

Exclusion Checks: Verifying That Employees and Vendors Are Not Excluded Providers

This e-alert explains and synthesizes the law and regulations surrounding background checks on service providers to help health care providers minimize the risk of employing or contracting with excluded individuals and entities.

Hiring or contracting with an individual or entity that is excluded from participation in federal health care programs (including, among others, Medicare, Medicaid, TRICARE and the veterans' programs) is prohibited under a variety of antifraud statutes. Most health care providers screen each potential employee against the U.S. Health and Human Services Office of Inspector General's (OIG) List of Excluded Individuals and Entities (LEIE) prior to hiring such potential employee.

Many providers, however, do not conduct ongoing screening to determine whether employees or contractors subsequently become excluded from participation in federal health care programs. To be clear, criminal background checks are separate and distinct from screening against the LEIE. As a matter of course, we assume that providers are conducting adequate criminal background checks during the pre-employment phase and as required by law on an ongoing basis.

Health care providers can take simple precautions to ensure that employees and contractors are not excluded from participation in federal health care programs. Unfortunately, many providers fail to take adequate precautions and become subject to Medicare and Medicaid fraud penalties and repayments.

Exclusion from Federal Health Care Programs

The OIG may impose exclusions for a number of reasons. The OIG is required to exclude individuals and entities convicted of Medicare or Medicaid fraud, as well as any other offenses related to the delivery of items or services under federal and state health care programs, as well as those convicted of patient abuse and many other felonies. The OIG is permitted to exclude individuals and entities on a number of other grounds, including, among others, health care related misdemeanors, submission of false or fraudulent claims to a federal health care program, and defaulting on student loan obligations.

POSTED:

Jul 7, 2014

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No federal health care program payment may be made for any items or services furnished (a) by an excluded person, or (b) at the medical direction or on the prescription of an excluded person. The prohibition on receiving payments applies to all methods of federal health care payment, including itemized claims, cost reports, fee schedules and capitated payments.

For example, a skilled nursing facility (SNF) may not receive payment for the items or services furnished by an excluded nurse to a Medicare beneficiary, even if the nurse's services are paid for as part of a group payment to the SNF. The nurse would also be in violation of his/her exclusion for causing the SNF to submit a claim for items or services furnished while excluded. The exclusion also applies to SNF administrators and others who do not provide direct patient care, even if the services are not separately billable. For example, if an SNF employs a medical director who is excluded from participation in federal health care programs, payments attributable to the medical director's salary and benefits would be excluded.

Penalties

Providers that employ or contract with individuals or entities that such provider knows or should know are excluded from participation in federal health care programs may be subject to a civil monetary penalty (CMP) of up to \$10,000 per claimed item or service provided by the excluded individual or entity. Further, the provider may be subject to an assessment of up to three times the amount claimed for each item or service. This is often referred to as "treble damages."

To illustrate the magnitude of potential penalties, take a hospice that screens current employees against the LEIE every three months. Such a hospice might employ a physician who provided, on average, 25 services per week. If the hospice billed Medicare for services provided by such physician on 300 occasions over 3 months, the hospice could be subject to: (a) a CMP of up to \$3 million; (b) repayment for each of those services; and (c) an assessment of up to 3 times the amount claimed for each service.

If the individual or entity knowingly conceals or fails to disclose their inability to receive payments from federal health care programs with the intent to fraudulently receive payment, that individual or entity may be subject to criminal liability. Civil liability may also exist under the False Claims Act for knowingly presenting for payment a false or fraudulent claim.

Screening Tips

All providers have free access to the LEIE. We recommend providers take the following steps in implementing exclusion screening practices:

- Conduct screening against the LEIE on a monthly basis (the LEIE is updated monthly). Although monthly screening is not mandated by the Centers for Medicare and Medicaid Services, it is encouraged. Many states, including New York and Massachusetts, have taken affirmative steps to require monthly screening.
- Follow up to determine if the individual or entity has been reinstated following the exclusion period. Individuals and entities are not automatically reinstated following the exclusion period; excluded individuals and entities must submit an application for reinstatement in order to be reinstated.
- Screen employees at all levels. Do not limit screening to physicians, nurses and senior executives. The exclusion on payment extends to any services tainted by an excluded individual or entity, so do not assume that the risk is limited to highly compensated employees.
- Do not forget to screen employees and contractors against other databases, including the U.S. General Services Administration System for Award Management (SAM). The LEIE contains only the exclusion actions taken by the OIG, whereas SAM database contains exclusion actions taken by other federal agencies.

To ease the ongoing burden of screening all employees and contractors, third-party providers have emerged that will do the screening on behalf of such health care providers.

Detecting Evaders

The LEIE allows users to enter the name of an individual or entity to determine whether that individual or entity is currently excluded. If the name matches one on the LEIE, users can verify the identity using a Social Security Number or Employer ID Number. Users can search for up to five names at a time.

Keep in mind that excluded individuals and entities may use variations on the name or Social Security Number associated with the exclusion. It is possible that a



Social Security Number does not match the searched name, even though the person or entity is actually excluded from participation in federal health care programs. The LEIE database, like any highly complex program, is not perfect.

- When searching for a name on the LEIE, simply enter the individual's last name and first initial. Individuals and entities may attempt to escape recognition by changing the spelling of their first name, so this strategy allows users to check Social Security Numbers against similar names.
- Screen employees and contractors against other databases, including the U.S. General Services Administration System for Award Management.
- Decide whether it is more cost effective to engage a third-party provider to conduct the screening on your behalf. [What to Do if You Identify an Excluded Person](#)

Pick up the phone. If you find that you currently employ or used to employ an individual or entity that is excluded from federal health care programs, you may have an obligation to disclose to OIG any payments related to any item or service provided by an excluded individual or entity. Failure to disclose may subject you to civil or even criminal liability.

If you have questions regarding your compliance with the exclusion check requirements, please contact Rob Heath, any other member of Reinhart's Health Care team or your Reinhart attorney.

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