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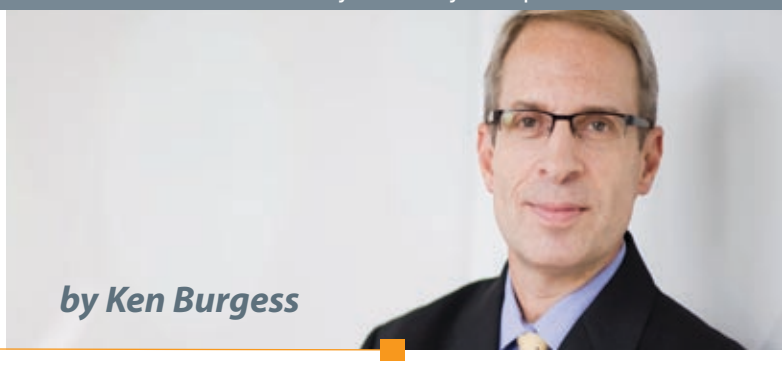
SHORTS ON LONG TERM CARE

for the North Carolina LTC Community from Poyner Spruill LLP

Hiring or Contracting With Excluded Individuals or Entities: Checking the OIG's Exclusion List Can Avoid Harsh Sanctions



by Ken Burgess

Editor's note: *This is one of those articles you NEED TO READ and share with your management staff and remind them of periodically.*

Over the years, we have written in *Shorts* about the importance of checking the Office of Inspector General's "List of Excluded Individuals and Entities" before hiring an employee (or rehiring a former employee) or contracting with any sort of vendor or supplier (services or goods) before you hire or contract with them. When the OIG excludes an individual or entity from federal health care programs, that individual is essentially banned from working for any health care provider who receives federal health care program funds (Medicaid, Medicare, TriStar or any other type of federal health care program) in any role related to program beneficiaries or program goods or services.

The OIG's ban is broad. No payment may be made for any item or service provided by, ordered by, subscribed by, or arranged by an individual excluded from federal health care programs, either directly or indirectly. A provider that employs or contracts with an excluded individual or entity may itself face civil money penalties of up to $10,000 for each item or service claimed (for reimbursement) and three times the amount claimed as reimbursement plus, in some cases, exclusion from federal health care programs. These sanctions can be imposed against any provider that hires or contracts with an excluded individual or entity and the standard that applies is the provider "knew or should have known" of the exclusion. With the OIG's easily accessible Exclusion Database, which lists all excluded individuals and entities and costs nothing to check, the "knew or should have known" standard will catch all providers except in very rare instances.

An excluded individual does not have to be performing direct patient care or services. For example, a health care provider can incur CMPs and/or program exclusion for hiring an excluded nurse or other individual to work in a hospital, SNF or other health care facility to perform exclusively nonclinical, administrative duties, such as review of treatment plans, if such services are reimbursed directly or indirectly (such as through a prospective payment system or a bundled rate) to the employing or contracting provider. As a practical matter, the only time you can hire or contract with an excluded individual or entity is when you can totally segregate that person's payment from federal health care reimbursement, paying the person solely from private funds, AND their role involves any service or item provided directly or indirectly to federal program beneficiaries. That is a very tough standard.

The OIG's website at www.oig.hhs.gov/exclusions contains tons of information about these rules and prohibitions, how to check the Exclusion List, a set of frequently asked questions, and an easy link to the Exclusion Database itself. You can also just Google "OIG Exclusion" and get there easily.

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RALEIGH CHARLOTTE ROCKY MOUNT SOUTHERN PINES WWW.POYNERSPRUILL.COM

301 Fayetteville St., Suite 1900, Raleigh, NC 27601 / P.O. Box 1801, Raleigh, NC 27602-1801 P: 919.783.6400 F: 919.783.1075

"Independent" Informal Dispute Resolution Goes Live on January 1, 2012: CMS Issues Program Memorandum to State Survey Agencies Outlining Required Elements

By Ken Burgess

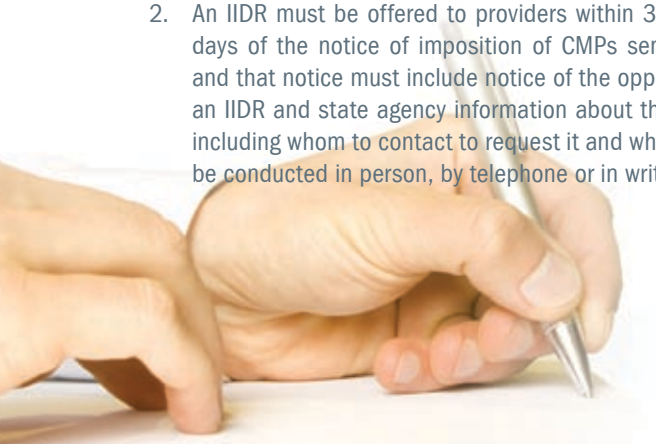
The Patient Protection and Affordable Care Act of 2010 ACA—also known as the health care reform law—requires that civil money penalties (CMPs) levied against them for survey deficiencies will, as of January 1, 2012, be collected and placed in "escrow" until all appeals, both formal and informal, are completed. ACA also requires CMS and state survey agencies to offer providers who face collection and escrowing of CMPs the opportunity for an independent informal dispute resolution (IIDR).

On October 14, 2011, CMS issued a program memorandum to state survey agencies (SSAs) containing the required elements and processes states must include in the IIDR process. According to the memo, the IIDR process will go live on January 1, 2012, and states must submit their proposed IIDR process to their CMS regional office no later than November 30, 2011, for prior approval by CMS.

CMS also announced that while eventually all CMPs collected and placed in escrow will permit providers to request an IIDR, for now CMS intends to "phase in" the collection and escrow process and limit it to CMPs imposed as a result of deficiencies rated at a "G" (actual harm or immediate jeopardy) level on the scope/severity scale. That process will not apply, for now, to CMPs issued for deficiency rates "D", "E" or "F" on the scope/severity scale. As a result, CMPs imposed for those deficiencies will be treated as they are now and providers will not have the opportunity for an IIDR regarding them (note that, in any event, the vast majority of CMPs result from deficiencies rated "G" or higher).

Some of the more important "required" elements set out by CMS in the October 14 memo (which closely tracks the Final Rule on this same topic issued earlier this year) include the following.

1. CMPs may be collected and placed in escrow on the earlier of the date only when the IIDR is completed or 90 days from notice of imposition of CMPs by CMS.
2. An IIDR must be offered to providers within 30 calendar days of the notice of imposition of CMPs sent by CMS, and that notice must include notice of the opportunity for an IIDR and state agency information about the process, including whom to contact to request it and whether it will be conducted in person, by telephone or in writing.
3. The IIDR must be conducted by an independent entity (not the SSA) or a component of an umbrella state agency that is organizationally separate from the SSA and has knowledge of Medicare and Medicaid requirements, and that entity must be approved by CMS.
4. The facility must request IIDR within 10 days of receiving the CMS notice, and the IIDR must be completed within 60 days of a provider's request. An IIDR is "completed" only when the entity conducting the IIDR has provided a written report to the SSA and the SSA has provided written notice of the final IIDR decision to the facility.
5. The SSA retains final decision-making authority over the IIDR, and the report made by the entity conducting the IIDR is only a "recommendation" to the SSA. CMS retains, as now, final decision-making authority over survey results and CMP imposition.
6. The written record prepared by the IIDR entity must include a number of specified findings and information, but, interestingly, there is no provision for the affected provider to receive a copy of that written record, and it only receives a summary of the outcome and findings from the SSA. However, where the SSA disagrees with the recommendation of the IIDR entity, the entire written record must be sent to CMS for review.
7. The IIDR process must include notice of an opportunity to comment on the challenged deficiencies to the involved resident(s) or their representative and to the state long term care ombudsman.
8. Any deficiency that has already been the subject of a regular IDR (the process now in place, as opposed to an IIDR) cannot also be challenged in an IIDR.
9. As is the case now with the existing IDR process, providers may not challenge an IIDR for the following reasons.
    - Scope/severity of the deficiency except where the scope/severity constitutes immediate jeopardy or substandard quality of care
    - Remedies imposed by the SSA or CMS
    - Failure of the survey team to follow required survey processes



- Inconsistency of the survey team in citing deficiencies at other facilities
- Allegations that the IIDR process is inadequate

There is no fee or charge for providers to take advantage of the IIDR process, although many SSAs have requested the right to charge fees to cover the expected additional costs of this process to states. CMS has said it will "study" that issue in the future.

It remains to be seen just how "independent" the IIDR process will actually be and what entity in North Carolina will be responsible for conducting this new process. We will continue to monitor this process and report to you about it in future issues of *Shorts*.

Hiring or Contracting

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In our practice, we still encounter SNFs that do not routinely check the OIG Exclusion List. This is a very reckless practice. Excluded individuals are not always folks you have heard about in some high-profile fraud case. They may simply be professionals who have lost their licenses temporarily, thus automatically referred by the licensing board (Board of Nursing, Board of Nursing Home Examiners, etc.) to the OIG and excluded. Also, reinstatement is not automatic and an excluded individual or entity must reapply to be reinstated for federal health care program participation. Until they have reapplied, and are formally readmitted, all these prohibitions remain in place and you may not hire or contract with them until they are formally readmitted. This is true even if the underlying offense, such as loss of professional license, has been corrected.

In other cases, well-meaning and diligent SNFs check the OIG Exclusion List but make mistakes, such as entering the wrong name, an incomplete name, or a nickname and missing a positive "hit" on the Exclusion List. While a provider's efforts to check the list that is marred by such a mistake will often be considered by the OIG in considering sanctions against that provider, you can't count on that, and the OIG retains almost total discretion in determining whether to impose sanctions on the employer in such cases.

Here are a couple of tips to easily avoid these huge risks.

- Always, always, always check the OIG's Exclusion List before hiring or contracting with anyone for any job in or for your facility or your related company (i.e., where you have your own pharmacy or DME company).
- Always check before you rehire or enter a new contract with former employees or contractors. Their program participation status may have changed since you last knew or worked with them.
- Always ensure you have the full and complete name, taken from an official government identification document such as a driver's license, passport, or other reliable document.
- Always ask if that person or entity has ever gone by any other name—an alias or maiden name—and check all those names.
- Your employment application should ask "Have you ever been excluded from participation in any state or federal health care program?" If the answer is yes, ask for details (date, time, facts involved, and current status). Then ask for documentation to confirm what you've been told.
- If you get a "hit" on the Exclusion List, DO NOT hire or contract with that individual or entity for any purpose, even one you may think is totally unrelated to patient care or to any federal or state health care program payments, until you get some professional advice about whether that role can legally be offered to the excluded person or company.
- Print documentation from the OIG's Exclusion List showing that you checked the database, the name or names entered, the date of the inquiry, and the results.

This is one of those situations where you would rather be safe than sorry. Checking the OIG's Exclusion List should be a routine and constant part of any pre-employment screening process, just like conducting criminal background checks or checking an applicant's prior employment history. The same goes before entering into any contracts with suppliers or vendors. The OIG site contains other tips on checking names on the Exclusion List. It's a good idea to have one person in your organization responsible for reviewing and keeping up to date with the OIG's website on program exclusions.

Ken Burgess may be reached at 919.783.2917 or kburgess@poynerspruill.com.

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ACTIVITIES PROFESSIONALS: Win a FREE Trip to Nicaragua

by Ken Burgess

If you think your activities professional is the best in the world, prove it by nominating him or her to take an all-expenses-paid trip with us to Nicaragua to work with the elders in the hogares de ancionas, or "home of the ancients," we've written about in *Shorts* for the past several years. On January 15 through 20, 2012, Carron Suddreth of Wilkes Senior Village (who was just named to the national Board of Directors of the Jessie F. Richardson Foundation which coordinates our work in Nicaragua) and I will travel to Nicaragua to train local volunteers and hogares staff how to provide activities programs for the Nicaraguan elders. Currently there is nothing even approaching an activities program in the five centers where we work, and our goal is to change all that. This first trip will lay the foundation for activities programs in the centers we support and is just the first step in an ongoing effort to meet the psychosocial needs of these wonderful, abandoned and impoverished elders.

We are looking for one excellent activities professional who can spare a week for a life-changing adventure, and we are asking you to help us find the best of the best. The winning nominee will have a sense of adventure; a huge heart with a desire to change the world; experience in organizing, conducting and teaching activities programs; and a free week in January to go with us. No visas, special shots or other health care prep is required, only a valid U.S. passport. If you speak Spanish, even better, but if not, we'll have interpreters. And the best part is that we're providing a scholarship to the winner to cover the roughly $1,500 cost of the trip, which includes airfare, ground transportation and lodging (only a small amount of money for daily food is required and we can help with that, if needed). The winner will be joined by Carron, me, the director and staff of the JFR Foundation, and two to three other North Carolina activity professionals. This trip will change the winner's life! And the winner will be featured in the February 2012 issue of *Shorts*.

Please send nominations to me via email at kburgess@poynerspruill.com or by mail to me at Poyner Spruill, P.O. Box 1801, Raleigh, N.C. 27602-1801. Nominations must be received no later than November 30, 2011. A simple description of the nominee's qualifications and why you think the person should be chosen will do.

Also, if you'd like to participate in this terrific program, we are looking for activity supplies (beads, string, paper, paints and so forth), and, of course, donations to the JFR Foundation would be amazing and are totally tax-deductible. Maybe your facility would like to nominate someone and/or donate supplies, have a fundraiser to help with this project, or just make a small donation. Let the contest begin!

Ken's Quote of the Month

"Life is what happens to you while you're busy making other plans."

John Lennon

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