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Legal Matters

Overpayments: Key Issues Physicians Should Consider - Part 2 of 2

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While the FCA has historically been used to establish liability for submitting false or fraudulent claims to the government or making or using false records or statements in connection with such a claim, a lesser known provision of the FCA is the reverse false claim provision. This provision establishes liability for any person who knowingly conceals or knowingly and improperly avoids or decreases an obligation to pay or transmit money or property to the government. The FCA defines the term "obligation" to include the retention of any overpayment. Similar to other provisions of the FCA, the reverse false claims provision includes the threat of treble damages and substantial per claim penalties.

In June 2014, the U.S. Attorney's Office for the Southern District of New York intervened in an FCA qui tam against several New York hospitals alleging that the hospitals violated the FCA by improperly retaining certain overpayments. United States v. Continuum Health Partners, Inc. marks the first time that the government has intervened in an FCA action based upon an alleged violation of the 60-day rule. Although the 60-day rule has been law since 2010, CMS has clearly stated in its February 2015 notice that providers are subject to the statutory requirements under the ACA and could face potential FCA liability for failure to report and return an overpayment prior to the publication of the final CMS rule next year. This case will set precedent on the interpretation and application of the 60-day rule and potential FCA liability.

While these issues are working their way through the courts, physicians and physician practice groups must work to identify and fully report and refund any overpayments to Medicare and Medicaid programs at the first sign of a potential overpayment to comply with the 60-day rule and to avoid risk of liability under the FCA.

There are many unanswered questions related to the 60-day rule and its enforcement, including when an overpayment is "identified" for purposes of starting the clock on the 60-day rule; however, physicians and physician practice groups should take immediate steps to identify any potential overpayments and exercise reasonable diligence to comply with the 60-day rule or risk liability under the FCA and other fraud and abuse statutes.

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