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## OMIG reminds providers that compliance officer must be an employee of the provider

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New York State law requires certain Medicaid providers, including hospitals, home care agencies, mental health clinics, Article 16 clinics and other providers that derive a substantial portion of their business from the Medicaid program, to operate and maintain an effective compliance program. Pursuant to that law, one of the essential components of an effective compliance program is to vest an employee of the provider with the responsibility of overseeing the day-to-day operations of the compliance program.

Earlier this month, the New York State Office of the Medicaid Inspector General (“OMIG”) released guidance reminding those Medicaid providers of their obligation to employ such a person. To be considered an employee, an individual must qualify as an employee for state or federal tax purposes. Independent contractors, consultants and volunteers are not considered employees.

The compliance guidance also addresses the situation where multiple corporate entities are controlled by a parent holding company. In that situation, the holding company may operate or coordinate a compliance program throughout the enterprise. The guidance explains that, even though the parent holding company may not actually be participating in the Medicaid program, it may employ a compliance officer on behalf of wholly owned subsidiaries that are participating in the Medicaid program because there is a unity ownership and control.

Similarly, the compliance guidance states that a wholly owned subsidiary may employ the compliance officer on behalf of the parent holding company if the employee of the subsidiary:

- a) is vested by the parent company with responsibility for the day-to-day operation of the parent company’s compliance program;
- b) satisfactorily carries out all of the compliance responsibilities;
- c) reports directly to the parent company’s chief executive officer or other senior administrator; and
- d) periodically reports directly to the parent company’s governing body on the activities of the parent company’s compliance program.

If the subsidiary is not wholly owned by the parent company, however, the OMIG will not consider a parent company to have “unity of ownership and control” over the subsidiary. That means that an employee who is the compliance officer of a subsidiary will not be deemed to be an employee of the parent holding company. The same individual, however, may serve as the compliance officer for the parent company and individual subsidiaries if the individual has separate employment relationships with each entity.

The compliance guidance applies the same rule to joint ventures that are participating in the Medicaid program. Because a joint venture does not involve unity of ownership and control between the joint venture and its owners, a compliance officer employed by either owner will not be considered to be an employee of the joint venture itself. A joint venture required to have a compliance program will thus have to separately employ an employee who is vested with the day-to-day operation of the compliance program. But, again, that individual may enter into separate employment arrangements with the joint venture and one or more owners.

Similarly, providers that choose to delegate responsibility for carrying out compliance activities to a management company will have to ensure that a provider employee is the compliance officer vested with the responsibility for compliance program.

Providers should examine their compliance program and ensure that the designated compliance officer’s employment status complies with the regulatory requirements.

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