

The Fraud Enforcement and Recovery Act of 2009 and its Significance to Medicaid Providers

On May 20, President Obama signed the federal Fraud Enforcement and Recovery Act of 2009 (FERA). The FERA is focused primarily on mortgage, banking, and federal stimulus fraud.

However, Section 4 of the FERA has major significance for health care providers and managed care plans, and all Medicaid providers. This section, “Clarifications to the False Claims Act to Reflect the Original Intent of the Law”:

- 1) Redefines “claim” to include claims submitted “to a contractor, grantee, or other recipient, if the money or property is to be spent or used on the Government’s behalf, or to advance a Government program or interest.” This language makes explicit the ability of Government and whistleblowers to pursue subcontractors and contractors with grantees for the claims they submit to contractors and grantees. This has a significant effect on health care providers who contract with Medicaid or Medicare managed care plans, who will now have liability to the United States under the Act.
- 2) Redefines “obligation” to include “an established duty, whether or not fixed,” arising from a variety of relationships, and specifically includes obligations “arising from statute or regulation, **or from the retention of any overpayment.**” This change allows the government and whistleblowers to pursue violations of regulatory statutes with penalty provisions as False Claims Act cases and to pursue false documents which are “material to an obligation to pay or to transmit money...to the Government” regardless of whether a false claim has been submitted. For example, a physician who creates backdated medical records to support a claim already submitted could be liable under this provision.
- 3) Expands the anti-retaliation provisions from only employees to include “contractors and agents” who “act to stop one or more violations.” This provision could protect contracted physicians in a government-funded managed care plan, for example, who took action to stop false reporting or illegal denial of services by the plan.

The new language is likely to have a significant impact on the range and number of new False Claims Act cases. Different provisions have different effective dates.

The entire statute can be accessed by going to <http://www.govtrack.us/congress/legislation.xpd> and entering S. 386.

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This article is not to be construed as legal advice and is for informational purposes only.