

Long-Term Care Providers in the Crosshairs: Minimizing Risk of Liability Under the False Claims Act in the COVID-19 World

April 30, 2020

Long-term care providers face multiple challenges that have put them at the epicenter of the COVID-19 public health crisis. Not only is COVID-19 exacting an extraordinary and tragic human toll on nursing homes, it is creating an unprecedented risk of legal liability arising from governmental enforcement efforts designed to identify and penalize fraud and abuse. However, just as there are measures that providers can take to reduce, if not eliminate, the risk that infection will spread, there are also measures that they can take to reduce, if not eliminate, the enforcement risk.

Foremost among the government's anti-fraud enforcement tools are the federal False Claims Act (FCA) and similar state laws. In general, the FCA prohibits an entity from knowingly making a false statement in order to obtain payment from the government. A long-term care facility that violates the FCA may be liable not only for repayment of all fraudulently obtained funds but may also be subject to significant monetary penalties and, in cases of egregiously culpable conduct on the part of an individual, imprisonment.

A suit under the FCA may be commenced by the government or by an individual whistleblower acting on behalf of the government. The law incentivizes whistleblowers to come forward by providing for them to share in any ultimate recovery. The FCA strictly prohibits retaliation against a whistleblower.

At one end of the spectrum, for a long-term care facility to bill Medicare or Medicaid for services that the facility did not provide clearly violates the FCA. However, potential liability can arise in much more nuanced circumstances. Liability may arise when a provider bills for services that it provided but that are later claimed to have been unnecessary. Further, the Department of Justice has pursued FCA claims against nursing homes on the theory that the nursing homes provided "substandard care." Such liability can arise, for example, because of a nursing home's failure to follow applicable regulations regarding standards of care. Although there are relatively few court decisions addressing this theory, these substandard care cases have resulted in nursing homes paying millions of dollars to settle the claims.

Even before COVID-19, health care providers, including long-term care facilities, represented an FCA enforcement focus. In late February 2020, just a month after the first reported COVID-19 case in the United



States, the Department of Justice announced that improper billing and care by long-term care facilities would be an enforcement priority in 2020. It seems probable that the intensity of governmental scrutiny will only increase in our new COVID-19 world. The carnage that COVID-19 is wreaking among long-term care residents makes long term care providers a likely enforcement target.

There are, however, a number of steps that long-term care providers can take to reduce risk in the event of an FCA enforcement action:

1. Keep up with care standards. Standards for preventing the spread of COVID-19 and caring for those who have contracted the disease continue to be very much a work in progress. Stay abreast of and comply with standards of care guidance, such as those issued by the Center for Disease Control, the Minnesota Department of Health, and other federal and state agencies and professional organizations. Significant failures to implement appropriate infection control practices may be fodder for an FCA claim based on alleged failure to provide adequate care. .
2. Update your compliance plan. Revise your compliance plan so that it includes specific steps designed to prevent the spread of COVID-19 and to provide necessary care for individuals diagnosed with the disease. Once you have adopted a compliance plan, you must follow that plan. To have a plan that you do not follow is potentially worse than having no plan at all.
3. Train employees. Make sure you appropriately train all employees on infection control procedures. Document that you have trained each employee and the specific training provided.
4. Enable employees to report suspected wrongdoing. Provide employees with a mechanism for anonymously reporting suspected violations, fraud and abuse. If you receive a report of improper conduct, you must carefully investigate the report and take appropriate remedial action based on the results of your investigation. Regulators generally regard providing employees with an opportunity to report wrongdoing, free from any concern about possible retaliation, as a critical feature of an effective compliance plan.
5. Keep complete and accurate medical records. Appropriate record keeping is a central responsibility of any health care provider and is even more important in times of medical crisis.
6. Document the use of stimulus funds. If you receive funds under the CARES Act or other governmental stimulus program, maintain documents necessary to establish how you used the funds, in the event it becomes necessary to respond to a claim that the funds were not used for their intended purpose. (See "More Money More Problems? CARES Act Stimulus Comes with Potential for Broad Oversight Investigations, Audits, and Enforcement")

For more information, please contact Susan Gaertner, Litigation and Dispute Resolution Practice Group Chair Matthew Jacober, or your regular Lathrop GPM contact.