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What hospitals need to know about recent changes to False Claims Act

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President Obama recently signed into law significant expansions to the federal civil False Claims Act (FCA) as part of the 2009 Fraud Enforcement and Recovery Act (FERA). Much of the opposition to the legislation focused on the unintended consequences of broadening the FCA's reach.

The most significant threat the FERA poses to hospitals will be whistleblower lawsuits and government investigations second guessing some of the most routine of hospital accounting and audit functions – about whether a hospital that received Medicare or Medicaid overpayments, through no fault of its own, moved fast enough to repay them or instead tried to conceal or improperly retain them.

The FCA was enacted during the Civil War to combat fraud perpetrated against the government by companies that sold supplies to the Union Army. Since that time, it has permitted private citizens – whistleblowers – to sue on behalf of the federal government and then claim a sizeable bounty from any recovery for fraud against the government. In the past 20 years, the focus of these whistleblowers has shifted to heath care, and quite frequently to claims submitted by hospitals. Because many lawsuits against hospitals are ultimately found to lack merit, any expansion of the statute poses a risk of diverting hospital resources unnecessarily to attorneys' fees and other defense costs.

Congress's recent action makes changes to the FCA for the first time in more than 20 years. The primary focus of the amendments is on expanding the circumstances that can lead to liability for treble damages and penalties of $5,500 to $11,000 per false claim. The changes encourage more litigation by would-be whistleblowers and permit these individuals to file complaints alleging not just that the government was defrauded, but also that "downstream" contractors, agents, or entities that received funds as part of a federal program were defrauded by an even further downstream bad actor.

Before the FERA passed, Congress added a few important words to address concerns raised by the AHA and others that whistleblower suits and investigations into overpayments could interfere with the routine reconciliation processes already built into the federal health care programs. The final language aims to preclude an FCA case during reconciliation.

The new law does not define the term overpayment. The potential for expanded investigations, litigation and liability makes it incumbent on Medicare, Medicaid and state and federal regulators to issue clear guidance for hospitals and others about how to deal with all overpayments. Until compliance guidance is issued, hospitals' reliance on this established reconciliation mechanism remains subject to possible whistleblower lawsuits.

For hospitals that are required to reconcile or "net-out" over and underpayments on a periodic basis, the word "improperly" in the amended FCA is likely to be the key to any defense or explanation. A hospital's compliance with routine reconciliation processes built into government programs should not be considered "improper" retention of an overpayment. Despite the AHA's success in obtaining some clarification, however, the overpayments provision remains somewhat ambiguous. As a new weapon in the bounty hunter's arsenal, that ambiguity practically guarantees that whistleblowers will test the bounds of the new provision and pursue abusive or meritless claims against hospitals.

Although more cases will be filed alleging more attenuated sorts of "fraud," it is likely the government will decline to pursue many of these cases, because of the ambiguities in the new statutory language and because the statute's incentives encourage would-be whistleblowers to treat filing an FCA case as a ticket in a litigation lottery. For hospitals, the clearest path to ending an investigation will likely be to demonstrate a reasonable degree of diligence in efforts to identify and address overpayments. Hospitals also can anticipate greater scrutiny of their "vendor" relationships, not just as providers of services, but now as purchasers of services, items and supplies used to treat Medicare and Medicaid patients.

It is imperative that the Department of Justice (DOJ) increase its vigilance to avoid abuse of FCA's investigative tool and avoid imposing unwarranted costs on America's hospitals and businesses already struggling in today's difficult economic reality. Civil investigative demands, particularly requests for depositions and testimony from defendants, only make sense as a tool to be used once the government has had an opportunity to carefully assess a plaintiff's knowledge and credibility.

Hospitals and others who do business with the government should expect an increase in lawsuits filed by whistleblowers and a corresponding increase in DOJ investigations. The scope of alleged fraudulent conduct now covered by FCA is greater. With these changes comes a possibility of greater law suit abuse by the whistleblower lawyers. And because the government now had more tools for conducting investigations, the potential for increased costs to hospitals cannot be taken lightly.

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