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# No Games with EHR: DOJ Vows to Prosecute Reimbursement Claims Based on Inaccurate Electronic Health Records

***By Mark A. Rush, Amy O. Garrigues, Joseph A. Valenti, Katherine M. Gafner***

While the United States continues to push health care providers to adopt electronic health records management programs, it also worries that these programs may be used to game the Medicare and Medicaid reimbursement systems by allowing health care providers to "copy and paste" inaccurate information into records used to support reimbursement claims. The False Claims Act ("FCA"), 31 U.S.C. §§ 3729 *et seq.*, prohibits presenting fraudulent or misleading invoices to a government agency for reimbursement and extends to making or using inaccurate statements or records to support a claim for reimbursement. The United States Department of Justice ("DOJ") continues to be aggressive in prosecuting both criminal and civil violations of the FCA, with health care billing issues remaining at the forefront of its FCA enforcement campaign to reduce government costs and recoup government money, particularly in light of the hot-button election-year issue of funding and administering the Medicare program.

In yet another example illustrating the DOJ's focus on health care, the Attorney General of the United States, Eric H. Holder, Jr., and the Secretary for the United States Department of Health & Human Services ("HHS"), Kathleen Sebelius, issued a joint letter to five hospital trade associations on September 24, 2012 (the "Letter") requesting help from the health care community in promoting the legitimate use of electronic health records to coordinate care and reduce paperwork. This request was intertwined with a clear warning that health care providers should be vigilant in submitting their claims to avoid any appearance of fraud because of the rote use of inaccurate electronic health records to support the claims.

## The Letter

The Letter acknowledges that electronic health records are essential to "coordinating care, improving quality, reducing paperwork, and eliminating duplicative tests." However, the DOJ expressed deep concern that this technology is being used "to game the system, possibly [allowing health care providers] to obtain payments to which they are not entitled." Specifically, the Letter notes three scenarios where electronic health records may be used illegally:

- The submission of "cloned" records where information about one patient—particularly one whose reimbursement claim was successful—is repeated in other records to inflate or obtain more reimbursements;
- The use of inaccurate records to "upcode" the intensity or severity of a patient's condition to gain a larger reimbursement with no commensurate improvement in the quality of care; and
- Simply copying and pasting patient information from one record to the next, risking "medical errors as well as overpayments."

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The Letter emphasizes that the ease with which electronic health records are created, maintained, copied, and submitted is no excuse for not individually verifying a patient's care information in every record—and in every claim based on that record. The Letter indicates that the Centers for Medicare and Medicaid Services ("CMS") will undertake more intensive audits and medical reviews of billing statements to identify improper billing and improper code evaluation. The efforts are expected to identify health care providers (1) with billing patterns that are inconsistent with the billing patterns of peer providers or (2) that bill for services not rendered—or at least not at the complexity level billed. CMS efforts will be further bolstered by law enforcement agencies—including the DOJ, HHS, and the FBI—that monitor health care providers for potential health care fraud.

According to the Letter, the DOJ's efforts to prosecute health care fraud resulted in a 75% increase in prosecutions from 2008 to 2011. If the words of Attorney General Holder and Secretary Sebelius hold true, these efforts will continue to escalate.

## Responses and Preventive Measures

The ominous tone of the Letter was surprising to certain health care industry stakeholders, particularly because HHS repeatedly has supported—through additional payments for meaningful use of electronic health records or subtractions from reimbursements for failures to meaningfully use electronic health records—the quick adoption and increased use of electronic health records management programs. One such stakeholder (and a named recipient of the Letter)—the American Hospital Association ("AHA")—replied, affirming that "America's hospitals take seriously their obligation to properly bill for the services they provide to Medicare and Medicaid beneficiaries." While condemning the practices highlighted in the Letter, the AHA noted that "Medicare and Medicaid payment rules are highly complex and the complexity is increasing." The AHA also expressed its frustration with CMS's repeated failure to create and implement a uniform national system of evaluation and management codes that are specific to the hospital setting, which creates potential legal pitfalls when attempting to properly bill using electronic health records. Indeed, the AHA claimed that the flood of new auditing programs is already "drowning hospitals with a deluge of redundant audits" and that these resources perhaps instead "should be made in provider education and payment system fixes to prevent payment mistakes before they occur."

As health care providers continue their migration to electronic health records management systems, they must involve their compliance officers and legal counsel to ensure that, when implementing these programs and related policies, unintended billing practices do not result -- practices that inadvertently expose providers to possible enforcement actions or worse. Such systems must allow and even require customized input on an individual patient basis by health care practitioners and be carefully structured to avoid default settings. Health care providers must further ensure continuing compliance review of how such systems are implemented and used, so that complete and tailored patient medical record documentation is not unintentionally compromised in the name of efficiency.

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