Compliance: Vendor Agreements

Compliance: Vendor Agreements

by David S. Barmak, Esq.

Corporate compliance programs require healthcare providers to maintain a broad perspective on their roles within the full continuum of care provided to patients. This recognition that they are not alone in providing care to a patient is a critical awareness in the providers' ("Provider") attempt to comply with OIG guidelines. Providers often minimize, if not totally neglect, the OIG requirement to monitor the compliance activity of their vendors. A compliance driven Provider must be concerned not only about its own compliance efforts but also that of its vendors (e.g.; home health agencies, durable medical equipment companies, pharmacies, etc.).

What follows are some generalized guidelines, not meant to be all inclusive, for investigating, contracting and evaluating on an on-going basis vendor relationships. Please note that all of the arrangements discussed below may be subject to and affected by additional Federal, State and local laws and regulations including, but not limited to, prohibitions against self-referral, Federal and State fraudulent claims acts and fee splitting restrictions.

Check For Possible Antikickback Statute Violations

In general, the Medicare and Medicaid Antikickback statute is an attempt to eliminate what is perceived as unacceptable conflicts of interest that exist when Providers have financial relationships with vendors to whom the Providers refer patients. The antikickback statute requires evidence of intent to prove a violation under the law. Criminal sanctions are imposed for specified violations, including both monetary fines and prison sentences. The antikickback statute prohibits any knowing and willful conduct involving the solicitation, receipt, offer, or payment of any kind of remuneration in return for referring an individual or for recommending or arranging the purchase, lease, or ordering of an item or service that may be wholly or partly paid for through the Medicare or Medicaid programs. Safe harbors do exist that provide total immunity for particular arrangements that are deemed free from fraud and abuse. If a safe harbor does not apply, then the facts and circumstances involved will determine whether or not the law has been violated.

The Provider must carefully scrutinize on all organizational levels whether or not any inappropriate exchanges of products and services will be occurring between the Provider and a vendor. In general, two questions that a Provider must ask: "Are both parties going to be receiving fair market value for the proposed transaction?" And if so, "Will the proposed relationship be fully articulated in a contract between the two parties?" If the answer to these two questions is "yes", absent transactions that are obviously prohibited, the proposed contractual relationship is probably appropriate. If fair market value is

clearly laid out in the vendor contract, than the compensatory relationship between the Provider and the vendor are considered to be above board. What must be guarded against is the effort to satisfy ulterior motives by entering into arrangements that are not clearly identified within the confines of the vendor contract. E.g.; a long-term care Provider accepts gifts from a durable medical equipment vendor that provides wheelchairs and walkers for the Provider's residents.

Conduct An Initial Screening Of Prospective Vendors

Create a pre-engagement application to garner the following information from prospective vendors:

- All on-going proceedings as well as completed proceedings involving possible debarment, exclusion or other ineligibility aspects of the vendor's participation in federal and state programs (e.g.; Medicare and Medicaid).
- Check the HHS/OIG Cumulative Sanctions Report to ascertain the status of prospective vendors as well as the General Services Administration's list of Parties Excluded from Federal Programs.
- If a prospective vendor is in the process or has actually been debarred, excluded or deemed otherwise ineligible, then the prudent course of action, absent any significant mitigating factors or circumstances, is to forgo contracting with the vendor.

Actual Contracting With The Prospective Vendor

A number of specific provisions should be included in the actual contract with the vendor. These provisions supplement the basic contractual provisions that clearly outline the rights, responsibilities, obligations and remedies of both parties to the contract. A few of the more basic fraud and abuse provisions include but by no means are limited to, the following:

- The vendor must notify the Provider immediately upon receiving information that the vendor has been charged with a crime related to health care or is facing a proposed debarment, exclusion or other ineligibility proceeding relating to the vendor's participation in federal and state programs (e.g.; Medicare and Medicaid).
- If the contracted vendor has been charged with a criminal offense related to health care, or has been proposed for debarment or exclusion, then the Provider will immediately remove the vendor from responsibility for or involvement with the Provider's business affairs until the resolution of such criminal charges, suspension or proposed debarment.
- If the contracted vendor is ultimately found to be convicted, debarred, excluded or is otherwise ineligible to participate in federal and state programs, then the Provider will terminate its contractual relationship with the vendor.
- The vendor acknowledges that the Provider adheres to a corporate compliance program and agrees to abide by the terms and conditions of the Provider's

corporate compliance program, all federal and state program legal requirements as well as the Provider's internal policies and procedures.

- If the value or cost of the services or supplies provided under the vendor agreement equals or exceeds $10,000.00 over a 12 month period, the vendor will, for a period of at least seven years after furnishing of the services and supplies, retain records to verify the nature and extent of the costs of such services and supplies and make such records available upon request by the Provider; and the vendor shall impose similar obligations on any subcontractor it uses to provide the services and supplies under the vendor agreement.
- The vendor and any subcontractor of the vendor shall cooperate with the Provider in the event that any third?party payor, including the Medicare or Medicaid programs, conducts an audit or otherwise requests documentation regarding services or supplies provided by the vendor or its subcontractors.
- The contract must be in writing.
- The contract must specify the particular services or supplies to be provided.
- The contract must specify the fee or payment to be made to the vendor, which must be set at the fair market value for such services or supplies and/or be based upon applicable fee schedules or other payment guidelines established by HCFA or its designees, the state Medicaid agency or its designees, or other applicable third?party payors, and must not take into consideration the value or volume of referrals provided to or by the Provider.
- The vendor agrees to submit all bills in accordance with the payment method and amount set forth in the vendor agreement.
- The contract must have a term of at least one-year or provides that the contract will not be renegotiated within 12 months of its inception in the event of its termination before the expiration of 12 months.
- The contract must be signed all parties; and
- The contract must contain a representation that the vendor currently is eligible for participation in the Medicare and, where applicable, Medicaid programs.

Visit other areas of our website for overview of our services, our experience and our attorney profiles