New Legislation Means Increased Liabilities for Healthcare Providers
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The new healthcare reform legislation known as the Patient Protection and Affordable Care Act of 2010 (PPACA) has significantly increased potential liability for healthcare providers. The PPACA includes new provisions designed to reduce fraud and abuse in the healthcare system; however, the new provisions make it possible for healthcare providers to inadvertently run afoul of anti-fraud statutes. Therefore, healthcare providers should develop procedures now to ensure compliance with the new laws because in most cases good-faith compliance will not be a defense.

Anti-Kickback Statute

The federal anti-kickback statute regulates healthcare arrangements and transactions to deter healthcare providers from making referrals of patients in exchange for some benefit. Traditionally, courts only found that healthcare providers violated the statute when they specifically intended to do so. However, the PPACA erases the old specific intent requirement meaning that a healthcare provider may now violate the statute even if the provider was acting in good faith and never intended to do anything wrong.

In addition, a violation of the anti-kickback statute is also now a violation of the False Claims Act. The False Claims Act is a federal law that allows private citizens, known as whistleblowers, to file lawsuits against government contractors, such as healthcare providers, for fraudulent claims made to the government. If the lawsuit is successful, the whistleblower receives a portion of the damages. In short, an entity that violates the anti-kickback statute, even mistakenly, is now vulnerable to a lawsuit under the False Claims Act.

Potential Liability for Overpayments

The PPACA also makes healthcare providers potentially liable for overpayments under the False Claims Act. The PPACA requires that healthcare providers report and return any overpayments of federal funds within 60 days. If the healthcare provider does not return an overpayment within 60 days, it risks a lawsuit by a whistleblower under the False Claims Act. To avoid violating the new law, healthcare providers should develop a diligent auditing program to discover overpayments and promptly issue refunds.

Changes to Stark Law

The changes the PPACA makes to Stark Law are a mixed bag for healthcare providers. Generally, Stark Law prohibits physicians from referring patients to a medical facility in which the physician has a financial interest. Physicians are strictly liable under the Stark Law, meaning that the physician may be punished if he or she violated the law even without intending to do so, and a violation results in a financial penalty. One exception to Stark Law is known as the in-office ancillary services exception, which allows physicians to refer patients to services that are ancillary to the physician's professional offices under certain conditions. Now, when physicians use this exception, they must disclose the financial relationship to the patients and give the patients a list of other suppliers of the service.

One potential source of relief for healthcare providers under the PPACA may be the new Stark Law self-disclosure protocol. To encourage self-reporting of violations of the Stark Law, the PPACA allows the Department of Health and Human Services to reduce financial penalties if the provider timely discloses the violation and cooperates with the agency. The Centers for Medicare and Medicaid Services will develop a protocol for self-disclosure of Stark Law violations in the next five months. Healthcare providers should follow this new protocol carefully to limit their financial liability for Stark Law violations.

PPACA Changes to Medicare Payments

Healthcare providers' compliance with the anti-fraud provisions of the PPACA is especially important given that regulators may suspend Medicare payments to providers while the regulators investigate credible allegations of fraud. In addition, providers must be diligent in processing their Medicare claims on time because the PPACA reduces the period for submitting claims to 12 months.

Although the PPACA is a source of many potential new liabilities for healthcare providers, providers can limit their risk by developing robust programs to ensure compliance with the new anti-fraud laws. Those healthcare providers that develop effective compliance programs will find themselves much better positioned to meet the demands of the new statutes than others in the industry.