THE OIG EXCLUSION LIST: A BACKGROUND CHECK YOU MAY HAVE FORGOTTEN ABOUT
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The recent changes in Indiana law regarding criminal background checks have brought a renewed interest to criminal checks in home and hospice care. Criminal background checks are not the only checks providers should be concerned about. There is another equally important background check that any provider who is enrolled in a federal health care program should be performing. This other background check is checking the Department of Health and Human Services’ Office of Inspector General’s (“OIG”) exclusion list. If you receive any reimbursement from a federal health care program, Medicare, Medicaid, Medicaid waiver, etc., this check should be performed before you hire an employee or contract with any subcontractor.

Exclusion - What Does it Mean

One of the many penalties the government can impose on an individual or organization that commits Medicare, Medicaid or other health care fraud, is exclusion from participation in any federal health care program. If an individual or organization is excluded from participation, they are not allowed to receive federal funds for providing items or services. For an individual, exclusion effectively ends the individual’s career, because they can no longer work for a provider that participates in a federal health care program. For an organization, it effectively shuts down the provider, because the provider will have to stop serving the majority of its patients.

The government will not provide reimbursement for any “items or services, furnished, ordered or prescribed” by an excluded individual or entity. This means that if you provide home health services through an employee, independent contractor
or contracted organization that is excluded from participation, you will, at a minimum, not be paid for those services. Federal law gives OIG the power to impose other sanctions as well.

Individuals and entities can be excluded from participation for a number of reasons. There are mandatory exclusions and permissive exclusions. As the name implies, a mandatory exclusion is automatic. If an individual commits an action subject to a mandatory exclusion, they are automatically excluded from participation in federal health care programs.

There are a number of grounds for mandatory exclusion from the program. These include convictions for “program related” crimes, felony convictions for health care fraud, convictions for patient abuse or neglect, and felony drug convictions. Mandatory exclusions are for a minimum of five years. If after a mandatory exclusion an individual or organization commits another mandatory exclusion offense, the offender can be excluded for a minimum of ten years. A third mandatory exclusion offense will result in being permanently excluded from all federal health care programs.

Permissive exclusions are actions for which the individual may be excluded, but for which OIG can determine to allow the individual to continue to participate. Activities which include permissive exclusion as a penalty include misdemeanor health care fraud convictions, convictions for any type of non-health care fraud, conviction for obstructing an investigation, misdemeanor convictions relating to controlled substances, and losing your license.

**Knowingly Employing Excluded Individual**

The CMP statute prohibits you from employing or contracting with someone you “knew or should have known” was excluded from the program. This means you do not have to actually know an individual is excluded to be in violation. You can be found in violation for hiring an individual if it is determined that “you should have known” the individual was excluded, regardless of what you actually knew about the individual at the time.

Agencies that have failed to check the exclusion list have tried to defend themselves by arguing they did not have actual knowledge the individual was excluded. OIG and Indiana’s Medicaid Fraud Control Unit ("MFCU") are not persuaded by this argument. They take the position that an agency should have known an individual was excluded, because the individual appears on the exclusion list. Unless the employee or contractor misrepresented their status and their identification, your lack of actual knowledge will not convince OIG or MFCU to drop a case.

What an agency should have known, but did not know, comes up quite frequently in the home health and hospice industry. These industries tend to be local and most providers are familiar with one another. This can lead to situations where an agency is hiring an employee whom the administrator or director of nursing knows professionally, knows form school, or with whom the administrator or director of nursing is friends.

Because the administrator or director of nursing knows the individual, she may not check the individual’s exclusion status. She assumes, because she has know the individual for years, the individual is not excluded. Based upon this familiarity, she does not actually check the exclusion list. Years later, the Administrator discovers that Jane was excluded. The administrator’s failure to check means that although the agency did not “know” the individual was excluded, it should have known. This can lead to the agency being liable, even though there was no intention to violate the exclusion rule.

**Exclusion – OIG’s Interpretation**

The federal statute states that the government will not reimburse for items or services furnished, ordered, or prescribed by an excluded individual. This has led providers to conclude
that they can employ excluded individuals in non-caregiving capacities, because the individuals are not furnishing services to patients. These providers are reading the exclusion statute much more narrowly than OIG does.

OIG has taken the position that providers are not only prohibited from employing excluded individuals to provide direct care, but may not employ an individual in a management or administrative capacity where the management or administrative services are a necessary component of providing patient care. OIG considers an individual who is employed in such an administrative or management capacity to be indirectly providing covered items or services.

In bulletins, OIG has listed a number of positions it considers to be "indirect care" positions. For example, providing administrative duties such as review of plans of care, claims processing, working as an agency administrator, working as a billing agent, or working as a utilization reviewer for federally reimbursable claims.

Although the statute prohibits the government from providing reimbursement for the services provided, OIG considers this prohibition to include the use of federal funds to pay an excluded employees wages. If a provider is employing an excluded individual in an "indirect care" capacity, the provider must be able to demonstrate that 100% of the individuals wages were derived from funds that were not received from a federal health care program.

This makes it very difficult to employ an excluded individual in any capacity if you participate in federal health care programs. For example, if a Medicare or Medicaid certified agency hired an excluded home health aide to work in its billing office, OIG would consider this agency to be employing the aide in an "indirect" capacity, because she would be submitting claims to Medicare, Medicaid, or other federal payer sources for direct care provided to program beneficiaries. This indirect care would be "reimbursed" using federal dollars, because you would pay her wages out of the agency's income, which would include federal reimbursement.

With OIG's broad interpretation spelled out in a number of bulletins and advisory opinions, the only way to safely hire or contract with an excluded individual or entity is if you can place them into a position, direct or indirect, that only relates to non federal health care program patients and whose compensation can be attributed completely to non federal health care program dollars. Because of this broad interpretation, the safest approach for any provider that serves federal health care program patients is to not hire an excluded individual.

What Happens if I Employ An Excluded Individual or Contract With An Excluded Individual or Entity?

Recoupment

The most obvious penalty for employing an excluded individual is that the payer source will want to recoup some, or all, of the money they paid to the provider. There are a number of ways a recoupment can be calculated. For Medicare home health, OIG could ask for you to return the entire amount paid for all client episodes in which the excluded individual provided care to the patient. If the individual provided care that was reimbursed on a fee for service basis such as Medicaid home health or Medicaid Waiver services, the payer may simply request the amounts paid for each visit or service performed by the individual.

If the excluded individual provided services indirectly, OIG or MFCU will still seek to recover amounts paid for services provided while the excluded individual was employed. In the case of "indirect services", OIG or MFCU may not request repayment of specific reimbursement. Instead the agency may calculate the percentage of your agencies income attributable to the payer source. This percentage will
then be applied to the individual’s salary and this percentage will be the amount subject to recoupment. There are of course other methods OIG or MFCU may use when calculating a recoupment amount.

**Civil Monetary Penalties**

Repayment of reimbursement is not the only penalty for employing excluded individuals. Entities that employ excluded individuals are also subject to civil monetary penalty liability. CMP liability for employing excluded individuals includes a penalty of up to $10,000 per claim and an assessment of up to three times the amount paid for each service wrongfully claimed.

The penalties and assessments on top of repaying amounts to the payer can make employing an excluded individual very costly. In many cases, just to settle a case, the OIG or MFCU will ask for a $10,000 penalty and state, if we go to court we can ask for a lot more. It makes fighting the case very difficult.

**Compliance**

With the potential for both recoupment and steep penalties for employing or contracting with an excluded individual very costly. In many cases, just to settle a case, the OIG or MFCU will ask for a $10,000 penalty and state, if we go to court we can ask for a lot more. It makes fighting the case very difficult.

Another reason to ask for this information is that the limited criminal history check will not include information on federal convictions. Many program related convictions and health care fraud convictions are likely to be federal criminal convictions. You would not be aware of this information without asking. Asking for it provides further proof to OIG and the MFCU of your efforts to not employ excluded individuals.

The application should ask for not only the applicant’s name, but any aliases or other names by which the individual has been known. Typically this will include maiden names, but your application should not ask for the applicant’s maiden name. Your application should use the more general request for any other names by which the applicant has been known.

If an applicant does not answer the exclusion question, the criminal history question, and the alias questions, you should not hire them. If you hire an individual who does not answer those questions, OIG and MFCU will view the incomplete application as a failure on your part to properly screen applicants.
**Compliance – OIG Exclusion List Search**

Whenever you are considering hiring an individual, you should check to make sure that the individual is not excluded from participation. OIG maintains a list of excluded individuals on its website. You can find this list at: [http://www.oig.hhs.gov/fraud/exclusions/listofexcluded.html](http://www.oig.hhs.gov/fraud/exclusions/listofexcluded.html). This webpage contains links to both an online searchable database and a downloadable copy of the database.

The only way to search the list is by individual or entity name. Contrary to what some investigators think, there is no way to search the database by social security number or employer identification number. You can confirm an individual’s identity using a social security number or employer identification number, but only after you have searched by name and found names matching your search criteria.

If you have more than one name for an applicant or contractor, you must search by every name, to be certain the individual or entity is not excluded. For example, an individual may be listed under her maiden name and not under her current married name. If you searched by her married name only, you would receive a report indicating no entry found. This might lead you to conclude incorrectly that the individual was not excluded.

This is why it is important to ask job applicants for other names under which they have been known. You should search the list for every name the applicant provides you to be certain you correctly determine whether an individual is excluded.

When you perform the search or searches, you should print the results screen, even if it shows no records found. This serves as proof that you checked the exclusions list for the individual and found no evidence of exclusion. Without this proof, it may be hard to convince an investigator that you checked the list. If you can show you checked the list for every name that the applicant had provided you on the application, it will be difficult for OIG or MFCU to argue that you should have known an individual was excluded.

If you perform the search and find evidence the individual or entity is excluded, you should not hire them or contract with them. You could attach a copy of the exclusion entry to the application, so that you could provide proof that your decision was based upon the exclusion.

You might also consider checking all current employees against the list on a recurring basis. You would do this to ensure that current employees have not become excluded in the time since you hired them. There may be other ways to achieve this result, but as you consider compliance, you should consider that it is possible to hire an individual who is not excluded only to have them become excluded later. Without some form of check, you might not know they were excluded after you hired them.

**Compliance – Written Policy and Procedures**

All of your policies and procedures relating to ensuring you do not hire excluded individuals should be in writing. Any person with authority to hire should be aware of all of the steps relating to exclusion list checks. You might also consider penalties for failing to perform such checks. The purpose of the penalties is to ensure your staff does not make the mistake of assuming someone is not excluded, simply because they know the individual or have worked with them in the past.

Written policies and procedures are not only helpful to ensure your employees take the appropriate steps to avoid hiring or contracting with excluded individuals, but they also serve as proof of your efforts to comply. In the event you hire an individual who is excluded, you can at least demonstrate you had policies designed to prevent the problem and maybe demonstrate the hiring was the result of employee error. While this may not prevent OIG from imposing penalties, it provides an argu-
ment that OIG should at least be more lenient.

**Compliance - Audits**

The only way to be certain your employees are following these policies and procedures is to check. Your written policies and procedures should state that at certain set intervals, quarterly, semi-annually, annually, etc., your compliance officer will audit a percentage of your personnel files or all new hire files, to check that the files contain proof that the exclusion list was checked.

A regular audit provides two benefits. First it provides oversight to your compliance policies and procedures to make certain they are followed. If your employees know the files will be checked, they are less likely to hire a friend or former co-worker without checking the list first. Second, it provides a means to catch mistakes before they become a much larger problem.

**Compliance - Contractors**

Your compliance efforts should also address contracting with outside individuals and entities to ensure contractors do not become a source of exclusion statute violations. Because the exclusion list includes individuals and entities, you should always check the exclusion list before retaining any individual or entity as a contractor. This means you will need to obtain any aliases for a contractor.

When dealing with entities, aliases can include former corporate names. You should ask for any former corporation names, because an excluded entity might have simply changed its name in an effort to circumvent the exclusion.

Your contracts should also include a specific representation from the contractor that they are not excluded from participation in any federal health care program. The contract could also require the individual or entity to affirm that they have not been convicted of any program related crimes or health care fraud.

The contractor should be required to pay you money or be subject to other penalties should these representations turn out to be false. The contractor should also promise to notify you immediately if it learns that any of its employees become excluded or if it becomes excluded, or if it or any of its employees become subject to an investigation that could lead to exclusion.

The contract could also include an indemnification provision in which the contractor agrees to repay you any amounts you paid in recoupments, penalties or assessments as a result of the contractor, one of the contractor’s employees or one of the contractor’s sub-contractors being or becoming excluded. This at least gives you the ability to pursue the contractor to recover amounts you lose due to the contractor’s mistake.

The contract should also allow you to immediately terminate the agreement without penalty should the contractor or any of the employees it uses to provide services to you or on your behalf become excluded.

**Conclusion**

Although it is not an explicit requirement of the conditions of participation, checking that employees and contractors are not on the OIG exclusion list is something every provider should do. Failing to perform this check can result in an agency hiring or contracting with excluded individuals. Employing an excluded individual or contracting with excluded entities to provide federally reimbursable services, either directly or indirectly, can lead to repayments and steep civil penalties. Checking before hiring can save you a great deal of stress and money.

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