

Medicaid Compliance Program Mandate Approaches Deadline

The New York State Office of Medicaid Inspector General (OMIG), an independent entity within the Department of Health, recently issued final regulations under a 2006 law that requires Medicaid providers to establish “compliance programs” to reduce fraud and abuse. **As a result, most New York Medicaid providers must establish an effective compliance program by September 29, 2009.**

Background

The New York Medicaid program, the largest such program in the country, has long been faulted for failing to adequately police fraud and abuse. Criticism of New York’s program reached a fever pitch beginning in 2005. In July of that year the *New York Times* ran a series of articles that exposed pervasive fraud in the New York Medicaid system and decried the state’s ineffective efforts to fight it.¹ Later in the same year, the U.S. Senate’s Finance Committee held hearings on Medicaid reform and again the New York program was cited for its waste and inefficiencies. And the following year, the federal Centers for Medicare and Medicaid Services (CMS) published a harshly critical report on New York’s Medicaid anti-fraud efforts.²

In the wake of these criticisms, the New York legislature passed a law in 2006³ that made significant changes to the Medicaid program. In particular, the 2006 law established the OMIG (Office of Medicaid Inspector General) to coordinate Medicaid anti-fraud efforts in the state, and amended the Social Services Law to require Medicaid providers to establish Medicaid compliance programs aimed at detecting fraud and abuse.

¹ “New York Medicaid Fraud May Reach Into Billions” (July 18, 2005); “As Medicaid Balloons, Watchdog Force Shrinks” (July 19, 2005).

² Centers for Medicare and Medicaid Services, “Medicaid Integrity Program: Review of Program Integrity Procedures - Final report - State of New York”, available at <http://www.crowell.com/pdf/expertise/healthcare/CMSIntegrityRptNY.pdf>.

³ Chapter 442 of the Laws of 2006.

The OMIG issued proposed regulations on the compliance program requirement in January of this year. Final regulations were issued in June,¹ and became effective July 1, 2009. The final regulations require that nearly all New York Medicaid providers implement an effective compliance program no later than September 29, 2009.

Who Is Subject to the Compliance Program Requirement

The final regulations state that the following New York health care entities are subject to the new compliance program mandate:

- Providers subject to Article 28 of the Public Health Law (hospitals, nursing homes, public health centers, diagnostic and treatment clinics, dental clinics, rehabilitation centers, and certain laboratories)
- Providers subject to Article 16 of the Mental Hygiene Law (residential facilities and out-patient programs serving persons with mental retardation or developmental disabilities)
- Providers subject to Article 31 of the Mental Hygiene Law (drug and alcohol treatment facilities and residential facilities and out-patient programs serving persons with mental disabilities)
- Providers subject to Article 36 of the Public Health Law (home care services)
- “Other persons, providers or affiliates who provide care, services or supplies under [the Medicaid program] or persons who submit claims . . . for or on behalf of another person” if Medicaid represents a substantial portion of their business operations.

For purposes of the last category, a “substantial portion” is defined by a fixed dollar threshold in Medicaid claims or orders - \$500,000 over any consecutive 12 month period, calculated on any of the following bases:

- prior, current or reasonably anticipated Medicaid claims or orders,
- prior, current or reasonably anticipated Medicaid receipts, whether direct or indirect, or
- prior or current Medicaid claims submitted on behalf of one or more other parties.

The last category presumably would include billing services or management companies who handle Medicaid claims, since they “submit claims . . . for or on behalf of another person”.

In published commentary that accompanied the regulations when they were proposed in January, the OMIG acknowledged that, because of the broad scope of the law and regulations, many small businesses, including pharmacies, dentists, durable medical equipment businesses, service bureaus and transportation providers, will be required to adopt and implement compliance programs.

¹ NY Register (June 24, 2009), adding new Part 521, entitled “Provider Compliance Programs”, to Title 18 of New York Codes, Rules and Regulations.

Required Elements of the Required Compliance Program

The 2006 law - Section 363-d of the Social Services Law - identifies eight elements that must be included in a Medicaid compliance program:

- *Code of Conduct:* The provider must adopt a written policy or procedure in a Code of Conduct that describes compliance expectations.
- *Chief Compliance Officer:* The provider must designate an employee, typically a Chief Compliance Officer, responsible for the day-to-day operation of the compliance program. Such individual must report directly to the Chief Executive Officer and also report periodically to the Board (or other governing body).
- *Employee Training and Education:* The provider must provide training and education to executives, Board members and other appropriate employees regarding compliance expectations, and such training and education must recur periodically and remain part of the provider's orientation program.
- *Accessibility:* The Chief Compliance Officer must be accessible to all employees, and there must be a mechanism for anonymous and confidential reporting (for example, an anonymous hotline).
- *Disciplinary Policies:* The provider must establish disciplinary policies that encourage good faith participation in the compliance program and specify that non-compliant behavior and failure to report suspected problems are grounds for discipline.
- *Audits:* The compliance program must include mechanisms for the "routine identification of compliance risk areas" and internal and external audits for evaluation of non-compliance.
- *Action on Audits:* The compliance program must include mechanisms for responding to compliance issues as they develop, reporting those issues to the Department of Health or the OMIG and refunding of over-payments.
- *Non-Intimidation and Non-Retaliation Policies:* The compliance program must include a policy of non-intimidation and non-retaliation for good-faith participation in the program.

The 2006 law states that the required compliance program must at minimum apply to Medicaid billings and payments. The final regulations *significantly* expand on this provision by requiring that the program also apply to a variety of other risk areas, including medical necessity, quality of care, governance, mandatory reporting, credentialing and "other risk areas that are or should with due diligence be identified by the provider."



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In addition, the final regulations - unlike the 2006 law itself - require that covered providers implement an *effective* compliance program. The regulations do not clarify what an "effective" program is, other than to state that the program must be "appropriate to the provider's characteristics". The Commissioner of Health and the OMIG have the authority to determine at any time if a provider has an effective compliance program.

Certification Requirement

The final regulations require that a covered Medicaid provider certify each year, during December, that the required compliance program is in place. A new provider must also submit the required certification upon enrollment in the Medicaid program.

Enforcement and Effective Date

The new law states that if a covered Medicaid provider does not have a satisfactory compliance program in place within 90 days after the effective date of the regulations, the provider may be subject to any sanctions or penalties available under federal or New York State law, including revocation of the provider's agreement to participate in the Medicaid program. Since the final regulations are effective as of July 1, 2009, the deadline for the required compliance program is September 29, 2009.

For more information or assistance in developing a Medicaid Compliance Program, contact Robert W. Patterson at the Firm's Buffalo office at 716.843.3910 or RPatterson@Jaeckle.com.