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# Civil Penalties for Hiring Excluded Health Care Employees

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The Department of Health and Human Services Office of Inspector General is authorized to impose civil monetary penalties against health care providers for hiring an individual whom the provider ''knew or should have known'' was excluded from participation in federal health care programs, assuming the provider received federal reimbursement funds for that employee. 42 U.S.C. § 1320a-7a(a)(6); 42 C.F.R. § 1003.102 (a)(2).

Recent discussions with the OIG indicate that the OIG's position is a ''strict liability'' one where a health care provider is liable for civil monetary penalties whenever it employs an excluded employee whose name appears in the OIG's exclusion database.

This article will examine the legal standard of ''knew or should have known'' as compared to the OIG's practice.

## The Civil Monetary Penalty Act's 'Knowledge' Requirement

To be liable under the Civil Monetary Penalty Act, a health care provider either must ''know'' or ''should have known'' of its improper conduct. Liability attaches to ''[a]ny person [including health care provider] . . . that knowingly presents or causes to be presented . . . a claim . . . that the Secretary determines is for a medical or other item or service *and the person knows or should know* the claim is false or fraudulent.'' 42 U.S.C. § 1320a-7a(a) (1)(B) (emphasis added).

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With respect to a provider's employment of an employee excluded from participation in federal programs, the statute authorizes the imposition of monetary penalties against ''[a]ny person . . . that arranges or contracts (by employment or otherwise) with an individual or entity *that the person knows or should know* is excluded from participation in a Federal health care program (as defined in section 1320A-7b(f) of this title), for the provision of items or services for which payment may be made under such a program.'' 42 U.S.C. § 1320a-7a(a)(6) (emphasis added).

The OIG's regulations, in line with these statutory provisions, provide that the ''OIG may impose a penalty and assessment against any person whom it determines in accordance with this part has knowingly presented, or caused to be presented, a claim [for federal reimbursement] which is for— . . . [a]n item or service for which *the person knew, or should have known*, that the claim was false or fraudulent, including a claim for any item or service furnished by an excluded individual employed by or otherwise under contract with that person.'' 42 C.F.R. 1003.102(a)(2) (emphasis added).

If a provider has actual knowledge that it has hired an excluded employee (i.e., the provider ''knew'' that it hired an excluded employee) and the provider submitted claims for reimbursement for services provided by that employee, the provider plainly meets the standard of knowingly submitting a false or fraudulent claim. Presumably, cases where a provider knows, in fact, that it has hired an excluded employee are relatively rare and, in any event, these ''actual knowledge cases'' are straightforward.

The more common cases, however, are those in which the OIG asserts that the provider ''should have

known'' that it hired an excluded employee. These are cases where the provider (employer) did not ''know'' that it had hired an excluded employee, but it ''should have known.'' ''Should have known'' is defined to mean that the provider acted ''in deliberate ignorance of the truth or falsity of the information'' or ''in reckless disregard of the information.'' 42 U.S.C. § 1320a-7a (i)(7); 42 C.F.R. § 1003.101.

The False Claims Act, the civil action counterpart to the monetary penalties statute, imposes liability under a similar knowledge standard. Liability under the False Claims Act attaches to conduct involving ''deliberate indifference of the truth or falsity of the information or act[ing] in reckless disregard of the truth or falsity of the information.'' 42 U.S.C. § 3729(a). This ''knowledge requirement'' requires proof of ''an aggravated form of gross negligence (i.e., reckless disregard).'' *United States ex rel. Burlbaw v. Orenduff*, 548 F.3d 931, 945 n. 12 (10th Cir. 2008); see also *United States v. Krizek*, 111 F.3d 934, 941 (D.C. Cir. 1997) (''reckless disregard lies on a continuum between gross negligence and intentional harm''); *United States ex rel. Ervin and Assocs. Inc. v. Hamilton Sec. Group Inc.*, 298 F.Supp.2d 91, 100, 101-02 (D.D.C. 2004) (''best reading of the False Claims Act defines reckless disregard as an extension of gross negligence, an extreme form of gross negligence'') (quotations and citation omitted).

''Should have known'' (i.e., reckless disregard which is ''an aggravated form of gross negligence'') as it is understood under the False Claims Act informs, if it does not control, the meaning of this standard under the Civil Monetary Penalty Act. The purpose and language of the two statutes are very similar and there is a well-developed body of decisional law under the False Claims Act while there is not under the Civil Monetary Penalty Act.

The treatise *False Claims Act & The Healthcare Industry* (2008) summarizes the two categories of cases in which courts have refused to impose False Claims Act liability based on proof of conduct no worse than negligence ''where [the] defendant had a process in place to ensure that accurate claims were submitted, and notwithstanding its best efforts some erroneous claims seeped through the cracks, and where [the] defendant exercised good faith business judgment and had a plausible basis to believe that it was entitled to payment.'' Id. at 150.

## The OIG's Position

The OIG maintains an online database of excluded employees. See http://exclusions.oig.hhs.gov/. The OIG's position regarding a provider's liability for hiring an excluded employee is simply stated: if an excluded individual is hired and that individual's name is in the OIG's excluded employee database, the provider is liable for civil monetary penalties (assuming, of course, claims for federal reimbursement have been submitted by the provider while the excluded employee was employed).

The OIG candidly describe its position as ''strict liability.'' The OIG's view is that civil monetary liability flows automatically from the fact of hiring an employee whose name was in the excluded employee database.

The position of the OIG is that facts in mitigation—facts which might explain why an excluded employee was hired notwithstanding the employee's name being in the database—are irrelevant to the question of liability. Facts in mitigation or by way of explanation are, in the OIG's view, relevant at most to the question of the amount of the civil penalty. See 42 U.S.C. § 1320a-7a(d); 42 C.F.R. § 1003.106 (listing factors to be considered in determining the amount of penalty).

With respect to liability, the OIG is unmoved by factual arguments explaining why an excluded employee whose name appears in the exclusion database was hired (arguments such as the hiring was, at most, an error and here is how/why that error occurred). Similarly, the OIG is not persuaded by the legal authorities which support those arguments. Those authorities including the above cited cases defining ''should have known'' under the False Claims Act.

Neither the Civil Monetary Penalty Act nor the OIG's regulations supports the OIG's position that hiring a person listed in the exclusion database automatically triggers liability. By its plain terms, the ''should have known'' standard is a fact-dependent standard. ''Should have known'' calls for a factual inquiry into what the provider did or failed to do which resulted in the hiring of an excluded employee. The fact dependency of this inquiry is confirmed by the judicial interpretations of the counterpart language in the False Claims Act. There, ''reckless disregard'' requires misconduct sufficiently bad to constitute ''an aggravated form of gross negligence.'' See *Orenduff*, 548 F.3d at 945 n. 12.

Two contrasting hypothetical cases illustrate the point.

**Case One.** A health care provider has no policy and practice of searching the excluded employee database when an employee is hired. In that case, the provider's actions or inactions constitute an ''an aggravated form of gross negligence'' and thus properly trigger liability because the provider ''should have known'' that it was likely to hire an excluded employee.

**Case Two.** A health care provider contracts, in a legitimate arm's length transaction, with a competent third party search firm to do the provider's employee background checks and exclusion searches. The contractor does the searches and gets ''no hits'' for an individual who the provider hires and then it is learned months or years later that the individual was excluded and his name was in the database. The provider in Case Two should be entitled to rely upon the results it receives from the background search firm without being at risk for civil monetary penalties for the firm's errors. See *Hamilton Sec. Group*, 298 F. Supp 2d at 101 (''not negligent in the extreme, if negligent at all, for Hamilton to rely on an organization like Bell Labs and forego attempts to further test Bell Labs / Schindler's temporary fix''); Id. (''Proof of reckless disregard requires much more than errors, even egregious errors.'').

The practical effect of the OIG's ''strict liability'' position (a provider is liable whenever it hires an employee whose name appears in the exclusion database irrespective of any facts negating the provider's knowledge) is to eliminate the statutory and regulatory distinction between actual knowledge (the provider ''knew'') and constructive knowledge (the provider ''should have known''). This view treats the fact of the employee's name appearing in the exclusion database as irrefutable proof that the provider ''knew'' or ''should have known'' that it hired an excluded employee.

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## Recourse for Challenging The OIG's Position

Procedures exist to challenge the OIG's position. Health care providers have the right to a hearing before an administrative law judge followed by review before the departmental appeals board (or its designee), and then judicial review in a U.S. circuit court of appeals. See 42 C.F.R. § § 1003.109(b), 1005.1-1005.23; 42 U.S.C. § 1320a-7a(e).

However, because most health care providers cannot afford the expense, risk, and distraction of a protracted dispute with the OIG, there are many settlements and few contested cases. The vast majority of OIG cases involving excluded employees settle, without going to any kind of hearing, let alone to judicial review. The OIG's view thus prevails without being tested. One health care provider after another pays a negotiated sum to bring its matter to an end and, over time, the OIG accumulates a docket of settled cases upon which the OIG relies in its next negotiation to insist upon the correctness of its view.

The OIG's approach is unlikely to change as long as health care providers continue to settle cases, thereby effectively ratifying the OIG's ''strict liability'' view.

The OIG's view will continue to prevail until health care providers start saying ''no'' to proffered settlements, for only then will the courts have the opportunity to take a close look at the OIG's position that a health care provider is liable for civil penalties whenever it hires an employee whose name appears in the exclusion database irrespective of mitigating facts or circumstances which negate the provider's knowledge of the employee's exclusion.