

Highlights

CMS Additional Guidance to State Medicaid Directors Deficit Reduction Act Employee Information Requirements

On March 22, the Centers for Medicare & Medicaid Services (CMS) issued additional guidance on implementation of section 6032 of the Deficit Reduction Act of 2005 (DRA) (*Employee Education About False Claims Recovery*). The DRA requires that states participating in the Medicaid program amend their State Plans to mandate that entities receiving annual payments of at least \$5 million under a state Medicaid program (“Entity”) establish written policies for all employees, contractors and agents providing:

- information regarding various federal and state false claims laws, and relevant whistleblower protections; and
- the Entity’s policies and procedures for detecting and preventing fraud, waste and abuse.

The same information also must be included in the Entity’s employee handbook (if there is one).

The additional guidance was transmitted in a letter to State Medicaid Directors in the form of an “FAQ” (Frequently Asked Questions). The letter also included a template description of the Federal False Claims Act (FCA) prepared by the Department of Justice (DOJ). The FAQ included 71 items. What follows are highlights of the most relevant items for hospitals.

In reviewing the guidance from CMS, it is important to keep in mind that the authority and responsibility for implementing and enforcing the DRA requirements rests with the states. CMS makes clear that the states have discretion in implementing the DRA and monitoring compliance.

Parent/subsidiary corporations

As a general rule, unless a parent corporation furnishes Medicaid health care items and services, the DRA requirements would not apply to that entity, even if any subsidiary did have to comply. However, in the case of health care systems, CMS suggests that the parent be treated as furnishing items and services based on its relationship to subsidiaries that do, and the parent and subsidiaries are viewed as one for purposes of calculating whether the \$5 million threshold has been reached. CMS also is suggesting an “aggregation requirement” for related but otherwise legally separate and independent corporations that furnish items or services. For any corporate or other legal entity (e.g., partnership) that furnishes items and services, any sub-units (e.g., divisions or subsidiaries) will be aggregated for purposes of determining whether the \$5 million threshold is reached. *See* FAQ 6, 5, 4.

Calculation of the \$5 Million Threshold

The FAQ clarifies that:

- Payments received through a contract with a Medicaid managed care organization are excluded.

This summary was prepared with the advice and assistance of the AHA’s outside counsel, Hogan & Hartson, L.L.P.

- Payments made by Medicaid for deductibles or co-insurance for dual-eligible individuals or qualified Medicare beneficiaries are included.
- Medicaid payments from other states are excluded.
- The calculation period is a federal fiscal year.

See FAQ 15, 17, 18, 22.

Dissemination of Policy

Dissemination to Employees. With one exception, an Entity must disseminate its DRA-compliant policy and handbook (if one exists) to all of its employees, regardless of whether they work in that state. Dissemination may be made by electronic posting if all employees are made aware of the existence and location of the information. *See* FAQ 18, 40, 43.

Exception. In the case of universities, dissemination to employees of non-health care components (e.g., non-health care campus) is not required. *See* FAQ 9.

Expectations for Contractors and Agents

CMS' previous guidance that an Entity's policies must be "adopted by" its contractors and agents caused a high degree of confusion. In the FAQ, CMS clarifies that provision.

"Adoption" of Policies and Procedures. The FAQ explains that entities meet the DRA requirement to "establish written policies for all employees . . . of any contractor or agent" by disseminating those policies to the contractor or agent, who must "abide by [those] policies as to the work the contractor or agent performs for the entity." *See* FAQ 38.

As a practical matter, most of an Entity's DRA policy is informational in nature (e.g., descriptions of various federal and state laws), not something to which "abide by" would apply. An Entity's policies and procedures for detecting and preventing fraud, waste and abuse, however, will have implications if they are relevant to the work the contractor or agent performs. To that extent, the FAQ suggests that contractors and agents should "abide by" those policies and procedures (e.g., utilizing a compliance hotline or other reporting mechanisms) in the same manner as an Entity's employees would.

This means that, for a hospital that is both an Entity that must establish and disseminate its own policies and a contractor expected to "abide by" another Entity's policies, the potential for conflict should be minimal. (An example would be a hospital that receives more than \$5 million in Medicaid payments that is also under contract to provide services to another hospital that receives more than \$5 million in Medicaid payments.) In that instance the hospital and its employees involved with the contract work should be aware of the contracting Entity's policies and procedures for detecting and preventing fraud, waste and abuse and should invoke those policies and procedures for reporting suspected fraud and abuse to the contractor as it relates to any work the hospital is performing. *See* FAQ 30.

Policy Dissemination and Contract Amendment. CMS is not suggesting specific methods for disseminating policies and procedures, nor does it expect an Entity to amend contracts to meet the DRA requirements. Entities have discretion in accomplishing dissemination, subject to any requirements the state may set. CMS has suggested the policies must be "readily available," which means that contractors and agents, like employees, should be made aware of their existence and location. *See* FAQ 27, 41 - 43.

Contractors and Agents Excluded From Coverage. The FAQ reinforces that only contractors or agents who furnish or otherwise authorize the furnishing of Medicaid health care items or services on behalf of the Entity, or who are involved in monitoring health care provided by the Entity, are subject to the DRA. Functions such as copy services, hospital cafeteria services or grounds maintenance are excluded. *See* FAQ 23, 26.

Medical Staff. The FAQ reinforces that staff privileges alone do not make a physician a contractor or agent for DRA purposes. In illustrating contractors who furnish Medicaid health care items or services, it includes “all contract therapists, physicians (including, but not limited to, house staff [residents, interns and fellows], hospitalists, and independent contractors), and pharmacies.” *See* FAQ 25.

Compliance

While the text of the DRA requires that State Plans be amended by January 1, 2007 to implement the DRA obligations, many states have not yet taken action. Although the statutory requirement applies to the states, the FAQ follows the earlier CMS guidance that Entities also were expected to comply with the DRA requirements by that date. *See* FAQ 48, 53, 67.

At the same time, the FAQ states repeatedly that CMS will not prescribe the manner in which states should enforce compliance. (For example, it is up to the state to determine whether Entities issuing policies prior to a state adopting its State Plan Amendment will be required to reissue those policies to meet any additional requirements imposed by the state.) *See* FAQ 55, 60. Faced with the continuing ambiguities and delay by many states in issuing guidance, it is important for hospitals to make a good faith effort to develop and disseminate information to their employees and affected contractors.

Template FCA

At the request of State Medicaid Directors, CMS asked the DOJ to develop a template description of the federal FCA. It is not required that the template be used or distributed, but it can be a helpful tool. For hospitals that have already implemented a DRA policy, it would make sense to review what is covered in the template; however, there is no requirement to replace existing policies with the DOJ description assuming a hospital’s FCA description meets or exceeds that provided by the DOJ.

If you have questions or comments about the DRA requirements or what’s covered in this document, please contact Maureen Mudron, Washington counsel, at mmudron@aha.org.

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