Health Care Law Update

November 2022

DOJ Continues Enforcement of False Claims Act Against Electronic Health Records Vendors

On November 1, 2022, the United States Department of Justice ("DOJ") announced[1] that Modernizing Medicine Inc., an electronic health records ("EHR") technology vendor, agreed to pay $45 million to settle allegations that it violated the False Claims Act by engaging in several practices that caused its customers to submit false claims to federal health care programs.[2] The government alleged that Modernizing Medicine improperly generated sales for itself and a strategic partner laboratory while causing health care providers to submit false claims for reimbursement to the federal government for laboratory services and for incentive payments for the adoption of "meaningful use" of Modernizing Medicine's EHR technology. The DOJ confirmed that the United States would not have paid these false claims if it had known that the requests were associated with referrals obtained as a result of violations of the Anti-Kickback Statute.

In this action, a former vice president of Modernizing Medicine filed a complaint on behalf of the United States, and the United States in turn filed its own complaint[3] in partial intervention alleging that Modernizing Medicine violated the False Claims Act by engaging in the following conduct, among other conduct, which resulted in Modernizing Medicine's customers submitting tainted claims for reimbursement to federal health care programs:

1. Encouraging its specialty practice customers to accept donations of Modernizing Medicine's EHR technology by a strategic partner pathology laboratory ("Laboratory") in an effort to increase lab orders to the Laboratory and simultaneously add customers to Modernizing Medicine's user base.[4]

2. Accepting remuneration from the Laboratory to develop enhanced interface features that allowed users of the EHR to order laboratory tests from the Laboratory that Modernizing Medicine did not offer to other pathology laboratories, thus arranging for its customers to utilize the Laboratory's services.

3. Paying consultants and other leaders in specialized medical fields to refer and promote Modernizing Medicine and its EHR technology.

4. Paying current users for referring new business to Modernizing Medicine, hosting prospective customers at their facilities, and serving as references for prospective customers wishing to speak with current users about the product.

5. Falsely certifying that its EHR software met the requirements of the Medicare and Medicaid Meaningful Use Program, causing providers using the EHR to submit false claims to Medicare for incentive payments under this program.

The Laboratory previously agreed to pay $63 million to settle a False Claims Act case resulting from potential violations of the Anti-Kickback Statute and the Stark Law by providing subsidies for electronic health records systems and free or discounted technology consulting services to referring physicians and physician groups.

[1] Modernizing Medicine Agrees to Pay $45 Million to Resolve Allegations of Accepting and Paying Illegal Kickbacks and Causing False Claims

[2] Modernizing Medicine issued a statement denying the allegations of misconduct - ModMed® Fully Resolves All Government Claims

[3] Justice.gov, *United States ex rel. Long v. Modernizing Med., Inc.,* No. 2:17-cv-179 (D. Vt.)

[4] The Laboratory's EHR donations did not comply with the safe harbor to the Anti-Kickback Statute because the donation decisions took into account the volume or value of the referrals of laboratory tests or other business between EHR donation recipients and the Laboratory.

The Modernizing Medicine settlement is fourth in a series of enforcement actions by the DOJ against electronic health record technology companies. This enforcement action is another reminder of increased government scrutiny of kickback arrangements involving vendors and health care providers. While vendors do not directly participate in federal health care programs, any kickback arrangements between vendors and health care providers, or vendors and other third parties, can implicate the Anti-Kickback Statute resulting in tainted claims submitted by health care providers to federal health care programs in violation of the False Claims Act.

Thompson Hine follows enforcement actions involving financial arrangements between health care providers and EHR and other vendors and is prepared to assist clients in assessing and mitigating potential risks of these arrangements.

FOR MORE INFORMATION

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