Medicare and Medicaid Providers: Choose Your Vendors Wisely—But Be Sure to Pay Them at Fair Market Value and for Bona Fide Services

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Health care providers will often try to negotiate and receive fair, commercially reasonable business terms with vendors and suppliers, to both better serve their patients and improve their “bottom line.” Yet when it comes to services reimbursed by the government — be it Medicare, Medicaid, or TRICARE — what exactly those terms are and how they are structured could affect whether a provider and vendor negotiate themselves into liability under the False Claims Act.

Last week, the U.S. Department of Justice (U.S. Attorney, Northern District of Texas) and Reliant Rehabilitation Holdings settled a False Claims Act lawsuit brought by a whistleblower, a former Reliant employee, for $6.1 million, over improper inducements allegedly offered by Reliant to nursing homes in order to secure the nursing homes’ therapy business. That business included providing rehabilitation therapy services to nursing home residents covered by the Medicare Part A program, which reimburses nursing homes for among other things rehabilitation therapy provided to those residents. To secure that business, according to the U.S. Attorney, Reliant allegedly assigned a nurse practitioner to the nursing homes “without charge or for a minimal, below market fee, in order to induce or reward nursing homes for contracting with Reliant to provide rehabilitation therapy for their residents.” In addition, Reliant allegedly paid nursing facility physicians “above fair market compensation for supervising and collaborating with Reliant nurse practitioners in exchange for the facilities’ therapy business.” Those arrangements, characterized as “kickbacks,” allegedly “caused” the submission of “false” Medicare Part A claims by the nursing homes in violation of the Anti-Kickback Statute and the False Claims Act. (The nursing homes were not named as defendants in the lawsuit.)

Significantly, there was no allegation made that Reliant had rendered, or that the nursing homes were reimbursed for, excessive or medically unnecessary therapy to the facilities’ Part A residents. Nor was there a claim that Reliant or the nursing homes had “upcoded” residents’ “RUG” scores or overstated residents’ medical acuity in order to increase Medicare reimbursement. Rather, it was alleged that the inducements had unduly influenced the selection of Reliant over rival therapy vendors and thus “tainted” all of the nursing homes’ Part A therapy claims.

The U.S. Attorney explained that the alleged FCA liability resulting from these arrangements is based not on excessive reimbursement dollars paid by Medicare but on their subordinating the best interests of Medicare residents to the vendor’s financial interests:

Companies that work to secure patient referrals by providing kickbacks inject improper financial considerations into our healthcare system. . . . Today’s settlement demonstrates our determination to thwart such improper inducements whether they take the form of cash payments or free services.

Paying illegal remuneration to nursing homes and doctors to increase the bottom line . . . too often sacrifices the best interests of patients to profit-making schemes. . . . Patients and taxpayers deserve better.
Providers can continue to evaluate and select vendors on such terms as the quality and reliability, as well as the price, of services being offered by prospective vendors and suppliers. However, entertaining offers from prospective vendors or suppliers for free or discounted services, or conversely compensation for nominal services or above-market compensation for services other than those being contracted for, could be problematic; such offers could have the intent if not effect of skewing the contracting process and steering the selection toward one vendor over another, rival vendor better suited to meet the needs of the Medicare or Medicaid beneficiaries being served the provider. Indeed, as the DOJ’s settlement with Reliant illustrates, those forms of remuneration can present a serious risk of FCA liability – for both the provider and vendor.

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