



Should You Hire an Excluded Individual or Entity in Your Practice?

FAROOQ MIR, ASSOCIATE, FENTON NELSON, LLP

UNDER SECTIONS 1128 and 1156 of the Social Security Act, the Office of Inspector General (OIG) has the authority to exclude individuals from participation in federal healthcare programs, including Medicare and Medicaid. The purpose of exclusion, according to the OIG, is to protect the integrity of the healthcare system as well as protect the public from individuals and entities engaging in fraud and abuse. Healthcare providers thinking of employing an individual excluded by the OIG should think twice before doing so because of the potentially significant consequences.



leading to the making of healthcare claims. This broad interpretation makes it extremely difficult, if not impossible, for an excluded person to obtain work with a healthcare provider.

Healthcare providers that bill Medicare or Medicaid should be careful not to hire an excluded individual if the person's job involves patient care activities and if any of the revenue supporting the wages of the excluded individual comes from federal healthcare programs. The OIG has stated in multiple Advisory Opinions that employers of excluded individuals or entities face civil monetary penalties for submitting claims to federal and state healthcare programs for services provided by excluded individuals or entities. With this in mind, healthcare providers should always refer to the OIG's exclusions list, as well as California's Medi-Cal exclusions list, prior to hiring any employee or contracting with an individual or entity. Further, providers should conduct checks on all potential contractors, manufacturers and medical equipment suppliers that are used in the care or treatment of patients and are reimbursed by a federal healthcare program.

An individual can be excluded from participation for a variety of reasons, including patient abuse or violation of Medicare and Medicaid billing rules. Exclusions are mandatory based on certain events (e.g., conviction of healthcare fraud) and discretionary in other cases. In addition to exclusion by the OIG, state Medical authorities have the power to exclude individuals irrespective of federal authorities.

The effect of exclusion on an individual is serious: no payment will be made by any federal healthcare program for services furnished, ordered or prescribed by an excluded individual. The Medicare Program may demand repayment of amounts paid while an excluded individual was employed.

Perhaps the most common errors regarding exclusion relate to indirect services. The OIG does not limit the prohibition to provision of patient care by excluded individuals, but instead takes an extremely broad view of services that are in the "causal chain"

For healthcare providers in the unfortunate position of already having hired an excluded individual, acting expeditiously is the best option. Terminating the relationship and stopping all billing of government payers is crucial. Developing a corrective action plan, including voluntary disclosure under the Provider Self-Disclosure Protocol, is also necessary and important step in this scenario. Failure to act quickly can carry serious consequences, including civil monetary penalties, the repayment of significant government payments, costs associated with government investigations, and civil or administrative litigation. ■

Farooq Mir is an associate at the law firm of Fenton Nelson LLP and advises healthcare providers in civil and administrative litigation matters, and has experience in representing clients in healthcare regulatory and transactional matters. Sources: https://oig.hhs.gov/exclusions/effects_of_exclusion.asp; <https://oig.hhs.gov/faqs/exclusions-faq.asp>