February 25, 2014

Health Care FAQ: How Often Should We Run the Federal OIG/GSA Check?

***The answer*: The U.S. Department of Health and Human Services (HHS) recommends MONTHLY health care sanction checks.**

On May 8, 2013, the HHS Office of Inspector General (OIG) issued an Updated Special Advisory Bulletin on the Effect of Exclusion from Participation in Federal Health Care Programs. These guidelines recommend that health care providers screen their employees and contractors monthly to confirm that they are not on the OIG's List of Excluded Individuals/Entities (EXCLUSION LIST).https://oig.hhs.gov/exclusions/files/sab-05092013.pdf

The Special Advisory Bulletin is a "must-read" resource for compliance officers, as well as legal counsel, human resources, finance and other managers who work to ensure that health care providers do not employ or contract with individuals and organizations that have been excluded from a Federal health care program. Under the law, no Federal health care program payment may be made for any item or service furnished by an excluded person or at the medical direction or on the prescription of an excluded person. Health care providers that violate this provision risk imposition of civil monetary penalties ("CMPs") of up to $10,000 for each item or service furnished by the excluded person, as well as an assessment of up to three times the amount claimed. In serious cases, the provider itself could face exclusion.

In the Special Advisory Bulletin, the OIG reviews the statutory history behind the OIG's exclusion authority, which Congress has strengthened and expanded over the last fourteen years. The Special Advisory Bulletin also updates discussion in the original Bulletin about the effect of exclusion, consequences for excluded persons who violate exclusion, and the effect of exclusion on health care providers. Of particular interest to health care providers is the Special Advisory Bulletin's guidance about exclusion screening, which is richer and more detailed than the discussion on that topic in the 1999 Bulletin. According to the revised Bulletin, the OIG drew this additional guidance from questions raised over the last fourteen years and public comments solicited in November 2010.

Following are some highlights from the revised Special Advisory Bulletin's guidance on the screening process:

Who Should Providers Screen for Exclusion?

- Providers should screen employees and contractors to ensure they have not been excluded from a Federal health care program. In addition, the Affordable Care Act of 2010 extends CMP liability to providers that provide other items or services prescribed or ordered by an excluded person. As a result, providers should screen physicians and other practitioners who order items and services that the provider renders.

- When determining how far downstream to screen for excluded persons, the OIG recommends that providers first determine for each job category or contractual relationship whether the item or service provided is directly or indirectly, in whole or in part, payable by a Federal health care program. If the answer is yes, the OIG recommends that the provider check all persons in that job category or who are employees or perform under the applicable contract, including volunteers who receive no payment from the provider for their services. As the OIG notes, the greatest risk for CMP liability lies with failure to do exclusion checks for individuals who provide services integral to the provision of patient care because

it is more likely that those services are payable by a Federal health care program. That being said, the prohibition on payment for services furnished by excluded individuals extends beyond direct patient care to include: services performed by excluded pharmacists, transportation services, and administrative and management services.

How Often Should Exclusion Checks Be Done?

- While there is no statutory or regulatory requirement to check the Exclusion List, OIG recommends that providers screen their employees and contractors for exclusion prior to employment or engagement. In addition, providers should conduct exclusion checks on a regular basis for existing employees and contractors.

- Since there is no statutory or regulatory obligation to check the Exclusion List specifically, there is no legal requirement addressing the frequency of exclusion checks. Recent OIG Integrity Agreements require annual checks. Some providers check annually, some check quarterly and others check monthly.

- For the first time, the OIG has provided guidance on the frequency of EXCLUSION LIST checks. Pointing out in the Special Advisory Bulletin that it updates the EXCLUSION LIST on a monthly basis, the OIG advises providers to check the EXCLUSION LIST monthly to minimize the risk of CMP liability. While the OIG is not requiring monthly checks and simply suggesting that they be done as guidance, providers that conduct monthly checks may be in a better position to defend situations in which excluded persons are discovered on their payrolls or among their vendors and other contractors.

- When deciding how frequently to perform exclusion screening, providers must also check their state's requirements. Many states require or recommend monthly checks of their databases in response to guidance from the Centers for Medicare and Medicaid Services in 2009 and 2011 recommending that states require monthly screening. For example, in Connecticut, the Department of Social Services issued a notice to providers suggesting but not mandating monthly checks

How Should Exclusion Checks be Documented?

- The OIG suggests that providers maintain documentation of all searches performed in order to verify the results of potential name matches. The OIG provides the example of capturing screen shots of the results of the name search as a way to document exclusion checks performed by providers.

What Happens When the Check Reveals that an Employee or Contractor Has Been Excluded?

- Obviously, the provider should not employ an individual or enter into a contract if the provider's screening shows that the prospective employee or contractor has been excluded.

- A provider may choose to employ or contract with an excluded individual or organization without risking CMP liability only in very narrow circumstances. For example, a provider may employ or contract with an excluded person as long as that individual only provides items or services that are not paid for through Federal health care program dollars; no Federal dollars may be used directly or indirectly to pay for items or services provided by or ordered by an excluded individual. Again, the provider must also ensure that such employment or contract does not run afoul of state requirements, which likely means that the excluded individual or organization cannot provide items or services that will be paid for directly or indirectly with state dollars.

- If a provider discovers that it has employed or contracted with an excluded person or organization, the provider may wish to disclose this information to the OIG using the OIG's Self-Disclosure Protocol ("SDP"). The OIG recently updated the SDP at the end of April 2013. The updated SDP contains specific guidance on making disclosures involving exclusions, including guidelines on how to calculate potential overpayments. Whether to make a disclosure to the OIG is a significant decision and it is advisable to involve legal counsel to ensure discussions about options for self-disclosure are conducted in a privileged manner and informed by a full assessment of legal risks and options.

OPENonline's Federal OIG/GSA Search has the ability to run large groups of employees at one time and provide one concise, detailed, easy-to-read report at minimal cost. If an organization employs an individual on one of the sanctioned lists, they may be forced to pay back all Federal funds received via these programs dating back to the date the individual was employed. read more »

It's important for all health care providers to read this new guidance, which replaces and supersedes the 1999 Bulletin.

Nothing in this article constitutes legal advice, which can only be obtained as a result of a personal consultation with an attorney. The information published here is believed accurate at the time of publication, but is subject to change and does not purport to be a complete statement of all relevant issues.

Sources

https://oig.hhs.gov/exclusions/files/sab-05092013.pdf