Final Rule Issued on Stopping Fraud by Healthcare "Bad Actors"

9.17.2019

Effective November 4, 2019, CMS will have a new weapon against waste, fraud, and abuse. The new rule creates new revocation and denial authorities and will allow CMS to identify healthcare providers that pose an "undue risk" based on their relationships with previously sanctioned entities. If an owner or manager that was affiliated with a previously revoked entity becomes involved with a new entity, the new entity can be denied enrollment in Medicare, Medicaid or CHIP, or if already enrolled the entity can have its enrollment revoked because of the prior affiliation.

(An "affiliation" is defined as a 5% or greater direct or indirect ownership interest in another organization; a general or limited partnership interest without regards to the percentage that an individual or entity has in another organization; an interest in which an individual or entity exercises operational or managerial control over, or directly or indirectly conducts day to day operations of another organization either under contract or through some other arrangement irrespective of whether the manager is a W-2 employee; an interest in which an individual is acting as an officer or director of a corporation; any reassignment relationship.)

Additional tools are also provided under the new rule and provide a basis for administrative action to revoke or deny as applicable Medicare enrollment. Actions for which Medicare may exercise these tools are:

1. Where a provider or supplier circumvent program rules by attempting to come back under a different name.
2. A provider bills from locations previously identified as non-compliant.
3. A provider or supplier exhibits a pattern or practice of abusive or certifying of Medicare Part A or B items, service or drugs.

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4. A provider or supplier has an outstanding debt to CMS from an overpayment that was referred to the Treasury Department.

CMS can exclude an applicant from enrolling in the program for up to three (3) years if a provider or supplier submits false or misleading information in its enrollment application. The new rule will expand the sanctions to prevent providers from re-entering Medicare program. CMS will now be able to block providers from re-entering the Medicare program for up to ten (10) years. A second revocation allows CMS to block a provider or supplier from re-entering the program for up to twenty (20) years.

Conclusion

The new rule makes it even more important for providers and suppliers to screen employees – especially those who will be involved in management – and any new and even current owners of the provider or supplier entity. Failure to take these precautions may mean that a provider or supplier, even if it does not directly violate Medicare rules, can lose the ability to serve Medicare and Medicaid patients and the reimbursement that comes with providing those services, just because they are affiliated with a prior "bad actor." Further, it is incumbent upon organizations to obtain data from its owners and employees to be able to demonstrate serious efforts at obtaining back up to the answers submitted to CMS on any application. Regulatory guidance is expected on the level of due diligence that CMS will expect in securing affiliation information.

For more information about this alert, fraud, and abuse, or other issues in healthcare, please contact the authors of this alert, any member of Butzel Long's healthcare industry group, or your regular Butzel Long attorney.

Robert H. Schwartz
248.258.2611
schwartzrh@butzel.com

Mark R. Lezotte
313.225.7058
lezotte@butzel.com