

PUBLICATION

Providers Beware: OIG Alert Highlights FCA Liability Under Contractual Reassignment [Ober|Kaler]

2012: Issue 2 - Focus on Fraud and Abuse

A recent OIG Alert highlights potential False Claims Act (FCA) liability for physicians whose services are billed to Medicare under an independent contractor reassignment. The February 8, 2012, Alert titled, "OIG Alerts Physicians To Exercise Caution When Reassigning Their Medicare Payments — Physicians May Be Liable for False Claims Submitted by Entities Receiving Reassigned Medicare Payments [PDF]," discusses recent settlements with eight physicians who were found to have caused false claims to be submitted. Each of the physicians had entered into reassignments with physical medicine companies, which submitted the alleged false claims. The OIG cautioned that "physicians who reassign their right to bill the Medicare program and receive Medicare payments by executing the CMS-855R application may be liable for false claims submitted by entities to which they reassigned their Medicare benefits."

Under the facts of the scenario present in the OIG Alert, the physicians were reassigning their billing rights to providers through a contractual arrangement, under which the physicians agreed to serve as medical directors and perform certain patient care services. The fact that the physicians were *contractors and not employees is a key distinction*. It is also worth noting that the Medicare reassignment *rules apply to not only physicians but also to other practitioners* who enter into reassignment agreements.

With limited exceptions, the Medicare payment rules prohibit payment for covered services to anyone other than the patient or the Medicare enrolled individual or entity that provided the service. Among the listed exceptions to this general rule are exceptions that allow payment to be made to an employer of a physician or practitioner *and* payment for certain services provided under a contractual arrangement. See Medicare Claims Processing Manual, Ch. 1 § 30.2.1.

Employer/Employee Reassignment

In order for the employer to receive payment, there must be an employer-employee relationship and the terms of employment must provide that the employer and not the physician or practitioner has the right to receive the payment. CMS policies provide that the entity accepting the reassignment may establish that it qualifies to receive payment for services provided by an employed physician or practitioner simply by submitting a reassignment or CMS 855R form. No further written agreement is required under the Medicare rules. See Medicare Claims Processing Manual, Ch. 1 § 30.2.6. Under this type of employment arrangement, the Medicare rules do not place FCA liability on the employee. The obligation to file a clean claim rests on the employer. Independent Contractor Reassignment

Historically, reassignments were allowed only in an employee-employer relationship. The Medicare Modernization Act of 2003 expanded the Medicare reassignment rules to allow a reassignment with an independent contractor. When the reassignment rules were expanded by the MMA, program integrity required that there be certain safeguards to reduce the risk of fraud and abuse. The federal regulations were revised to incorporate the MMA program integrity provisions. Specifically, the regulations require that "an entity enrolled in the Medicare program that receives payment under a contractual arrangement... and the supplier that

otherwise receives payment are jointly and severally responsible for any Medicare overpayment to that entity" and that "the supplier who furnishes the service has unrestricted access to claims submitted by an entity for services provided by that supplier." 42 C.F.R. § 424.80(d). The program integrity provisions were based on the fact that unrestricted access to claims had to be required if the individual providing the service was jointly and severally liable for the claim. In providing this access, the program integrity provisions placed a duty on the physician or practitioner to inquire and confirm that claims are accurately submitted.

To further emphasize the unique nature of the independent contractor reassignment, CMS included substantially the same provisions in its manual guidance. Specifically, the CMS manual notes that under a contractual reassignment arrangement, both the entity submitting the claim and receiving payment and the contract physician or practitioner are subject to the following requirements:

1. The entity receiving payment and the person that furnished the service are jointly and severally responsible for any Medicare overpayment to that entity; and,
2. The person furnishing the service has unrestricted access to claims submitted by an entity for services provided by that person.

Medicare Claims Processing Manual, Ch. 1 § 30.2.7.

Furthermore, CMS provides that these requirements must be memorialized in one or more written agreements, which is in addition to the required reassignment or CMS 855R.

It is these requirements specific to contractual reassignments that the OIG was highlighting in the recent Alert.

As health care organizations become more complex, it is not uncommon to find that the entity submitting the claim is not the entity that issues the W-2 to the physicians and practitioners. This is often the case even though the physicians and practitioners are otherwise treated like employees and not independent contractors. The Medicare rules, however, make no exceptions for situations in which a contractual relationship exists between related entities.

Ober|Kaler's Comments

It is critical to recognize the distinction between a reassignment from an employee and a reassignment from a contractor. For independent contractor reassignment, the entity accepting the reassignment must ensure that there are adequate written agreements containing the required language in addition to the CMS 855R form. The physician or practitioner entering into a reassignment under a contractual arrangement also must understand that there is the potential for FCA liability for claims submitted under an independent contractor reassignment.