

POST-COVID-19 INVESTIGATIONS AND HEALTHCARE FRAUD

As we continue to work through the new world of COVID-19, it's important not to lose sight of what is almost certainly on the horizon – post-COVID investigations. The federal government has poured trillions into not only containment and treatment, but also financial stimulus. In order to facilitate greater flexibility for healthcare providers attending to the onslaught of pandemic-related needs, the feds are waiving certain requirements. Nevertheless, healthcare facilities should be implementing careful compliance practices to help avoid potential claims under the False Claims Act (FCA) once the current crisis begins to recede.

Federal Funds Mean Federal Scrutiny

Federal funds come with the very real catch that they are attended by federal scrutiny. When the uproar related to the coronavirus dims, alleged provider-misconduct will be investigated by multiple actors for the federal government. The fact is, however, the effects of the COVID-19 pandemic are unprecedented, which leaves many medical facilities unprepared to cope with the mounting problems. Doctors, hospital administrators, and other healthcare providers are left to find a balance between effectuating nimble responses in the face of evolving emergencies that are yet to abate and adhering to federal rules and regulations. Future allegations of federal false claims will almost certainly be forthcoming.

Fraud and Abuse

Authorities who enforce governmental oversight often look to the federal False Claims Act (FCA) as their tool of choice when bringing claims in the aftermath of a national crisis, for which COVID-19 certainly qualifies. Examples include universities that were penalized for misuse of the post-9/11 GI Bill and contractors who were similarly fined for failing to adequately perform for funds funneled through Hurricane Katrina relief. It only stands to reason that similar repercussions could befall healthcare providers once the dust from the COVID-19 crisis settles.

Focus on Healthcare

For years, the FCA has focused significant attention on healthcare. In fact, governmental settlements and judgments related to healthcare entities remain at the forefront in terms of total financial recoveries. This heightened attention is

expected to both continue and flourish post-coronavirus, and a recent message from Attorney General Barr to the American people strongly reinforces this expectation. Very early on in the crisis, March 20, Mr. Barr urged the public to report any suspected fraudulent schemes that relate to COVID-19, and on March 22, DOJ filed its very first [enforcement action](#) against *fraudsters*. The wire-fraud scheme in question operated out of *coronavirusmedicalkit.com* and offered customers COVID-19 vaccine kits in exchange for a small shipping fee.

The Nursing Home Initiative

Nursing homes house our nation's most vulnerable citizens and residents of nursing homes are among the hardest hit by the Covid-19 pandemic. To protect these residents, DOJ has launched the [National Nursing Home Initiative](#) to help ensure that substandard care does not elevate these numbers further.

One inroad is the *worthless services* claim, which is admittedly difficult to establish because the claimant must demonstrate that the services provided were as effective as receiving no services at all. Although it's a high bar, one such act (identified by one court) is knowingly requesting federal reimbursement for performing a procedure with no medical value. In cases with excessively adverse nursing home outcomes, inquiries related to whether breaches of protocol contributed will likely be forthcoming.

For obvious reasons, Medicare has strict rules of sanitation related to avoiding the transmission of infections and communicable diseases for nursing homes, hospitals, and other healthcare facilities. Further, Medicare has Conditions of Participation (CoPs) that implement quality-of-care levels that must be reached before providers are allowed to participate in the federal program. Emergency preparedness is one such CoP, but it isn't clear that a violation of this nature would amount to a false claim. Meeting the CoPs related to emergency preparedness, on the other hand, would likely be a strong defense against violation allegations.

Wavering Waivers

With the announcement of a national emergency, a broad waiver was issued that allows specific blanket waivers for Medicaid, Medicare, and the Children's Health Insurance Program (CHIP). While some waivers are being approved case by case, the sheer volume of requests means that the process could become sluggish.

The evolving landscape of these waivers is nothing if not fluid. In fact, new developments from the feds drop on a daily basis. When the waiver request represents an emergency, the provider may have to make the extremely delicate decision to move forward with treatment before obtaining approval from the Centers for Medicare & Medicaid Services (CMS).

The situation becomes more confusing from here. Healthcare providers need to stay on top of which requirements are waived and which remain in effect, but there is also the issue of state regulations, which can be just as restrictive. Ultimately, medical facilities and providers must proceed with caution, make reasonable decisions within the often-unprecedented circumstances in which they find themselves, and carefully document protocol changes made due to exigent circumstances.

Prevailing Trends

As this national emergency continues to unfold, the unexpected is almost certain to emerge as the new norm. The attributes that will help healthcare providers make decisions confidently include remaining agile in their responses (making decisions on a case-by-case basis when necessary), staying abreast of evolving policies, carefully documenting their decision-making processes, and seeking necessary authoritative guidance when possible. As we all move forward into this uncharted territory, it's important to adhere as closely to prevailing norms as possible and to have a thoughtful and well-documented reason for doing otherwise. Post-coronavirus investigations are coming and proceeding with caution is well advised.