

HEALTH LAW

Update

NEWS FOR THE CLIENTS AND FRIENDS OF BASS, BERRY & SIMS PLC

The Deficit Reduction Act of 2005: New Medicaid Fraud and Abuse Provisions

May 31, 2006

On February 8, 2006, President George W. Bush signed the Deficit Reduction Act of 2005 (DEFRA) into law. DEFRA contains many provisions reforming Medicare and Medicaid that are estimated to reduce program spending by \$11 billion over five years. These provisions include two aimed at reducing Medicaid fraud, which are summarized below:

New Compliance Requirements. Under Section 6032 of DEFRA, every entity that receives at least five million dollars in Medicaid payments annually must establish, by **January 1, 2007**, written policies for all employees of the entity (including management), and for all employees of any contractor or agent of the entity, providing detailed information about false claims, false statements and whistleblower protections under applicable federal and state fraud and abuse laws. These written policies (and the employee handbook for the entity) must include a specific discussion of the foregoing laws and detailed information regarding the entity's policies and procedures for detecting and preventing fraud, waste and abuse, as well as the rights of employees to be protected as whistleblowers.

Two significant aspects of this section of DEFRA are the timeframe for implementation, i.e., by January 1, 2007, and its scope. It extends not only to employees of the entity, but also to all employees of any contractor of the entity. As a result, Medicaid providers that are subject to this provision must ensure that every vendor is aware of and adheres to these procedures.

An additional challenge for Medicaid providers is that neither the Centers for Medicare and Medicaid Services (CMS) nor the Office of Inspector General (OIG) has clarified the meaning of the "detailed information" that must be included in these new compliance policies. Regulations clarifying these requirements are expected in the near future, but it is uncertain when they will be issued. In the meantime, the January 1, 2007, deadline remains firm, and providers are faced with the logistical task of creating these new compliance procedures. Since such procedures will be a condition of Medicaid reimbursement as of January 1, 2007, failure to do so could result in false claims exposure or exclusion from federal healthcare programs.

Incentives for Heightened State Penalties. Section 6031 of DEFRA creates an incentive for the states to enact false claims acts that are comparable to the federal False Claims Act. Effective January 1, 2007, the federal government will give 10% of any funds recovered as part of Medicaid enforcement actions

brought under such state's law that should have otherwise gone to the federal government. Many states either have false claims acts that are less rigorous than the federal False Claims Act or do not have a false claims act at all. As a result of DEFRA's new incentive, many states now have new legislation or regulations pending that will take advantage of this incentive. Medicaid providers should monitor state legislation to ensure that their written policies remain up to date and accurate.

If you would like assistance in developing any of the new compliance policies mandated by DEFRA or if you have any questions about this Health Law Alert, please contact one of the Bass, Berry & Sims attorneys in our Health Law Practice, shown below.

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