



**BARCLAY DAMON** LLP

# Hot Topics in Compliance

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# Agenda

- » Your Questions Get Answered (Hopefully)
- » Other Hot Topics

# Current Environment



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# Agenda; Hot Topics

- » Compliance
- » Self-Disclosure
- » Privacy
- » Board of Directors
- » Employment
- » Justice Center
- » Audits
- » Internal Investigations

# Compliance Review



# Hot Topics: Compliance

- » Effectiveness Reviews: The Hardest Questions to Address
  - › Contractor language and contractor training
  - › How would you show consistent discipline?
  - › Can you show the actual appointment of the compliance officer?
  - › Can you show the direct line to the CEO/ED?

# Hot Topics: Compliance

- » Effectiveness Reviews: The Hardest Questions to Address
  - › Can you show quarterly reports to the Board?
  - › Can you show quarterly compliance meetings?
  - › Can you show the compliance officer can handle all of the duties?



# Hot Topics: Compliance

- » Effectiveness Reviews: The Hardest Questions to Address
  - › Can you show sufficient compliance resources?
  - › Proof of compliance training (new staff, annual, board)?
  - › Distributed to affected individuals?

# Your Questions

- » Billing and coding during training
  - › Discuss concepts related to audit protocols and details in program training
  - › Discuss details of audit protocols
- » Making individuals and families aware of compliance program and officer?
  - › Already on website: refer to that
  - › Include one sheet in the intake packet
  - › Include something in the annual mailing

# Hot Topics: Compliance

- » Effectiveness Reviews: The Hardest Questions to Address
  - › Routine audits shared internally
  - › Annual work plan
  - › Exclusion checks
  - › Analysis of risk areas

## Your Question

- › What do we do with the False Claims Act requirements?
  - Summary of laws provided a number of years ago
    - › Put in policy
    - › Distribute in plan
    - › Summary in Employee Handbook

# Self-Disclosure





# OMIG's Self-Disclosure Program

- » Process for reporting, returning, and explaining any overpayments received.
  - » Voiding or adjusting claims alone does not satisfy the obligation to report and explain an identified overpayment.
- » Program also accepts reports of damaged, lost, or destroyed records from providers.

# Self-Disclosure Timeframe

- » Providers must report, return, and explain any overpayments received:
  - › Within 60 days of identification; or
  - › By the date any corresponding cost report was due.
- » Whichever is later.

# Self-Disclosure Statements

- » Two types of Self-Disclosure Statements:
  - › Self-Disclosure Full Statement: Used for errors that require formal corrective action plans and that are systemic and/or ongoing; also required for overpayments that are not related to claim data or that are related to an excluded or non-enrolled provider.
  - › Self-Disclosure Abbreviated Statement: Used for errors that are more transactional or routine in nature and that have already been repaid through voids or adjustments.
- » Statement used is dependent on the error identified.



# Full Statements: Use

- » Any error that requires a formal corrective action plan.
- » Actual, potential, or credible allegations of fraud.
- » Excluded providers or entities.
- » Documentation errors resulting in overpayments.
- » Software or billing systems updates that resulted in overpayments.
- » Systemic billing or claiming issues.
- » Overpayments involving more than one entity/provider (e.g., health homes and care management agencies).
- » Medicaid overpayments not based on claims.
- » Errors with substantial monetary or program impacts.
- » When directed by OMIG.

# Full Statements: Process

- » Self-Disclosure Full Statement and other applicable forms must be submitted within 60 days of identification of the overpayment.
- » Can be submitted online or by mail.
  - › Online: Submit completed documents using OMIG's Hightail Secure Uplink site and include specified information in the Hightail message section (name, email, name of the entity disclosing).
  - › Mail: Submit completed documents (including the Claims Data File on CD or another secure device) to Office of the Medicaid Inspector General, Attention: Self-Disclosure Unit, 800 North Pearl Street, Albany, NY 12204.
- » If submitted online, will receive email confirmation of receipt.
- » Submission will toll (pause) the 60 day timeframe while OMIG processes the disclosure.

## Full Statements: Process (cont.)

- » Self-Disclosure Unit will review the submission to:
  - › Determine eligibility to participate in the Self-Disclosure Program;
  - › Verify claim data against paid Medicaid claim information, when applicable;
  - › Verify the overpayment amount;
  - › Understand the error that occurred and the reason for the error; and
  - › Identify any law, regulation, or policy that was violated.

## Full Statements: Process (cont.)

- » Notification will be provided within 20 days either confirming acceptance of the submission or rejection due to failure to meet eligibility criteria.
- » Notification will include a project or case number for reference.
- » Additional information must be supplied within 15 calendar days of request.
- » Once the review is complete a Determination Notice will be issued confirming the total amount for the overpayments disclosed, confirming any amounts already repaid through void or adjustment, any balance still due, and repayment instructions.
- » If extended repayment terms have been requested, the provider will be contacted by OMIG's Office of Counsel.

# Full Statements: Determinations

- » Upon the issuing of the Determination Notice, if no voids or adjustments have occurred, the overpayment must be repaid within either:
  - › 15 days of the Determination Notice; or
  - › No later than the expiration of the deadline to report, return, and explain;
  - › Unless a SDCA has been requested and approved.
- » Payment can be made by:
  - › Lump-sum check, money order, or electronic check payment; or
  - › Voids or adjustments of the overpaid claims (prior to submission).
- » Efforts are made to process cases within 90 days.

# Full Statements: Corrective Action

- » Self-Disclosure Unit will review the plan of corrective action to confirm it is sufficient to prevent recurrence.
- » Provider must implement the corrective action.
- » Implementation or failure to implement will be taken into consideration during any Compliance Program review.

# Abbreviated Statements: Use

- » Routine credit balance/coordination of benefits overpayments.
- » Typographical human errors.
- » Routine Net Available Monthly Income (NAMI) adjustments.
- » Instances of missing or faulty authorization for services due to human error.
- » Instances of missing or insufficient support documentation due to human error.
- » Inappropriate rate, procedure, or fee code used due to typographical or human error.
- » Routine recipient enrollment issues.

# Abbreviated Statements: Process

- » Void or adjust the overpaid claims within 60 days of identification.
- » Claims must be reported and explained to OMIG using the Self-Disclosure Abbreviated Statement spreadsheet.
- » May aggregate submission into a monthly report, to be submitted by the 5<sup>th</sup> of the month following the month in which the claims were voided or adjusted.
- » Submit using the Self-Disclosure Abbreviated Statement online form.
- » Email confirmation of submission will be received.





# Abbreviated Statements: Process (cont.)

- » Additional information must be supplied within 15 calendar days of request.
- » Self-Disclosure Unit verifies that the voids or adjustments were completed successfully and reviews the self-disclosure to ensure no larger issues exist that need further corrective action.
- » No Determination Notice will be issued.
- » OMIG has the discretion to require submission of a Self-Disclosure Full Statement.



# Self-Disclosure Compliance Agreements

- » If a provider submits a Self-Disclosure Full Statement and is unable to pay in full within 15 days of notification, the provider may request an installment-payment agreement.
- » OMIG has the sole discretion to approve.
- » Includes the execution of a SDCA within 15 days of the date of the Determination Notice.
- » Requests for full repayment within 2 years will be considered and may be approved based on a review of the provider's annual billings.



# Self-Disclosure Compliance Agreements (cont.)

- » Extended repayment plans (longer than 2 years) require a demonstrated financial need through the submission of a financial hardship application.
- » Must submit a detailed request for consideration with the Self-Disclosure Full Statement.
- » Must provide any financial documentation requested.



# Compliance with Self-Disclosure Process

- » Providers must comply and cooperate with the self-disclosure process.
- » Includes sharing any additional information requested by OMIG to process the submission or determine eligibility for a SDCA.
  - > Must respond within the timeframe indicated on the request.
  - > Failure to timely respond may result in a determination that the provider is not complying with the self-disclosure process.



# Violations of the Self-Disclosure Process

- » Providing false material information in any disclosure documents.
- » Failing to cooperate in validating the overpayment amount disclosed.
- » Intentionally omitting material information from any disclosure documents, including the failure to submit a Self-Disclosure Full Statement when directed.
- » Failing to pay the overpayment amount and interest as agreed.
- » Failing to execute a SDCA.
- » Violating the provisions detailed in a SDCA.



# Violations of the Self-Disclosure Process: Penalties

- » Termination of participation in the self-disclosure process (including tolling).
- » Penalties for failure to report, return, and explain the overpayment.
- » Other penalties available under State and Federal law.
- » OMIG may use the disclosed information to pursue any civil or criminal penalty that may apply to the misconduct disclosed as part of the self-disclosure process.



# Penalties


- » In addition to recovery of any overpayment, failure to participate or meet the requirements of the self-disclosure process may result in monetary penalties.
  - › Up to \$10,000 per item or service.
  - › Increased to \$30,000 per item or service when a penalty has been imposed within the previous 5 years.
  - › Termination of provider agreement.
  - › Exclusion.



# Your Question – is there a threshold?

- » **Is there a dollar threshold for reporting?**
- » No, there is no dollar threshold for reporting. All self-identified inappropriate Medicaid payments received should be self-disclosed. However, the Medicaid entity/Provider should utilize the appropriate process for reporting inappropriate Medicaid payments – Full Self-Disclosure Process or the Abbreviated Self-Disclosure Process.





# Your Question – How Does One Get Excluded?


- » Exclusion Authority (42 U.S.C. Section 1320a-7)
  - › Mandatory: Certain criminal offenses/felonies related to health care.
  - › Permissive: Certain misdemeanors, revocations of license, suspensions, improper claims, etc.




# Corollary Question:

## How Does One Get Off Excluded List?

- » Individuals are NOT automatically taken off the excluded list
- » They must request removal
- » If excluded from OIG, must get off that list first and then request removal from OMIG



# Your Questions on Privacy/Records





# Your Questions: Who Should the Privacy and Security Officer Be?

- » Should the privacy officer be stand alone, combined with compliance, combined with security officer
  - › Personnel
  - › Responsibilities
  - › Reporting and Dealing with Outside
- » If separate, how collaboration works?
  - › Skill sets
  - › Delineation of duties



# Your Compliance Officer: Personality Traits

- » Logical Assimilators.
- » ISTJ (introvert, sensing, thinking, judging).
- » ISTJs are very responsible and reliable individuals who can be trusted to do their tasks well. As a result, they will usually excel in management where they are entrusted with responsibilities, expectations and objectives to meet.
- » Also, they are able to work with huge amounts of data and are painstakingly accurate and methodical.
- » Studies have shown that IT professionals tend to be much more introverted than extroverted – 25% of the general population is introverted; 67% of computer professionals are introverted.

# Documentation Retention





# Your Question: Document Retention

- » 6, 7 or 10 years and if 10, what has to be held for 10
- » Minor records
- » Best practice for destruction of paper and electronic
  - > For PHI in paper records, shredding, burning, pulping, or pulverizing the records so that PHI is rendered essentially unreadable, indecipherable, and otherwise cannot be reconstructed.
  - > For PHI on electronic media, clearing (using software or hardware products to overwrite media with non-sensitive data), purging (degaussing or exposing the media to a strong magnetic field in order to disrupt the recorded magnetic domains), or destroying the media (disintegration, pulverization, melting, incinerating, or shredding). For more information on proper disposal of electronic PHI, see the HHS HIPAA Security Series 3: Security Standards – Physical Safeguards. In addition, for practical information on how to handle sanitization of PHI throughout the information life cycle, readers may consult NIST SP 800-88, Guidelines for Media Sanitization



# Board Issues









# Board Issues: Popular Training Topics

- » Make sure your Board training meets the regulation standards
- » Most popular topic for CEOs to ask about
  - > Board liability for being outside D&O coverage
  - > Confidentiality
  - > Speaking with staff
  - > Responsibilities
  - > Conflicts



# Employment Issues





## Your Questions: ADA with Respect to Service Animals

- » Questions to Ask and What Law Allows
- » In situations where it is not obvious that the dog is a service animal, staff may ask only two specific questions:
  - › (1) is the dog a service animal required because of a disability?
  - › and
  - › (2) what work or task has the dog been trained to perform?

# Support Animals

- » Not subject to same protections as service animals BUT may be Reasonable Accommodation under FHA in residential setting
- » Does the individual have a disability and has the individual requested a reasonable accommodation?



# Justice Center for the Protection of People with Special Needs





# Your Questions: Justice Center

- » How to handle anonymous complaints to JC or HR that appear to be geared toward causing problems for other employees and/or potentially retaliatory.
- » Recourse for verified false reporting.



# Audits





# The Current Audit Issues

- » Increase in investigations by OMIG Investigations Unit, MFCU, and private payors
- » Increase in exclusions (even for small overpayment amount)
- » Self-disclosure requirements: Increasing number of referrals to OMIG's Division of Medicaid Investigation based on a provider self-disclosure
- » Audits of OPWDD programs: Residential habilitation
- » New OMIG audits: Health care worker bonus
- » Censures/Exclusions: both reported to the National Practitioner Data Bank. While a censure does not limit a provider's participation in the Medicaid program, it may impact participation in other insurance programs.

# Your Questions

- » Contemporaneous requirements – the definition
  - › Monthly summaries
  - › Service documentation
- » Inconsistencies with Auditors

# Your Questions: EVV

- » Data Aggregation
- » Possible updates to the audit process as a result of EVV (protocols before EVV)
- » Concerns when data does not submit due to human error

## Recent Requests

- » OMIG has recently sent requests to providers indicating that they have missing EVV data



# Residential Habilitation: OPWDD Providers

- » These audits review specific documentation requirements for those agencies that provide residential habilitation (res hab) services.
- » These audits typically are not questioning if a service was provided but if documentation met technical requirements spelled out in regulations, ADM's Medicaid updates, etc.
- » Use of alternative documentation.
- » Some of these findings have been extrapolated, but OMIG provides no guidance in its protocols as to which findings are extrapolated and why.
- » Inconsistent extrapolation of findings across the state.

# Contemporaneous Documentation

Dictionary Definition

» **as in *concurrent***

» existing or occurring at the same period of time

Daily documentation = within 24 hours

Monthly = within 30 days



# Residential Habilitation: OPWDD Providers (Cont.)

- » An old regulation may have new life thanks to electronic health records.
- » 18 NYCRR 519.18 (g) allows the provider to submit an actual accounting of all claims paid in rebuttal to OMIG's certified extrapolation.
- » This regulatory provision dates back to the late 1980s.
- » If OMIG extrapolates a finding for a missing document, EHR may allow you to produce the document and challenge the extrapolation.



# Residential Habilitation: OPWDD Providers – Your Question

- » OMIG provides a random sample but does not tell the date of service. OMIG asks for entire record for whole period. Is there a way to get this limited?
  - › YES
  - › At the Entrance Conference, you can request a more limited time period. We have negotiated 3 month in recent audits
  - › Focus on burden to produce





# Health Care and Mental Hygiene Worker (HCMHW) Bonus

- » Some providers have recently received audit engagement letters from OMIG.
- » Audit period stated as October 1, 2021, to March 31, 2024.
- » These audits appear to be a desk audit originating from OMIG's NYC office.
- » With a desk audit, only one opportunity to respond (response to the Draft Audit Report). No entrance conference, and no exit conference.



# Health Care and Mental Hygiene Worker (HCMHW) Bonus (Cont.)

- » No protocol for these audits posted on the OMIG website. Providers in the dark as to the regulatory or statutory standards that OMIG will use in determining overpayments.
- » Extrapolation?
- » Audit engagement letters ask providers to produce the following:
  - › W-2s, W-4s, 1099s, and 1098s for those who received a bonus.
  - › Employment start and end dates
  - › Job descriptions



# Health Care and Mental Hygiene Worker (HCMHW) Bonus (Cont.)

- » Throughout its history, OMIG has consistently sought overpayments for minor and technical documentation errors.
- » Look for such errors based on agency ADMs, Medicaid updates, and agency policy guidance.
- » This trend continues.
- » Recent ALJ decision: *National Seating and Mobility Inc.*
  - › Held provider to a standard that was in effect during the audit period but later reversed by the DOH.



# Investigations





# Agency Investigations: Questions

- » Who is investigating?
  - › OMIG, MFCU, DOH, OIG
  
- » What is the reason?
  - › Complaint, Random, Result of self-disclosure or audit



## OMIG SIU

- » The OMIG Special Investigation Unit has become more active
- » Limit Review, if possible
- » Compliance Summary Report Should be Written with Eye that it may be Produced

# Internal Investigation:

## Your Questions: Scope of Reviews

- » Factors for consideration:
  - › Possible frequency;
  - › The timeframe the issue might have been occurring – is there a logical limit;
  - › What are the various arguments as to why we approached something the way we did;
  - › Is there something we should stop right now;
  - › Impact on quality of services being provided;
  - › Impact on other operations and contracts;
  - › Regulations, ADMs, other guidance; and
  - › Financial impact.





# Staff Representation

- » Rules about staff members having representation in an investigation of an incident
- » What if they refuse interview without the person?
- » OPWDD states personal representatives cannot be present which seems to conflict with documents (refers to confidentiality).

# Additional Questions?

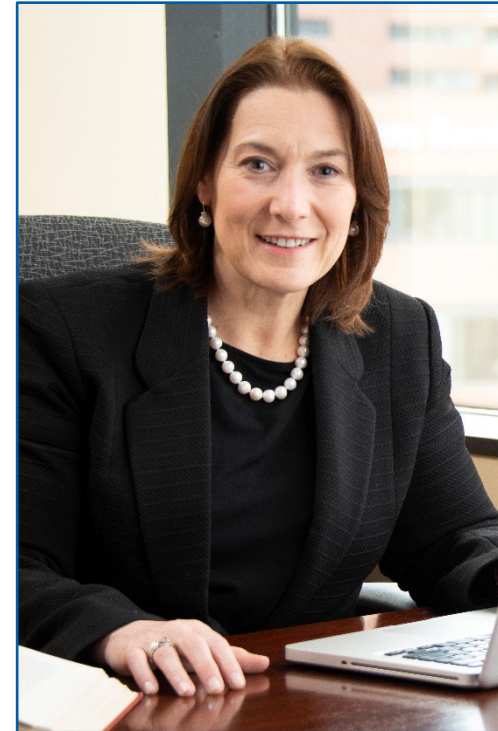


# »» Thank You!



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