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### Providers – Beware of Excluded Individuals

Both the federal and state governments are excluding health care providers from participating in federal programs such as Medicare and Medicaid as an enforcement tool to ensure that providers serving patients covered by such programs are competent and qualified and do not engage in fraudulent or abusive conduct. Medicare and Medicaid are precluded by law from paying for any item or service furnished, ordered or prescribed by an excluded provider. The law precludes not only direct payments but also indirect payments through mechanisms such as Institutional Cost Report (ICR)-based reimbursements or payments to a third party, such as the employer of an excluded individual.

The federal Office of the Inspector General (“OIG”) can exclude a provider from all federal health care programs. Moreover, state authorities can exclude providers from participating in Medicaid even if federal authorities have not excluded the provider from Medicare. The two layer exclusionary authority means that a provider can be excluded from both Medicaid and Medicare, or just from Medicaid.

Physicians are not the only people who can be excluded. Nurses, technicians, pharmacists, physical therapists, occupational therapists and even unlicensed individuals, such as administrators, billers, secretaries, manufacturers, suppliers and janitors, can be excluded. In addition, changing jobs will not change an individual’s excluded status. An exclusion remains in effect until an individual is formally reinstated. For example, an LPN excluded for a patient abuse conviction who seeks employment at a hospital as a secretary is still excluded even though the new job does not involve patient care.

#### Effect of Exclusion

Exclusion of large institutional providers is rare, but exclusion of individuals is common and provides a

highly effective enforcement tool. Because federal health care programs are precluded from paying for anything furnished by an excluded individual, both directly and indirectly, an excluded person will find it virtually impossible to obtain work with a health care professional. Hospitals, nursing homes and home health care agencies place themselves at significant risk by hiring an excluded individual, even for a non-clinical position, if such a person’s duties in any way relate to the provision of services or items for which the entity is reimbursed by a federal health care program. If the costs associated with the excluded employee are included in the entity’s ICR, a strong argument can be made that the entity cannot employ the excluded individual at all without risking significant and costly regulatory violations. For that reason, an excluded individual may well become unemployable within the health care industry.

The OIG is clear on this issue: “The practical effect of an OIG exclusion is to preclude employment of an excluded individual in any capacity by a health care provider that receives reimbursement, indirectly or directly, from any Federal health care program.”<sup>1</sup>

Even when the exclusion is from Medicaid alone, the consequences are serious, as demonstrated by the warning issued in the June, 2007 Medicaid Update:

#### “Disqualified Provider List Do Not Hire!”

It is important for all employers and individuals conducting business with the New York State Medicaid program to examine the list of *Providers Not Allowed to Order* before hiring an individual.”<sup>2</sup>

1 OIG Special Advisory Bulletin, “The Effects of Exclusion From Participation in Federal Health Care Programs,” September 1999.

2 New York State Department of Health, Office of Medicaid Management, Medicaid Update, June 2007 Vol. 23, No. 6.

While some consultants assert that employment and contractual arrangements may theoretically be structured to insulate excluded individuals and their employers from the more Draconian effects of exclusion, such structures are very complicated and should not even be considered without consulting your attorney.

### Recommendation – Proactive Compliance

What can a health care-related employer do to avoid the dire consequences of hiring an excluded provider or to respond if one is inadvertently hired?

### Check Exclusion Lists

The standard for liability under federal law is whether an entity knew or should have known an individual it hired or contracted with was excluded. Therefore, the following three web sites should be checked. Being on one list is enough to disqualify an individual:

1. OIG: <http://exclusions.oig.hhs.gov>.
2. GSA: <http://epls.arnet.gov>.
3. NYS Medicaid: [http://nyhealth.gov/health\\_care/medicaid/fraud/index.html](http://nyhealth.gov/health_care/medicaid/fraud/index.html)

There is a strong likelihood that the OIG would take the position that if an individual appeared on a list, the entity should have known of his/her excluded status.

**Thus, health care entities must conduct federal and state exclusion checks on all potential employees before hiring, and on all consultants and medical staff members before entering into a contract.** Health care entities should also check the excluded status of manufacturers and/or suppliers of items or equipment that are used in the care or treatment of patients and that are

reimbursed directly or indirectly by a federal health care program. An exclusion check should be a standard step in assessing both new applicants and those reapplying for privileges, as well as those applying for any status that would permit them to perform services at the facility.

Three other steps are advisable to assist in protecting an entity against the consequences of hiring, contracting with, or issuing privileges to, an excluded individual:

1. Ask on employment and medical staff applications and physician and vendor contracts whether the individual is or has ever been excluded from participating in a federal, state or private health care program. Follow up on troubling answers or unanswered questions.
2. Perform exclusion checks on a regular basis after hiring, at least annually.
3. Retain copies of all exclusion checks and screening results from the three web sites.

### What to Do With an Excluded Individual

An entity which identifies a current employee, vendor, consultant or medical staff member as an excluded individual must end the relationship immediately, by terminating the employment or contract or suspending staff privileges. Legal counsel should be contacted immediately to determine whether other corrective action, including voluntary disclosure to regulatory authorities, is appropriate or required. Failing to identify an excluded individual until after the fact can have serious consequences, including the repayment of significant prior Medicare and Medicaid payments.



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