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Creative passion, collaboration, and soft skills in Compliance

an interview with Walter E. Johnson
Director of Compliance and Ethics
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Compliance 101

Exclusion screening: The "low hanging fruit"

» Screening for exclusions is a simple way to reduce risk.
» Significant penalities are being levied against organizations.
» There are two types of exclusions that can be imposed.
» The prohibition for payment includes both indirect and direct services.
» The best way to protect yourself is to screen monthly.

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The sheer number of rules and regulations that healthcare organizations must follow can be overwhelming. Even with the best intentions, facilities can be faced with potentially staggering fines and liability exposure. One area where you can quickly and easily reduce your risk is in the area of exclusions.


Benander

In the last several months, the Office of Inspector General (OIG) has settled several cases involving excluded parties. In Illinois, a cardiology practice paid $274,721 related to the employment of a medical biller.[1] An imaging company in Nevada that had employeed an excluded X-ray technician entered into a settlement that included a fine of $34,187.[2] An Illinois hospital paid $317,661 because it employed two registered nurses who were excluded.[3] The potential for penalities is real and, without a process in place, you could be next.

Defining the terms

Let's back up a bit and review what an exclusion means and how an individual or entity can find themselves excluded. Federal healthcare programs are prohibited from paying for items or services that have been furnished or provided by someone who has been excluded from participation, or for items or services that have been furnished or provided based upon the medical direction or prescription of an excluded person.[4] According to the Special Advisory Bulletin issued in 2013, this "…includes amounts based on a cost report, fee schedule, prospective payment system, capitated rate, or other payment methodology."[5]

Various actions would lead one to find themselves excluded from participation. In most cases, the length of an exclusion can be anywhere from 5 years to permanently. There are two types of exclusions—mandatory and permissive.

Mandatory exclusions are those exclusions which must be imposed regardless of the circumstances. Actions which may cause someone to find themselves excluded under a mandatory exclusion include:

- Convictions for program-related crimes,
- Convictions related to patient abuse or neglect,
- Felony convictions relating to healthcare fraud, and

- Felony convictions relating to controlled substances.[6]

In contrast, with permissive exclusions an individual may or may not be excluded, depending on the circumstances. The list of those behaviors that could potentially lead to an exclusion is rather lengthy and includes:

- Convictions related to fraud;
- Convictions related to obstructing an investigation or audit;
- Misdeameanor convictions related to a controlled substance;
- License revocation or suspension;
- Exclusion or suspension under a federal or state healthcare program;
- Claims for excessive charges or unnecessary services;
- Failure of certain organizations to furnish medically necessary services;
- Fraud, kickbacks, and other prohibited activities;
- Entities controlled by a sanctioned individual;
- Failure to disclose required information;
- Failure to suply requesed information related to subcontractors and suppliers;
- Failure to supply payment information;
- Failure to grant immediate access;
- Failure to take corrective action;
- Defaulting on a health edcuation loan or scholarship obligations;
- Individuals controlling a sanctioned entity; and
- Making false statements or misrepresentation of material facts[7].

Not only do facilities face civil monetary penalty (CMP) liability for employing an excluded individual who provides services payable by and billed to a federal healthcare program, the excluded person is also liable. Regardless of whether the exclusion was mandatory or permisive, the excluded party should be fully aware of their exclusion status. If they violate their exclusion, they too are subject to penalities and may risk their chances of reinstatement or worse, they may face criminal or civil charges.[8]

Services or items that would be considered non-payable under a federal program include those provided both directly and indirectly. Some examples would include the most obvious, direct patient care, but the prohibition also includes indirect services such as administrative and management services, ambulance drivers, dispatchers, individuals who input prescription information for billing or filling prescriptions, and individuals who sell or deliver medical equipment.[9] This is not an all-inclusive list, but it certainly gives you an idea of how far the prohibition reaches.

Organizations are not prohibited from employing individuals who are excluded, but the excluded party is only able to provide services in extremely limited circumstances. The services provided by the excluded party can only be furnished to patients of non-federal programs, and their services can only be paid for with private funds or other non-federal funding sources. Employing or contracting with an excluded individual or entity and maintaining the documentation that would be required to demonstrate separation of funding sources may prove to be so cumbersome and complicated that it might be easier not to.

Sanction screening

Of all the regulatory requirements, this requirement may be the easiest to comply with and, therefore, be an easy way to reduce one area of risk. This can be done by setting up a simple process to screen an individual or company initially and subsequently on a monthly basis. Two databases are used to check for exclusions. The first and most important is the List of Excluded Individuals and Entities (LEIE) database. This database contains the names

of those individuals or entities who are currently excluded from participating in Medicare, Medicaid, and all other federal healthcare programs through actions brought by the OIG. Another valuable database is the System for Award Management (SAM) database (also called Excluded Parties List System or EPLS),[10] which is a good secondary resource that also contains debarment actions by other federal agencies.

So you've decided to set up a process to check both the LEIE and SAM, but who do you check and how often should you check them?

The prohibition is very clear; an entitiy can not receive payment by federal healthcare programs for "…items or services furnished (1) by an excluded person or (2) at the medical direction or on the prescription of an excluded person."[11] This includes services provided directly or indirectly. If you are a provider for Medicare, Medicaid, or another federal healthcare program, this would be a pretty inclusive list of the services you provide. All employees, contracted employees, providers (e.g., physicians, physician assistants, nurse practitioners), and vendors should be screened. Many organizations only look at their credentialed providers. But what about an out-of-area provider who has ordered a test to be performed at your facility? You will likely use an employee to register the individual, perform the test, and bill a facility fee. All of those actions will likely be paid for using federal monies. If the referring provider has been excluded, then you have now subjected yourself to liability under CMP for billing for services provided at their direction. For this reason, it is important to not only check employees and vendors, but to check all providers for whom the organization performs a service as a result of their direction/order.

There is no requirement indicating the frequency in which to check the databases. How an organization chooses to set up the program is totally up to them; however, one must evaluate the risk of not setting up a program. Recommendations have been published in various documents urging providers to screen individuals monthly, the first of which was a State Medicaid Director Letter (SMDL) issued in June of 2008.[12] A subsequent SMDL issued in January of 2009 urges states to advise their providers to "…search the HHS-OIG website monthly to capture exclusions and reinstatements that have occurred since the last search."[13] The language in regulations that were issued by CMS in 2011 says that states were mandated to check the LEIE and SAM/EPLS no less frequently than monthly; however, after receiving comments related to the administrative burden of this requirement, it was later changed to a recommendation.[14] And finally, in the 2013 Special Advisory Bulletin, the OIG states that it "…updates the LEIE monthly, so screening employees and contractors each month best minimizes potential overpayment and CMP liability."[15]

The monthly recommendation is really the best way to protect yourself.

The monthly recommendation is really the best way to protect yourself. If you employ someone who becomes excluded after your initial screening and doesn't notify you, then you will have no way of knowing that their status has changed. You could potentially bill for services provided by or at the request of an individual for months—or even years—before finding out they have

been excluded. Simple processes to check employees, contract employees, providers, and vendors against these databases can be set up. And the best part is that there is no fee to access these databases. Simply work with your IT department to develop a process for initial and ongoing screening.

Conclusion

Of all the areas that can expose your organization to penalities and fines, exclusion screening is one of the easiest areas in which to protect yourself. It's the "low hanging fruit." Take the time to develop a process, put it into place, and move on to your next project!

1. Office of Inspector General, press release: "Illinois Cardiology Practices Settle Case Involving Excluded Individual" January 7, 2016. Available from http://bit.ly/28NIM3C
2. OIG, press release: "Nevada mobile imaging provider settles case involving excluded individual" November 12, 2015. Available from http://bit.ly/28PA4VR
3. OIG, press release: "Illinois hospital corporation settles case involving excluded individuals" October 23, 2015. Available from http://1.usa.gov/28MnMtH [Cntrl +F, "Advocate"]
4. OIG: Updated: Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs. May 2013, p. 1. Available from http://1.usa.gov/16xodmK
5. Idem, p. 1
6. 42 U.S. Code §1320a-7 Exclusion of certain individuals and entities from participation in Medicare and State health care programs. Available at http://bit.ly/28MRdtQ
7. Idem.
8. Ibid, Ref #4
9. Office of Inspector General: Special Advisory Bulletin: The effect of exclusion from participation in Federal health care programs. September 1999. Available at http://1.usa.gov/28NuimW
10. General Services Administration, System for Award Management. Available at http://1.usa.gov/28Pv2aV
11. Ibid, Ref #4, p. 6
12. CMS: State Medicaid Director Letter, SMDL #08-003, June 12, 2008, p. 3. Available at http://1.usa.gov/28PArzU
13. CMS: State Medicaid Director Letter, SMDL #09-001, January 2009, p. 4. Available at http://1.usa.gov/28PvcyH
14. 76 Fed. Reg. 5898 (February 2, 2011).
15. Ibid, Ref #4