Health Care Enforcement Defense Practice Group Advisory: The Temperature is Changing in the Health Care Industry

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On July 1, 2009, U.S. Immigration and Customs Enforcement (ICE) announced that it had issued Notices of Inspection (NOIs) to 652 businesses across the country as part of a "bold, new audit initiative." ICE targeted these businesses for inspection as a result of information it had obtained "through other investigative means," and did not disclose the names or locations of the businesses. ICE described its issuance of the 652 NOIs as the "first step in [its] long-term strategy to address and deter illegal employment." As far as first steps go, this is a remarkable one considering that ICE issued only 503 NOIs during all of 2008. It also appears to have been an effective one—on July 7, 2009, ICE announced that it had reached a $40,000 fine settlement with Krispy Kreme Doughnut Corporation for various immigration law violations.

ICE's stepped-up enforcement efforts are consistent with the overall trend towards increased government enforcement seen during the Obama Administration. This trend began with the provision of an additional $48 million in funding to the Health and Human Services (HHS) Office of Inspector General (OIG) by the American Recovery and Reinvestment Act of 2009, and continued with the formation of the Health Care Fraud Prevention and Enforcement Action Team (HEAT) in May 2009 (described here). Enforcement initiatives often prove to be moneymakers, and therefore are likely to continue to increase in number. Daniel Levinson, HHS Inspector General, recently testified that the OIG's oversight activities had resulted in a Medicare- and Medicaid-specific return on investment of $17 for every $1 spent for the years 2006-2008.

Why should health care companies be aware of ICE's stepped-up enforcement efforts? In addition to evidencing the surge in enforcement activities across the various government agencies generally, ICE's enforcement efforts may expose companies employing unauthorized aliens to substantial civil and criminal penalties, including fines of up to $2,000 per unauthorized alien for a first offense, and liability for the payment of back wages to *all* company employees who earned less than the then-prevailing wage. The renewed vigor with which ICE is targeting violators also could potentially increase such companies' exposure under the recently amended False Claims Act (FCA). The Fraud Enforcement and Recovery Act of 2009 (FERA), enacted on May 20, 2009, significantly broadens liability under the FCA and makes it easier to prove, and also strengthens protections for whistleblowers, who receive between 15-30% of the government's recovery. A popular whistleblower strategy as of late has been to assert violations of statutes other than the FCA as the basis for FCA liability. One especially popular strategy has been to assert that violations of the Medicare and Medicaid anti-kickback statute made claims submitted to the government "false," and that such violations therefore serve as a basis for FCA liability.

Many in the health care industry believe that FERA's amendments to the FCA will lead to an increase in whistleblower suits, known as *qui tam* actions. Whistleblowers and the plaintiffs' bar may see ICE's increased enforcement efforts as a signal that the government will no longer tolerate immigration law violations. Following the strategy described above, they could race to file FCA suits against companies they believe knowingly violated immigration laws. To minimize the possibility of such *qui tam* suits, health care companies should strengthen their existing compliance programs and reinforce efforts to prevent and detect fraud, mistakes, and other legal noncompliance within the organization before the government or whistleblowers have the chance to seize upon them.

For assistance in this area, please contact one of the attorneys listed below or any member of your Mintz Levin client service team.

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