

Blog Post

Recent FCA Settlements Warn Providers of Improper Billing Practices

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Two recent multi-million dollar False Claims Act (FCA) settlements demonstrate the vigor with which the Department of Justice (DOJ) is investigating and prosecuting allegedly fraudulent health care billing practices. These large settlements demonstrate how imperative it is that providers routinely review billing practices with the guidance of counsel.

Sutter Health (third-party billing)

On October 17, 2022, the U.S. Attorney's Office for the Northern District of California announced that Sutter Health and its affiliate Sutter Bay Hospitals (collectively, Sutter Health) agreed to pay over \$13 million to resolve an alleged FCA violation. The United States alleged that, between August 1, 2016, and June 30, 2017, Sutter Health fraudulently billed and received reimbursement from government health programs for lab tests that Sutter Health did not itself perform.

Sutter Health entered into a Laboratory Services Agreement to perform qualitative and quantitative testing on urine toxicology specimens. Sutter Health allegedly billed the government for reimbursement from commercial insurers (including the Federal Employees Health Benefits Program (FEHBP)) and government payors (including Medicare, Medicaid, and TRICARE) for this testing. However, publicly-available statements about the case suggest Sutter

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Health did not perform the quantitative testing on thousands of specimens and, instead, referred this testing to be performed by third-party labs.

The Sutter Health settlement is an important reminder that typically providers cannot submit lab services provided by third parties to federal payor programs for reimbursement. Exceptions to this default rule exist. As one example, rural providers that meet other exception requirements may in certain instances bill for lab work referred to third-party labs. Publicly available documents do not suggest that Sutter Health met any of the exceptions to the third-party billing rules. Providers should review their policies and practices closely with experienced healthcare counsel if they are billing for lab work completed by third parties.

Carter Healthcare (medical necessity)

One day later, on October 18, 2022, the DOJ announced that Carter Healthcare, LLC, a home health provider, and its affiliates, President, and Chief Operations Officer all agreed to pay over \$7 million to resolve an alleged FCA violation. Whistleblowers alleged that Carter Healthcare fraudulently billed government health programs without regard to medical necessity.

Carter Healthcare allegedly submitted false claims for medically unnecessary occupational and physical therapy services. To be medically necessary, the services need to prevent, diagnose, or treat an illness, injury, condition, disease, or its symptoms and meet accepted standards of medicine. Carter Healthcare allegedly violated this rule by: (1) mandating the number of visits for patients without regard for medical necessity; (2) recertifying patients that had no medical need for continued therapy; (3) refusing to discharge patients who had no measured benefit from therapy; and (4) issuing homebound therapy services to patients who were ineligible for homebound healthcare services. Regarding the last set of allegations, Medicare

guidelines for home health services require that patients be unable to leave their home due to their condition, in general, or without assistance or considerable effort. Some patients treated were allegedly able to walk without assistance and were ineligible for homebound therapy.

This settlement reminds providers to be vigilant in applying clinical standards to medical necessity determinations. There is currently a circuit split regarding the level of falsity required in medical necessity-based FCA cases (*i.e.*, differing proof standards related to whether or not medical opinions must be objectively false to sustain a claim, which the Supreme Court has declined to resolve). Consequently, the best possible defense to such a claim involves disciplined application of clinical guidelines.

Akerman's healthcare attorneys are available to assist with compliance with proper billing practices when submitting claims for reimbursement with government health programs and considering the related regulatory and statutory authorities.

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