

Hospice and Palliative Care
Legal Service Group

7-31-09

False Claims Act Enforcement and Whistleblower Protections Expanded Under Fraud Enforcement Recovery Act of 2009

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The Fraud Enforcement Recovery Act of 2009 (FERA) contains amendments to the False Claims Act (FCA) which expand the reach of the FCA and add new protections to whistleblowers. It is important for entities submitting claims for payment to the federal government (such as hospices) and their subcontractors to understand the new tools and protections that FERA affords both the federal government and potential whistleblowers under the FCA. Hospices should review their existing compliance policies and procedures to ensure that they adequately address FCA risks and anti-retaliation procedures.

FERA dramatically revises the FCA to "clarify" its scope, which had been narrowed by several high-profile court cases, including a 2008 Supreme Court case. Among the new FCA provisions that hospices should be aware of are:

- FERA expands the government's ability to pursue what is referred to as a "reverse" false claim under the FCA: retaining overpayments. Specifically, FERA makes clear that entities or individuals receiving funds from the government have an obligation to return any discovered government overpayment under the FCA, and allows whistleblowers to bring an FCA action against a provider who knowingly and improperly retains such overpayment.
- FERA "clarifies" that the FCA applies in cases where alleged false claims are submitted through a government contractor (such as a fiscal intermediary) rather than directly to the government.
- FERA permits the results of the government's investigations to be shared with a whistleblower earlier in a case. This means that whistleblowers could be armed with governmental investigative information before the government chooses to intervene in a FCA *qui tam* whistleblower case, and may receive this information even if the government does not choose to intervene in the case.
- FERA revises the whistleblower protections found in the FCA to afford protections against retaliation to contractors or agents in addition to employees.

The net result of these changes could lead to whistleblower FCA cases brought by better-informed whistleblowers, regardless of whether the government chooses to intervene in a particular case. The changes could also lead to additional whistleblower FCA cases related to alleged overpayments knowingly and improperly retained by a provider.

In response to these changes, hospices could consider taking the following initial steps:

- Review existing compliance policies and procedures regarding monitoring and auditing the billing and claims process to ensure they are adequate.

- Provide additional training for billing staff on how to handle denials and other billing edits that may warrant a closer review to increase the chances that billing problems and potential overpayments are identified and addressed at the earliest possible time.
- Revise policies and procedures related to retaliation against whistleblowers to include anti-retaliation policies and procedures applicable to agents and contractors of the hospice, in addition to hospice employees.
- Ensure all employees receive training regarding the updated anti-retaliation and whistleblower protection policies and procedures.
- Evaluate the level of coordination and communication between compliance and human resources. Often, complaints raised during a performance review are dismissed as an attempt by the complainant to deflect responsibility for employment issues. Even if this is the case, a person with performance issues can raise a valid compliance concern. Given that a significant number of whistleblower actions are brought by disgruntled employees, we recommend that human resource policies and procedures require that employee performance issues and compliance complaints be documented and handled separately.

Given the complexities of billing, it is clear that errors will occur from time to time. However, having a variety of "early detection" systems in place can make a significant difference in risk exposure. In addition, by safeguarding employees, contractors and agents from retribution for identifying problems, hospices can empower them to be a critical part of the compliance process.

This article provides general information about hospice and palliative care issues. It should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them. This communication may be considered advertising in some jurisdictions.