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Don't Just Phone It In – Avoiding Fraud in Telehealth Contracts

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To facilitate the provision of care during the pandemic, the federal government and many state governments enacted changes that encouraged physicians and other nonphysician practitioners (collectively, Practitioners) to use telehealth services. While this new flexibility increased access to care, it also increased opportunities for fraud. On July 20, 2022, the U.S. Department of Health and Human Services (HHS) Office of Inspector General (OIG) issued a Special Fraud Alert cautioning Practitioners about potential fraudulent telemedicine contracts (Fraud Alert).

The Fraud Alert is derived from the lessons learned during the OIG's coordinated enforcement action with the Department of Justice (DOJ) and other agencies that resulted in criminal charges against 36 defendants involving more than $1.2 billion in fraudulent telemarketing services identified as telehealth. The Fraud Alert highlights these common themes in telehealth arrangements that raised red flags to the OIG and DOJ investigators:

1. *Patient Recruitment.* The patients were identified or recruited by telemedicine companies involving a telemarketer, recruiter, patient broker, call center, or internet, tv, or social media advertising of free or low out-of-pocket cost items or services. The Fraud Alert footnoted cases in which Medicare beneficiaries complained of being

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"bombarded" by overseas telemarketing calls offering, for example, "free" orthopedic braces.

2. *Insufficient Physician-Patient Contact.* No Practitioner had ever examined or "meaningfully assessed" the patients for whom these items or services were prescribed to determine their medical necessity. For example, the use of audio-only technology, regardless of patient preference and with no possibility of utilizing other telehealth modalities, was deemed suspect. Also, medical records that included only demographic information or a pre-determined template medical history concerned investigators. The medical records must contain "sufficient clinical information to inform the Practitioner's medical decision-making." The Fraud Alert footnoted a case in which a nurse practitioner acknowledged spending an average of 18 seconds from the time he opened a patient's record containing pre-written orders (sometimes for multiple types of braces) until his execution of the order.
3. *Compensation Formula.* The investigators deemed dubious fees that were based upon the number of purported medical records reviewed, rather than a Practitioner's diagnosis and treatment determination. The Fraud Alert footnoted several cases where Practitioners were paid not for the time, skill, and effort of evaluating patient records or communicating with the patient, but instead were compensated per order they signed for a particular item or service, regardless of medical necessity.
4. *Limiting to Certain Payors.* Many contracts were limited to the provision of items and services to federal healthcare program beneficiaries; no other payer insurance was accepted. Likewise, efforts to do the opposite – carve out federal healthcare program beneficiaries – raised concerns.
5. *Limitations on Items or Services.* Restricting a Practitioner's treatment options is deemed suspect. So, furnishing only one product or a

single class of products (g., genetic testing, diabetic supplies, prescription creams, or DME-like braces) suggests that the Practitioner is not evaluating a patient for the best treatment option, but instead for a specific treatment option. The Fraud Alert footnoted a case in which a nurse practitioner ordered 3,000 orthotic braces for patients with whom she never interacted, including a knee brace for an amputee and a back brace for a deceased patient.

6. *Absence of Follow-Up.* The absence of any anticipated follow-up could signal that the contract involves fraud and abuse. The Fraud Alert specifically identified ordering genetic testing without any planned follow-up to discuss the testing results as an example of concerning conduct.

Notably, telehealth represents a great expansion of access to, and affordability of, healthcare services. Such virtual options save patients time and money; reduce patient transfers, ER and urgent center visits; and offer savings to payers. However, Practitioners must be mindful of the potential for abuse. The Fraud Alert reminds Practitioners that engaging in these problematic contracts could subject them to criminal, civil, or administrative liability under various federal and state fraud and abuse laws. Practitioners should speak with healthcare counsel familiar with these regulatory issues when considering or negotiating telehealth contracts.
