

When the Government Comes Knocking

Article By:

Health Care

This article will provide an outline of some of the most significant points for hospitals to use when confronted with a formal government investigation under the Criminal or Civil False Claims Act. As noted below, you should refer to your compliance program, which should provide more detailed guidance in these situations. Audits or reviews by government health care programs or state Medicaid program contractors require a less immediate response by the hospital.

Federal and state enforcement agencies include the U.S. Department of Justice (DOJ), the Federal Bureau of Investigation (FBI), the Office of Inspector General for the U.S. Department of Health & Human Services (OIG), Department of Defense (Tricare Health Program), United States Postal Inspection Services, Drug Enforcement Administration, State Medicaid Fraud Control Units, and task forces comprised from these agencies.

Government investigators have the authority and tools to gather information relating to an investigation using many methods, including search warrants, subpoenas, electronic surveillance, and interviews. Investigations come from a wide variety of sources. The government may try to avoid alerting a health care organization that it is under investigation, and the provider often becomes aware of the investigation from the investigative tools used by the government. The particular tools used significantly affect how the provider should respond.

As part of an effective compliance program, a hospital should develop a process and written policy to prepare for situations where a government agent presents a search warrant, subpoena, civil investigative demand, authorized investigative demand, or other legal document, or attempts to conduct interviews of hospital management or employees. Outside legal counsel should be notified of the contact at the earliest possible time. The hospital should make every effort to allow counsel the opportunity to review the legal document or request presented to the hospital, to provide advice and assistance, and to be present when the government agent conducts interviews or has other direct contact with hospital personnel.

Search Warrants

- A search warrant is issued by a court to grant law enforcement agents the right to search a location and seize certain items. A search warrant indicates that the government is pursuing a criminal investigation. There may be allegations that a facility's records may have been

destroyed or altered. It may be used to initiate an investigation or result from extensive investigative activities already conducted. A hospital should follow the process and guidance in its compliance program for how to respond if served with a search warrant. The compliance policy should cover appropriate cooperation with government agents, while protecting the rights of the hospital to the fullest extent possible.

- The hospital compliance program should designate a point person and response team for the hospital. Request a copy of the search warrant and review it carefully to determine its scope (note that the affidavit may be under seal and not available). Contact the hospital's attorney immediately and send a copy of the warrant. Request that the government agent wait for the hospital attorney to arrive before searching or until the hospital may consult with its attorney by telephone.
- Find out the name of each agency and agent participating in the search. Request to see and copy credentials of each agent and ask for business cards.
- You are not required to assist the agents during their search, but hospital personnel should not obstruct or interfere with a government investigation. Search warrants are for documents and do not authorize interviews. You do not have to tell agents where the documents are located, nor do you have any obligation to answer questions about the content or meaning of the documents they are examining and seizing. However, any statements you make should be true and accurate.
- A search warrant authorizes seizure of original records. Ask the agents to accept copies of records that are essential to operations. Request permission to make a copy of all documents seized or arrange for a copy to be provided as soon as possible.
- Object to any demand for noncorporate or personal records unless specifically identified within the scope of the search warrant. Inform the agents of documents which may be subject to attorney/client privilege and insist that appropriate procedures be followed to protect that privilege.
- Request that a designated representative of the hospital accompany the agent to any location to be searched. Make a detailed list of the areas searched, the documents or types of documents seized, and any questions asked or information provided.
- Accept a copy of the inventory but decline to sign the inventory unless you are certain it is detailed and accurate. Tell the agent you do not have authority to sign any document until it has been reviewed by your attorney. After the search, conduct interviews with the employees who monitored the agents and document as much information as possible about what occurred during the search.

Subpoenas

- A subpoena is a court or administrative order that requires a health care provider to testify or produce documents or other items, or both, at a specified time and place.
- Subpoenas may be issued by a federal or state court or enforcement agency with jurisdiction over the provider.

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- There are many different types of subpoenas that may be used by the government in conducting health care fraud investigations. These include grand jury subpoenas, civil investigative demands, HIPAA subpoenas, and agency administrative subpoenas issued, for example, by HHS or OIG.
 - The hospital should accept service of a subpoena issued seeking documents or testimony by hospital or staff, and immediately provide a copy of the subpoena to its corporate counsel. Documents or interviews should not be provided at the time of service, as the subpoena will always have a future return date for either documents or testimony sought by the government.
 - Subpoenas cannot require you to create documents to produce, unless there is agreement to do so as part of discussions with government counsel in responding to the subpoena.
 - The HIPAA privacy rules generally prohibit the hospital from disclosing protected health information. HIPAA contains exceptions for responding to subpoenas, but the rules differ depending on the type of subpoena issued. There are also protections for documents considered attorney/client privileged or work product prepared on behalf of your attorney.

Internal Investigations

Government enforcement actions and investigations make it necessary for a hospital to conduct its own internal compliance investigations. In response to receiving notice of a government enforcement action, the hospital's compliance program should require an immediate internal investigation. The policy should address in detail how to conduct an internal investigation and the steps to be taken when that investigation is completed. Several important points are discussed below.

- Immediate efforts must be undertaken to gather and preserve materials relevant to the fraud or other allegations that are the subject of the investigation, even if the government has not yet requested materials or documents.
- Document retention and litigation hold policies should be in place to preserve relevant materials, especially electronically stored information. Failure to preserve relevant documents or electronic information may be viewed as obstruction of the investigation and result in penalties or other sanctions. Employees must be notified immediately when the hospital implements a litigation hold and informed of its scope.
- Hospital personnel may also have potential individual exposure in the investigation. Appropriate legal representation for these individuals, separate from hospital counsel, should be in place. Government attorneys should be informed that any contact with the hospital or its employees should be made only through counsel for the hospital. Hospital counsel will advise you regarding legal fees for independent legal counsel for employees. The hospital may decide to enter into a joint defense agreement with these attorneys to participate in the internal investigation. A decision should also be made early on as to whether to hire independent consultants to assist hospital counsel.
- The scope, method, accountability, and reporting between the attorneys directing the investigation, the consultants conducting the investigation, and the hospital authorizing the internal investigation should be clearly understood. The scope of the internal investigation

should also define the subject matter and issues to be reviewed, and to whom within the hospital the law firm and investigative team will be accountable.

- Conducting the internal investigation requires interacting with members of the hospital staff and may result in negative findings concerning the hospital or certain staff members. If the internal investigation confirms the existence of misconduct, improper billing, or noncompliance, corrective action should be taken and documented to stop any improper practices. Employees who engaged in misconduct should be appropriately disciplined. These steps may assist in obtaining a more favorable outcome and/or mitigating potential penalties.

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