

Akerman Practice Update

HEALTHCARE

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Doctors Beware – FERA Results in Major Amendment to the False Claims Act

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On May 20, President Obama signed the Federal Fraud Enforcement and Recovery Act of 2009 (“FERA”). This is a major amendment to the False Claims Act. Although FERA was primarily designed to focus on mortgage, banking and federal stimulus fraud, it also has significant impact for healthcare providers. Indeed, one of the main impacts of FERA is to overturn a recent Supreme Court decision which greatly reduced the scope of the False Claims Act. Section 4 of FERA is of major importance for healthcare providers and managed care plans and all Medicaid providers. This section, called “Clarifications to the False Claims Act to Reflect the Original Intent of the Law” has the following significant provisions.

Broadening the Law

First, it redefines “obligation” to include an “established duty, whether or not fixed” arising from a variety of relationships and specifically includes obligations “arising from statute or regulation, or from the retention of any overpayment.” This significantly broadens prior law and allows government agencies and whistleblowers to pursue violations of various regulatory requirements with the penalty provisions under the False Claims Act cases and to pursue false documents which are “material to an obligation to pay or to transmit money... to the government” regardless of whether a false claim has been submitted. Therefore, as an example, a physician or other provider who creates backdated medical records to support a claim already submitted could be liable under this provision.



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Redefining “Claims”

Second, FERA redefines “claim” to include claims submitted “to a contractor, grantee or other recipient if the money or property is to be spent or used on the Government’s behalf or to advance a Government program or interest.” This new language makes it clear that the government now has the ability, as well as whistleblowers, to pursue subcontractors and contractors of grantees for claims that are submitted to contractors and grantees. This has a significant effect on healthcare providers who contract with Medicaid or Medicare managed care plans, who will now have liability to the government under FERA.

Expanding Anti-Retaliation Provisions

Finally, FERA expands the anti-retaliation provisions extending it to include only employees but also now to include “contractors and agents” who “act to stop one or more violations.” This provision may well protect contracted physicians in a government-funded managed care plan, for example, who took action to stop false reporting or illegal denial of services by the plan.

Ronald Ravikoff is a Shareholder in the firm’s Miami office, specializing in antitrust and trade regulation litigation and counseling, and other related complex commercial litigation.

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