently provide some or all of this material through their existing compliance programs. But it would benefit every healthcare provider to review your current practices and documentation to ensure that you are prepared to meet these emerging requirements.

Requirements Related To Written Policies And Procedures

The DRA focuses primarily on controlling and reducing Medicaid costs. Significantly, however, the employee education section is limited to health care entities that receive \$5 million or more annually in Medicaid reimbursement. These entities must establish policies and procedures to educate employees and others regarding: 1) the False Claims Act, including administrative remedies; 2) the federal Program Fraud Civil Remedies Act; 3) state laws pertaining to civil or criminal penalties related to false claims or statements; 4) whistleblower protections provided under such laws and the role of these laws in preventing waste, fraud and abuse; and 5) the provider's own policies and procedures having to do with preventing, detecting and reporting waste, fraud and abuse. Employee handbooks must now include discussion of all of the foregoing items. The mandate for State Plans is effective on January 1, 2007.

If they have not done so already, individual providers should be taking steps to comply or risk the forfeiture of all Medicaid payments during the period of noncompliance. Additionally, if a covered entity knows or should know that it is not meeting these requirements, the government may assert that the presented Medicaid claims were "false" and the entity may be subject to further penalties. Currently, about one half of all states have enacted some sort of laws that should be referenced in these policies. Beyond this, little guidance currently exists to help employers comply.

Disseminating Required Information To Employees

The DRA requires covered entities *that have handbooks* to include a "specific discussion" of the laws enumerated in the preceding paragraphs, but the statute does not specify whether company policies and procedures must be disseminated if a covered entity does not have a handbook.

The Office of Inspector General (OIG) of the Department of Health and Human Services is expected to issue guidelines that will hopefully clarify this area. Based upon the apparent intent of Congress in passing the DRA, it seems likely that the OIG will advocate some form of mandatory education or training for all employees.

As a practical matter, it does not seem reasonable to develop written company policies and procedures without establishing a process for distribution and posting of the policies, along with some form of education. In fact, some state laws already require that companies provide employee training on such newly enacted policies.

Practically Speaking – Compliance Requires More Than A New Policy

Besides complying with the new requirements, covered entities should review and evaluate their compliance programs and the potential for whistleblower situations. Your policies should strongly encourage internal reporting, which will provide an opportunity to correct problems or misperceptions before they grow larger. In fact, effective policies can help all employers avoid costly and potentially embarrassing lawsuits.

The federal False Claims Act protects employees from retaliation for reporting such actions, and employees can receive 15% to 30% of the government's recovery from any fraudulent practices actually found. Further, several states have enacted false claims legislation, and other states will soon follow suit as the DRA includes provisions to allow states to receive 10% of the federal government's share of certain recoveries.

Taking Action To Maintain Compliance

To summarize, if yours is a covered entity, you must have specific policies and procedures in place to help detect and prevent fraud, waste, and abuse under applicable federal and state laws.

Additionally, if you have an employee handbook, it must include the "specific discussion[s]" described above. If your hospital, practice or clinic does not currently have a handbook, employees should be informed of the new policies and procedures in some fashion, such as posting the policy, or conducting special meetings to advise employees of the new policies and procedures. Your new employee orientation process should also address these issues and inform employees how to obtain more information.

Also, remember that in addition to employees, contractors and agents are covered by the Act. Make sure they are also aware of your company's policies and procedures addressing fraud, waste and abuse.

Last, while not specifically required, educating all employees on your company's policies and procedures will not only help ensure compliance, but can serve as a vital reminder to supervisors and managers not to retaliate against employees who question Medicaid or other reimbursement procedures. In fact, such policies should encourage employees to present concerns internally before their questions mushroom into bigger problems.

Fisher Phillips has developed a model policy to ensure compliance with this new requirement, which can be tailored to reflect your company's compliance policies and applicable state laws. For more information contact any member of our Healthcare Practice Group at healthcare@laborlawyers.com.

This Labor Alert provides an overview of some the more important aspects of this new law. It is not intended to be, and should not be considered, legal advice for any particular fact situation.