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PREPARED BY



[Kelly D. Herrera](#)

1401 McKinney Street
Suite 2200
Houston, Texas 77010
713.951.5677 Direct
kelly.herrera@strasburger.com

EDITORS

[Kathy Darling](#)
[Brian G. Hamilton](#)
[Laura Reilly O'Hara](#)

HEALTH INDUSTRY GROUP

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[R. Bradley Fletcher*](#)
[Brian G. Hamilton](#)

Are Your Health Care Employees Adequately Trained?

Health Care Organizations Receiving or Making Medicaid Payments Required to Implement Additional Training Programs

On January 1, 2007, an important provision within the Deficit Reduction Act of 2005 (the "DRA") went into effect. Section 6032 of the DRA, titled *Employee Education About False Claims Recovery* (the "Employee Education Provision"), now requires that health care organizations operating under the Medicaid program establish and implement an education plan for their employees, managers, contractors and agents. The education plan must include written policies and detailed guidance on the federal False Claims Act ("FCA"), state false claims laws, and the rights and protections afforded whistleblowers under the FCA and its counterparts.

Unfortunately, there has been little regulatory guidance to date further explaining the educational requirements under this new provision. However, because the consequences of a knowing failure to comply with this provision of the DRA are potentially severe for the employer,¹ this article will summarize what is currently known about the new educational requirements and which organizations are required to comply.

Is Your Organization Covered?

An entity is "covered" by the Employee Education Provision if it makes or receives annual Medicaid payments of at least \$5,000,000. Although this is all the guidance the provision itself gives on who is covered, the United States Department of Health and Human Services' Centers for Medicare and Medicaid Services ("CMS") has issued additional guidance on what constitutes an "entity" for purposes of this provision (the "CMS Letter"). According to CMS, an "entity" includes

[John R. Lowry](#)
[Bryan J. Maedgen](#)
[Cynthia Schafer Marietta](#)
[Stuart Miller](#)
[David G. Moore](#)
[Craig H. Myers](#)
[C. Scott Nichols](#)
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[Patrick Owens](#)
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a governmental agency, organization, unit, corporation, partnership, or other business arrangement (including any Medicaid managed care organization, regardless of its structure), whether for-profit or non-profit, that makes or receives the required annual amount of Medicaid payments.

An entity has met the \$5,000,000 annual threshold and thus must comply with the Employee Education Provision as of January 1, 2007 if it received or made payments in at least that amount in the Fiscal year 2006. Future determinations regarding an entity's responsibility under the provision will be made January 1 of each subsequent year based upon payments made or received in the previous year.

Who Must be Trained?

The Employee Education Provision requires information be conveyed to all employees of the entity, including management, and all contractors or agents of the entity. CMS has attempted to narrow this seemingly broad requirement. An employee is "any officer or employee of a Covered Entity." The CMS Letter states a contractor or agent includes any "contractor, subcontractor, agent, or other person which or who, on behalf of the entity, furnishes, or otherwise authorizes the furnishing of Medicaid healthcare items or services, performs billing or coding functions, or is involved in monitoring of healthcare provided by the Covered Entity."

One benefit of these definitions offered by CMS is that they limit the DRA requirements to individuals and entities that actually have a relationship to the provision of Medicaid health care items or services. However, the definitions still pose many questions about whether a Covered Entity must educate and train, for example, its vendors and providers. While further guidance is expected to answer these questions, CMS has stated the Provision remains in effect and enforceable until that guidance can be issued.²

What Information Must be Conveyed in the Training?

The Employee Education Provision of the DRA, codified at Section 6032, amends Section 1902(a) of the Social Security Act³ by, among other things, by providing that any Covered Entity shall –

(A) establish written policies for all employees of the entity (including management), and of any contractor or agent of the entity, that provide detailed information about the federal False Claims Act... any State laws pertaining to civil or criminal penalties for false claims and statements, and

whistleblower protections under such laws...

(B) include as part of such written policies, detailed provisions regarding the entity's policies and procedures for detecting and preventing fraud, waste and abuse; and (C) include in any employee handbook for the entity, a specific discussion of the laws described in Paragraph A, the rights of employees to be protected as whistleblowers, and the entities policies and procedures for preventing fraud, waste and abuse.

What does this mean? Essentially, this means a Covered Entity will want to, at the very least, provide: (1) detailed information about the FCA; (2) available remedies for false claims and statements covered by the FCA; (3) detailed information about state false claims laws; (4) explain *qui tam* provisions applicable to the FCA; (5) information regarding whistleblower protection; (6) information on the Covered Entity's own policies regarding the prevention of Medicaid fraud, waste and abuse; and (7) a detailed discussion of the above in the Covered Entity's handbook.

Interestingly, the Employee Education Provision does not specifically discuss the implementation of a "training program," but makes reference only to the preparation of written policies. However, it is clear that not only must these policies be established; they must be disseminated or taught to the covered individuals in some way. Therefore, in addition to following the above requirements, it is recommended that a covered health care entity establish in-person or web-based training, *including* dissemination of the written policies and handbook.⁴

The full text of the DRA is available at www.govtrack.us/congress.

¹ If a health care organization covered by DRA is found to have known or should have known that it was not meeting the requirements of DRA's Employee Education Provision, the government has the right to assert that all Medicaid claims made by the covered entity during the period of noncompliance are "false," subjecting that entity to significant damages and penalties under the FCA and forfeiture of payments on such claims and disqualification of further participation in the Medicaid program.

² See "New Compliance Requirements May Reach Further than Congress Originally Intended," *Medicare Compliance Alert* (January 22, 2007) at 1.

³ 42 USC § 1396a(a).

⁴ See *also* "False Claims Act Education Requirements under the Deficit Reduction Act: Compliance Guidance for Health Care Organizations in the Wake of Uncertainty," *The Health Lawyer* (April 2007).

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