

Naughty or Nice: Feds Hand Out More Than Lumps of Coal When it Comes to Healthcare Fraud

December 23, 2019 – Dorsey Health Law

by Alissa Smith, RJ Zayed, Alex Hontos, and Michael Brey

The United States government has an arsenal of agencies and civil and criminal statutes at its disposal to choose from in investigating and combating healthcare fraud. A recent federal indictment discussed below exemplifies just how multifaceted government investigations and prosecutions can be. And organizations need to be prepared to respond to such investigations.

Related People

- Alissa Smith
- RJ Zayed
- Alex Hontos

Related Capabilities

- Healthcare & Life Sciences
- Healthcare Transactions & Regulations
- Healthcare Litigation
- Medical Devices



Last week, the Department of Justice (DOJ) charged fifteen residents of southern Florida in a kickback and bribery scheme involving two VA Medical Centers (West Palm Beach and Miami). According to DOJ, ten of the defendants worked in the VA medical centers' logistics departments and had distinct roles in the scheme to defraud. DOJ also alleged some of the VA-

employee defendants would place fake or inflated orders with supply vendors. Other VA-employee defendants would then allegedly approve the fake orders and still other VA-employee defendants would allegedly falsely enter the supplies as having been received into the VA computer system. Once paid by the government, the defendant supply vendors allegedly would send a portion of the ill-gotten proceeds to the VA-employee defendants as kickbacks. Four individual supply vendors were charged in the scheme. And although not directly related to the kickback scheme, another individual supply vendor defendant was charged for making false statements in connection with VA application for companies seeking designation as a "Service Disabled Veteran Owned Small Business" (SDVOSB).



The charges against the fifteen individuals and supply vendors illustrate not only how seriously DOJ takes allegations of fraud in the healthcare and government-contracting arena, but also some of the statutory tools Congress has given DOJ to fight such fraud in the healthcare system. Federal statutes specifically criminalize healthcare fraud and conspiracy to commit healthcare fraud, which generally consists of knowingly and willfully executing (or conspiring to execute) a scheme to "defraud any health care benefit program" or to obtain "any of the money or property owned by, or under the custody or control of, any health care benefit program" by false or fraudulent pretenses. 18 U.S.C. §§ 1347, 1349. The VA is a "health care benefit program," 18 U.S.C. § 24(b), and the Anti-Kickback Statute provides stiff penalties, including fines and prison time, for fraud involving "federal health care programs" like the VA, see 42 U.S.C. § 1320a-7b. Civil fines under the Anti-Kickback Statute also can be imposed per violation, potentially exposing organizations to millions of dollars in liability. Also the government could have invoked—and may well still invoke—the False Claims Act, 31 U.S.C. § 3729, and its remedy provisions, including treble damages and statutory penalties for each claim

submitted by the vendors.

Those working in or with the VA system (or healthcare or the U.S. government in general) should take particular care to deter and detect fraud and bribery in their organizations. In this case, for example, ten employees within the Florida VA medical centers alone are alleged to have participated in the scheme. Such widespread misconduct may have been prevented—or detected sooner—with adequate policies and reporting procedures, better employee training, or regular and systematic audits. Regular audits, for example, comparing supply inventory as recorded in VA systems with the actual supply inventory received might have deterred or detected the false purchase orders. Organizations should regularly review their policies and procedures, as well as internal compliance with those policies and procedures, with legal counsel. Likewise, annual employee training and certification also would serve to educate employees about the applicable laws, rules and regulations and changes to them, how to spot red flags, the obligation to report and the mechanism for reporting suspected activity and the serious consequences for failure to comply. Organizations should also review with counsel whether their current practices do or can be adapted to meet one of the many “safe harbors” provided for under the Anti-Kickback Statute regulations.

Additionally, the charges for making false statements related to the SDVOSB application are yet another example of the breadth of DOJ investigations and enforcement tools. Federal law broadly criminalizes making certain misrepresentations or omissions “in any matter within the jurisdiction of the executive, legislative, or judicial branch,” see 18 U.S.C. § 1001, which includes government-contracting applications submitted to executive branch agencies like the VA. So even where a government contractor may not have participated in the criminal conduct being directly investigated (which, here, was the alleged kickback scheme), the scope of DOJ’s investigation can creep into other areas (such as representations on government-contracting applications) which place that government contractor in serious legal jeopardy. Government contractors should therefore seek legal counsel before and while participating in any DOJ investigations. Government contractors should also, as a preventative measure, seek legal counsel related to the representations they make on government applications so that they do not make misrepresentations in the first place.

Staying compliant with the laws, rules and regulations governing healthcare providers, vendors, and suppliers requires diligence and vigilance. In this ever changing and complex landscape companies and their employees must be pro-active in their efforts to combat fraud and to respond to governmental inquiries and investigations.