

If you have questions regarding the information in this alert or would like to receive further information regarding our health care department, please contact:

Jennifer L. Benedict

313.465.7326

jbenedict@honigman.com

Ann T. Hollenbeck

313.465.7680

ahollenbeck@honigman.com

Matthew R. Keuten

313.465.7510

mkeuten@honigman.com

Stuart M. Lockman

313.465.7500

slockman@honigman.com

Kenneth R. Marcus

313.465.7470

kmarcus@honigman.com

Erica D. Partee

313.465.7528

epartee@honigman.com

Linda S. Ross

313.465.7526

lross@honigman.com

Angela Epolito Sprecher

313.465.7540

asprecher@honigman.com

Failure to Return Overpayments May Lead to False Claims Liability

On March 23, 2010, landmark health care reform was signed into law in the form of the Patient Protection and Affordable Care Act of 2010, as amended by the Health Care and Education Reconciliation Act of 2010. While this legislation contains a number of changes related to health care fraud and abuse, this Alert focuses on one specific section of the legislation that will make it easier to establish liability under the federal False Claims Act (FCA) when a health care provider receives but does not refund a governmental overpayment.

Reverse False Claims

When a health care provider receives a government payment to which it was not entitled, the provider is potentially liable under what is generally known as a “reverse false claim.”

Last year, the government’s ability to bring a reverse false claim action against a provider was significantly strengthened as a result of the enactment of the Fraud Enforcement and Recovery Act of 2009 (FERA). FERA eliminated the need to prove that a false record or statement was used to avoid an obligation to pay money to the government.

Overpayments

The recent health care legislation further strengthens the changes made through FERA by expressly defining certain retained overpayments as an “obligation” that can lead to liability under FCA.

Under the new legislation, a person must report and refund all “overpayments” by the later of “60 days after the date on which the overpayment was identified” (emphasis added) or “the date any corresponding cost report is due,” whichever is later.

An “overpayment” is defined as “any funds that a person receives or retains under [Medicare] or [Medicaid] to which the person, after applicable reconciliation, is not entitled under such title.”

Further, “any overpayment retained by a person after the deadline for reporting and returning the overpayment . . . is an obligation [under the FCA].” Therefore, any person who knowingly conceals or knowingly and improperly avoids or decreases the repayment of an overpayment may be liable under FCA.

Action Steps

While FERA and the Act collectively increase exposure for health care providers who knowingly retain government overpayments, questions still remain. For example, it is not entirely clear when an overpayment is “identified,” thereby starting the 60-day reporting period. Nevertheless, even pending further clarification, the knowing retention of obvious overpayments beyond the stated time periods clearly can lead to liability under FCA even if the overpayment is subsequently repaid. Therefore, as part of a robust compliance plan, it is important that health care providers develop and maintain comprehensive auditing procedures to enable them to quickly identify and report overpayments within the statutory time period.

For questions concerning compliance with FERA, the Act, or any aspect of the FCA, please contact any member of the Honigman Health Care Department.