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Updated OIG Exclusion Guidance Spells Out The Targets and Frequency of Screening

It's a good move for hospitals and other providers to screen employees and contractors monthly for exclusion from federal health programs, according to the HHS Office of Inspector General's updated bulletin on the effects of exclusion that was unveiled May 8.

Monthly is the frequency with which OIG updates its searchable database — the List of Excluded Individuals and Entities (LEIE)— and "there's a good chance "monthly checks will soon be required in corporate integrity agreements, a top OIG official tells *RMC*. The importance of being earnest in this area is reflected in the prevention of paybacks to the government for services provided by excluded persons and fines and penalties.

This is the first time that OIG has urged monthly exclusion checks, and although the recommendation "doesn't have the force of law, it minimizes risk, the more frequently they screen," says Susan Gillin, deputy chief of the OIG Administrative and Civil Remedies Branch. While providers sometimes complain about the expense of frequent screening, Gillin says "it can be more costly to miss an excluded person."

The OIG exclusion bulletin, which supersedes a 1999 version, explains the implications of billing for services provided by excluded employees and contractors and how to minimize the fallout if it happens. According to OIG, no federal health care program payment will be made for goods or services provided by an excluded person or entity at the medical direction or on the prescription of an excluded person, regardless of payment methodology (e.g., DRGs, cost reports, fee schedules, bundled payments, capitation).This includes direct care, such as physicians' services, and indirect care, such as preparing surgical trays, reviewing treatment plans and entering prescription information for pharmacy billing. Excluded persons also are forbidden to furnish "administrative and management services that are payable by the Federal health care programs," the bulletin says. That means excluded people can't serve in executive or leadership roles, such as CEO, CFO, general counsel, director of health information management, director of human resources or physician practice office manager. Providers shouldn't install excluded people in other administrative or management roles, such as IT services and support and billing and accounting, unless they are completely unrelated to federal health care programs, according to the bulletin.

Lawyers appreciate the opacity of the revised exclusion bulletin. "The new guidance is much more clearly written," says Washington, D.C., attorney Heidi Sorensen, former chief of the OIG Administrative and Civil Remedies Branch. "It provides a lot of background and explanation that wasn't in the original guidance."

The bulletin should be incorporated into compliance training programs, adds attorney Michael Rosen, president of ProviderTrust, an exclusion screening vendor in Nashville. "It's good reading."

Providers that employ or contract with an excluded person may be subject to civil monetary penalties of $10,000 for each item or service provided by the excluded person plus three times the amount billed to the federal health care program, assuming they acted with reckless disregard, deliberate ignorance or actual knowledge in employing or contracting with the excluded person.

If that's the case, providers can use the OIG Self-Disclosure Protocol to resolve civil monetary penalty liability. But Gillin says if providers have used the LEIE in good faith and still billed for an excluded person anyway — perhaps because of an excluded person's deception — a simple Medicare refund would be fine.

Volunteers Pose a Risk

There were some surprises in the bulletin. For example, volunteers may get hospitals in hot water. OIG explains there is a risk of CMP liability from "an excluded health care professional who works at a hospital or nursing home as a volunteer." Sometimes people don't realize they must apply to OIG for reinstatement after the term of their exclusion is over, or maybe they don't bother (e.g., they are retiring anyway). The exclusion remains in effect if they haven't affirmatively been reinstated and the fact that volunteers don't get paid isn't relevant. "They are still providing services to Medicare, Medicaid or other federal program beneficiaries, so whether they are being paid is not important," Gillin says.

OIG also removed any doubt that CMP liability could attach if labs, durable medical equipment suppli-

ers, pharmacies and radiology centers accept orders from excluded physicians. "This is not a change but OIG is being more explicit about it," Sorensen says. "It's clearly an area they want folks to pay attention to."

There are about 54,400 individuals and 2,800 entities (e.g., physician groups, ambulance suppliers) now excluded from federal health programs, OIG spokesman Donald White says.

If providers do nonfederal business with excluded parties, they have to ensure no claims are submitted to federal health care programs, OIG says. But in a departure from the 1999 bulletin, there is no need for separate funding streams. "You can comingle funds as long as the individual's responsibilities are separate from federal health care beneficiaries," Sorensen says.

Although it's not required by law, OIG suggests that providers use its LEIE to screen prospective and current employees and vendors for exclusions monthly to avoid overpayments and CMP liability. The LEIE is an online searchable database with the names of excluded persons, their provider type, why they were excluded, the state where they were excluded or where the entity was doing business and a verification method through Social Security number or employer identification number. The National Provider Identifier will soon be added as an additional method to verify the excluded person's identity.

While other databases, such as the Health Care Integrity and Protection Databank (HIPDB), are valuable tools for checking on prospective employees, OIG says the LEIE should be the primary weapon for hunting exclusions. HIPDB was set up by HIPAA to furnish information on adverse licensing and certification actions, health care-related criminal convictions, civil judgments, exclusions from federal or state health care programs, and other adjudicated actions or decisions.

Providers Must Decide Who to Screen

Providers also have to decide which employees and contractors to screen for exclusions. It's a good idea to screen employees who perform services payable by a federal health care program. As for contractors, "the risk of potential CMP liability is greatest for those persons that provide items or services integral to the provision of patient care because it is more likely that such items or services are payable by the Federal health care programs," OIG says, such as nurses who work for staffing companies. Providers could rely on exclusion screening performed by contractors, but they would still be on the hook for overpayments stemming from reimbursement for goods or services furnished by excluded persons, OIG says. However, providers reduce or eliminate CMP liability if they ensure the vendor does a good job (e.g., the contract requires the staffing agency to use the LEIE and the hospital checks up on it), according to the updated bulletin. "That is a pretty significant requirement in terms of due diligence over the vendor," Sorensen says. Providers would repay the overpayment but at least they'd escape the CMP, she notes. Conversely, they face CMP liability if they don't ensure their contractors screen properly.

Rosen adds that the message for providers is to screen everyone for exclusions. Providers who thought they could just check the direct-care people should think again, he contends.

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