

Eli's Hospice Insider

COMPLIANCE : Watch Out For New False Claims Rules

What looked like a law cracking down on financial fraud could pack a punch for you.

Hospice providers shouldn't overlook a new law that makes identifying overpayments from the government a priority.

President Obama recently signed the Federal Enforcement and Recovery Act (FERA) of 2009 to focus on mortgage and banking fraud. But tucked into the legislation is language that could greatly affect your hospice organization.

Section 4 of the bill, titled "Clarifications to the False Claims Act (FCA) to Reflect the Original Intent of the Law," makes several changes that apply to healthcare providers.

First, the law defines "obligation" to include the phrase "arising from statute or regulation, or from the retention of any overpayment," regardless of whether you originally submitted a "false claim."

This suggests that you could be obligated under the False Claims Act if you have, for instance, created backdated medical records to support a claim you've already submitted, according to a release by **James G. Sheehan**, New York's Medicaid Inspector General.

Trouble brewing: "Proof of specific intent to defraud is not required under the FCA," says attorney **Scot T. Hasselman** with Reed Smith in Washington, D.C. "The law requires that a person 'knowingly' cause the submission of a false claim (or the corollary causes of action). 'Knowingly' is defined in several ways, but can include acting in deliberate ignorance or reckless disregard of the truth. This is a fairly low bar for the government to overcome," says Hasselman.

How it affects you: "The law now explicitly creates liability for individuals who improperly avoid an obligation to return an overpayment to the government," Hasselman says.

"So now the low intent standard of the FCA can be applied to a situation where a [provider] has been overpaid, and does not realize that it has been overpaid, if the failure to recognize the overpayment was a result of deliberate ignorance or reckless disregard of the truth."

In other words, the law makes it easier for the government to come after you, explains attorney **Robert Markette Jr.** with Gilliland & Markette in Indianapolis.

Also: "The act offers a lot of protection for whistleblowers," offering businesses fewer ways to fight a whistleblower, adds **Beth Carpenter**, president of Beth Carpenter and Associates in Lake Barrington, Ill.

"The bottom line is that providers should be as concerned about underpayments as they are about overpayments and have processes in place to regularly reconcile and return any overpayments to payers," Hasselman points out.

Play it Safe With These Key Proactive Strategies

To stay a step ahead of the FERA and a world of potential payment trouble, hospices should focus, as always, on documentation.

That's "incredibly important," says Carpenter, who also advises hospices to devise a "multi-review process" to identify overpayments.

"In other words, you want many eyes to review the documentation and related claims."

Carpenter advises hospices to conduct monthly meetings during which they review all claims paid in the last 30 days. "The hospice should maintain brief, but complete minutes of each of those meetings."

Focus: "Hospices need to monitor closely the ongoing qualifications of patients for higher levels of hospice care other than routine," Carpenter tells **Eli**.

"The documentation should explain to the reviewer what the patient is going through and why it's necessary for him to receive a higher level of care."

Example: Suppose the hospice has a patient with excruciating pain that the team hasn't been able to bring under control in the home on a routine level of care. So the patient is placed on inpatient care to transition him to methadone because other opioids haven't provided relief, says Carpenter. The patient requires a few days of observation and monitoring because the person has some respiratory issues, and methadone is known for respiratory suppression. Make sure the documentation paints a clear picture of the situation as an explanation of why the person needed the amount of inpatient care he did.

Keep your eyes peeled: Overpayments may be defined by post-payment review either at the local level by Medicare contractors or by contractors hired by the government, such as Recovery Audit Contractors, advises Carpenter.