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The Impact of the Deficit Reduction Act of 2005 False Claims Act Education Requirements on Providers

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DRA Incentives

Deficit Reduction Act of 2005 (DRA)

- The Deficit Reduction Act has incentives in place to encourage states to enact state versions of the False Claims Act.
- One of the key components of the False Claims Act is the ability of a private citizen to bring a *qui tam* action on behalf of the state. The DRA incentives are intended to encourage states to enact all aspects of the Federal False Claims Act at a state level.
- The incentive included in the Deficit Reduction Act basically provides that any state that has in effect “a law relating to false or fraudulent claims that meets the requirements set forth in the Federal False Claims Act that the federal medical assistance percentage with respect to any amounts recovered by the state under a state action brought under such law will be decreased by ten percentage points.”
- States that enact provisions that mirror the *qui tam* provisions in the federal statute, any federal share of any damages awarded in the case would be reduced by ten percent and the state would be eligible for a concomitant increase in its recovery.



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DRA Requirements

- Effective January 1, 2007, the DRA requires that “as a condition of payment,” any entity that receives or makes annual payments from Medicaid of at least five million dollars must establish written policies for all employees and of any contractor or agent that provide detail information about the False Claims Act, any administrative remedies for false claims and statements, any state laws pertaining to civil or criminal penalties for false claims and statements and whistle blower protections under such laws with respect to the roles of such laws of preventing and detecting fraud, waste, and abuse in federal healthcare programs.
- The written policies must also include detailed provisions regarding the entity’s policies and procedures for detecting and preventing fraud, waste, and abuse.
- Finally, any employee handbook for the entity must include a discussion of the employees’ protections as a whistle blower in the entity’s policies and procedures for detecting and preventing waste, fraud, and abuse.
- Each state’s Medicaid Division will be responsible for auditing providers to ensure compliance.
- Failure to meet the requirements could impact the ability to receive Medicaid reimbursement



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CMS GUIDANCE

- In December 2006 (about 3 weeks before the effective date of January 1, 2007), Centers for Medicare and Medicaid Services (CMS) Published Guidance to State Medicaid agencies on the Implementation of DRA (“Ltr 1206”)
- In March 2007, (2 months after the effective date), CMS published FAQs that offered insight into several terms that were undefined in the DRA statute (“FAQ 307”)

Important Definitions

- Entity – “For purposes of section 6032 compliance, an entity includes organizational units (a governmental agency, organization, unit, corporation, partnership, or other business arrangement) and individuals, as long as the organizational unit or individual receives or makes payments totaling at least \$5 million annually under a Title XIX State Plan, State Plan waiver, or Title XIX demonstration.”
- For purposes of section 6032 compliance, the entity is the largest separate organizational unit that furnishes Medicaid health care items or services, and includes all sub-units of that organizational unit that furnish Medicaid health care items or services, even if the components are separately incorporated or located in different States. Unless the organizational unit is part of a health system (see FAQ 6), each organizational unit is viewed separately for purposes of determining whether the \$5 million threshold has been met, and the other requirements of section 6032 are applicable.

FAQ 307



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Determining the \$5 Million Threshold

- Unless the organizational unit is part of a health system, as described below, each organizational unit is separate for purposes of determining whether the \$5 million threshold has been met.
- With respect to a health system, for purposes of section 6032 compliance, the parent corporation, partnership, government agency or other owner, and its sub-units, are all integrally involved in furnishing Medicaid items or services. In that instance, the entire organization is the entity for purposes of determining the requirements of section 6032.
- For purposes of determining whether an entity must comply with section 6032: If an entity receives or makes payments totaling \$5 million during a Federal fiscal year (October 1 to September 30), then the entity must comply as of January 1 of the next calendar year.
 - With respect to compliance as of January 1, 2007, look to payments received or made between October 1, 2005 and September 30, 2006. Similarly, for compliance as of January 1, 2008, look to the period October 1, 2006 through September 30, 2007.

FAQ 307



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What is a “Contractor”?

- Contractor – “contractors furnishing Medicaid health care items or services include, but are not limited to, all contract therapists, physicians (including, but not limited to, house staff, hospitalists, and independent contractors), and pharmacies.
- The definition of contractor excludes individuals, businesses, or organizations that perform functions not associated with the provision of Medicaid health care items or services, such as copy or shredding services, grounds maintenance, or hospital cafeteria or gift shop services.
- An entity’s contractors and agents, including independent contractors, must abide by the entity’s policies to the extent applicable.
- Supply vendors that supply products used in the furnishing of Medicaid health care services contractors for purposes must also comply

FAQ 307



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What does it mean to “establish written policies for all employees ... of any contractor or agent of the entity”?

- In order for the entity to establish policies for the employees of its contractor or agent, the entity must disseminate the policies to the contractor or agent, which must then abide by the policies as to the work the contractor or agent performs for the entity, in addition to making the policies available to the contractor’s and agent’s employees involved in performing that work.
- An entity must have policies that include policies and procedures for detecting and preventing fraud, waste and abuse. To the extent that an entity’s policies provide for reviews or audits of claims or services, the contractor or agent would participate in those reviews or audits. The contractor or agent must abide by the policies insofar as they are relevant and applicable to the contractor or agent’s interaction with the entity.

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Dissemination of Policies

- The policies must be disseminated to all of the entity's employees and to the entity's contractors and agents.
- Each entity must determine for itself how it will satisfy the dissemination requirement within the requirements of the State's methodology for compliance oversight.
- Each State will determine the manner by which it will ensure an entity's compliance with the requirements of section 6032, including the frequency of dissemination of policies.
- Written policies may be on paper or in electronic form, but must be readily available to all employees, contractors, or agents. Employees, contractors and agents must be made aware of their existence and location.

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Employee Handbook

- If there is an employee handbook, the policies and procedures required by section 6032 must be included in the handbook.

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Training

- There is no training requirement for compliance with DRA.
- Education refers to provision of information to employees, contractors and agents.

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Pros and Cons of DRA Implementation

Pros

- It can be easily incorporated into an existing compliance education program
- It's good information to share with employees to impart the wisdom of ensuring accurate claim submission

Cons

- Could be costly and burdensome
- Could encourage or increase qui tam actions



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Methods of Providing Education

- **Education of Employees**
- Include information in annual training or compliance updates
- Incorporate into New Employee Orientation

- **Education of Contractors and Agents**
- Incorporate into contract language
- Present materials and require acknowledgement and agreement to abide by the program. Provide to all Medical Staff members as part of the credentialing application process.



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Questions?



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