Get Ready for the DOJ to Come Asking About COVID Relief Programs

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The federal government has prioritized prosecuting Covid-19-related fraud since the pandemic began, and recently, Attorney General Merrick Garland made clear the Justice Department's commitment "to hold accountable those who seek to exploit the pandemic for personal gain."

Meanwhile, providers are now beginning to receive civil investigative demands, or CIDs, in the mail or visits from federal law enforcement.

Specifically, the federal government is focusing on Covid-19 testing for uninsured patients. Most claims submitted to the Health Resources and Services Administration, which administers the Provider Relief Fund that reimburses eligible providers for Covid-related expenses for uninsured patients, are legitimate. But there are tens of thousands that could be considered frivolous under the False Claims Act or the anti-kickback statute.

No matter which law may apply to a physician or entity, if one invoiced the HRSA, one should expect a civil investigative demand and consider the following steps in order to be prepared.

The Investigation Begins

The government serves a CID when they believe a person or entity may be in possession, custody, or control of documentary material or information relevant to a False Claims Act or anti-kickback statute investigation.

A CID is an administrative subpoena that allows federal agencies to request an extraordinary amount of information from private entities without formal court procedures. It is a powerful tool that allows the government to demand the production of certain documents while also demanding detailed explanations of the entity's Covid-19 procedures.

These requests are typically for the production of documents that include corporate organization, patients, contracts, and communications with employees, staff, other physicians. CIDs

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also include written interrogatories that can number in the hundreds.

Narrowing Scope, Extending Response Time

If you receive a CID, or a visit from federal law enforcement, it is imperative to call an attorney because CIDs typically have short response times.

Counsel typically will contact the DOJ to narrow the scope of the CID, establish a realistic response timeline, review the requested documents to determine potential privilege or liability, and conduct an internal investigation if warranted.

In addition, counsel can request an extension that will allow counsel and the provider to closely review and discuss documents before turning them over to the DOJ.

Many questions and requests regarding CIDs are either irrelevant, overly broad, or protected under privilege, which is why having counsel is important.

Review of Documents

Once counsel has narrowed the scope and received an extension of time to respond to the CID, it is time to locate, organize, and review all responsive documentation.

This step is vital in defending the CID. Counsel and the provider will need to actively look for the common denominator in all the documents. The government is looking for payments for patient referrals, lack of patient records, lack of medical consent, and even fictitious testing regarding HRSA billing.

A review should be focused on confirming that all steps in obtaining a specimen were proper—a medical necessity exists, the test was properly performed, and the results were reported to the providing physician and the patient.

Internal Investigation

Following the document review, counsel will identify areas of concern.

It is important to vet any potential issues by reviewing the patient's entire chart, including all billing and coding data. Upon completion, the provider might find it has received an overpayment.

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Under Centers for Medicare & Medicaid Services regulations, a provider has 60 days to return a newly discovered overpayment.

As Garland stated, the government is resolute in its efforts to find fraud, waste, and abuse. Caseloads will increase substantially, more sophisticated investigations using data analytics will come to fruition, and qui tam, commonly referred to whistleblower, actions will emerge.

Now is the time to conduct internal audits, follow up on internal complaints, revamp your compliance program, ask questions of your attorney, and above all, document.

As providers learn in medical school, if the task is not written down, it did not happen.

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