

# OIG Exclusion Enforcement Activity Continues to Rise

Recent settlements between health care providers and the U.S. Department of Health & Human Services Office of Inspector General ("OIG") make clear that enforcement actions related to the employment of excluded individuals will not be going away any time soon. In October, November and December 2015, 21 organizations settled with the OIG over claims related to billing federal health care programs for services provided by excluded individuals or entities. The settlements ranged from \$24,000 to more than \$21 million. Through the first three months of 2016, nine organizations settled similar cases for amounts ranging from \$19,000 to more than \$1.9 million.

As discussed in a [previous e-alert](#), it is critical that health care providers do not employ or contract with excluded individuals and entities. As Reinhart Health Care attorney Rob Heath explains, "Exclusion screening, though expensive and time-consuming, is a critical element of every health care provider's compliance program." Even isolated errors can lead to steep civil monetary penalties.

According to OIG's 2013 [updated bulletin on exclusions](#), no federal health care program payment may be made (1) for goods or services provided by an excluded person or entity or (2) at the medical direction or on the prescription of an excluded person. This prohibition applies to all methods of payment under federal health care programs, and includes both direct and indirect care. Excluded individuals and entities are also prohibited from providing administrative and management services that are payable by federal health care programs, even if the administrative and management services are not separately billable.

Unfortunately, there is no fool-proof way to ensure that a search of the List of Excluded Individuals and Entities ("LEIE") will detect all excluded individuals and entities. In a [previous e-alert](#), we provided a list of suggestions for health care providers to consider. Providers that do not contract with another entity to perform exclusion checks should always use two identifiers to confirm a match to the LEIE—we recommend an individual's name and social security number.

Many providers use an individual's name and some other identifier, such as an address or a national provider identifier ("NPI") to confirm a match. Because address information may be incorrect (or an individual provides inaccurate address information), and individuals may use a variety of NPIs (e.g., individual,

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skilled nursing facility, etc.), the use of such identifiers may not always provide reliable results. If there is any question as to whether or not an individual is excluded, a health care provider should ask the individual to sign an affidavit explicitly stating that the individual is not excluded from participation in federal health care programs. This affidavit should be drafted by your legal counsel to ensure that it contains all information necessary to protect your facility.

Oftentimes, staffing agencies are responsible for ensuring that their employees or contractors are not excluded under state and federal requirements. As a result, the staffing agencies frequently perform LEIE searches for caregivers. While this may sound convenient, it must be remembered that the *provider* is ultimately responsible for ensuring that its employees and contractors are not excluded. For example, if a skilled nursing facility hires a CNA from a staffing agency, and subsequently discovers the CNA is an excluded individual, the skilled nursing facility will be held liable.

Sometimes the contract between a skilled nursing facility and a staffing agency requires the staffing agency to indemnify the skilled nursing facility—but such indemnification will rarely reimburse the skilled nursing facility for legal fees incurred as a result of the staffing agency's failure to detect an excluded individual. As a result, indemnification does not come close to covering all expenses incurred because of the staffing agency's failure. We recommend that legal counsel review all staffing agency agreements (ideally, prior to execution or in advance of the renewal date) to ensure that they sufficiently protect a health care provider should an excluded individual slip through the cracks.

We cannot overstate the importance of conducting thorough exclusion checks. Following proper procedures can effectively address this issue and minimize the risk of liability; however, it can quickly become an enormous liability if errors are made. If you have questions related to exclusion checks or staffing agency contracts, please contact Rob Heath or your Reinhart attorney.

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