

## in this issue:

AUGUST 2006

The Deficit Reduction Act of 2005 requires employers making or receiving \$5 million or more in annual Medicaid payments to educate employees about whistleblowing protections.

Littler Mendelson is the largest law firm in the United States devoted exclusively to representing management in employment and labor law matters.

## Health Care Edition

A Littler Mendelson Newsletter  
specifically for the Healthcare Industry

### The Deficit Reduction Act of 2005: Requiring Health Care Employers to Educate Employees in Whistleblowing

By *Stephen D. Dellinger*

On February 8, 2006, President Bush signed into law the Deficit Reduction Act of 2005 (DRA). Included in the DRA are little known but sweeping obligations likely affecting entities receiving or making \$5 million or more in Medicaid payments each year.

The DRA includes numerous provisions designed to reduce and control Medicaid costs, such as Employee Section 6032 entitled "Employee Education About False Claims Recovery" aimed at curbing Medicaid fraud. This section was a late addition to the DRA and amends the Social Security Act, section 1396(a), "State plans for medical assistance." Under this section, as of January 1, 2007, entities receiving or making \$5 million or more in annual payments under a state Medicaid plan, must, as a condition of participation, create written compliance policies designed to educate employees, contractors and agents about false claims, false statements and whistleblower protections under applicable federal and state fraud laws. The DRA also mandates that these policies include specific "detailed information" regarding an entity's policies and procedures for detecting and preventing fraud, waste and abuse of government health care programs. Specifically, the compliance policies must include "detailed information" about the following:

1. the federal False Claim Act;
2. the administrative remedies for false claims and statements pursuant to the Program Fraud Civil Remedies Act of 1986;
3. any state laws pertaining to civil or

criminal penalties for false claims and statements;

4. whistleblower protections under these federal and state laws; and
5. the roles of these laws in preventing and detecting fraud, waste and abuse.

### Complying with the New DRA Requirements

Complying with the DRA requirement will be a condition of continued Medicaid reimbursement. Failing to meet the January 1, 2007, deadline can trigger potential false claim exposure, exclusion from Medicare reimbursements or participation in federal health care programs. Unfortunately, the DRA does not clarify the "detailed information" that employers are now expected to include in the written policies nor has any governmental agency issued any regulations to assist employers in meeting the DRA's requirements. Nevertheless, employee handbooks or manuals must now include the above referenced information. The DRA does not specifically address how such compliance policies are to be disseminated by entities without employee handbooks. Furthermore, while training is not specifically required, the provisions clearly contemplate that entities will inform their employees of their policies.

### The DRA and the False Claims Act

The DRA also encourages states to create false claims statutes similar to the federal False Claim Act (FCA). The FCA was first enacted in 1863 in response to fraudulent practices by defense contractors during the

Civil War. The Act allows a private person to file a lawsuit on behalf of the United States government against a person or business that has committed fraud.

The Act contains language protecting whistleblower employees from retaliation by their respective employer. Employees that are discharged, demoted, suspended, threatened, harassed, or in any way discriminated against in the terms and conditions of employment by their employer for “blowing the whistle” are entitled to recover all relief necessary to make the employee whole. Damages available to an employee that proves retaliation include: reinstatement, two times back pay, interest, emotional distress damages, costs and attorney’s fees.

In addition to such damages, the FCA was amended in 1986 to allow a successful whistleblower to recover 15% to 30% of the government’s recovery from the fraudulent practice. Companies that defraud the government are subject to treble damages and penalties for each fraudulent act.

Under the DRA, states that enact similar false claim statutes will receive 10% of the federal government’s share of any recovery of Medicaid funds under that state’s qualifying false claims statute. The DRA’s “carrot” to states enacting similar false claim legislation, will likely result in most states passing some type of false claims act. Currently several states have either enacted qualifying false claims legislation or are currently considering such legislation including: Alabama, California, Colorado, Connecticut, Mississippi, Missouri, Minnesota, Nebraska, New Jersey, Pennsylvania, Oklahoma and Texas.

## Time Is of the Essence

Employers are encouraged to act now. The January 1, 2007, deadline is most onerous for entities without existing internal policies or procedures addressing fraud, waste and abuse. However, employers with existing internal complaint and compliance policies are cautioned that they too should be evaluated to ensure full compliance with the DRA’s requirements. Employers must now walk a fine line in how best to comply with the DRA and communicate with employees, contractors and agents so as not to encourage

abuse of the whistleblower protections.

---

*Stephen D. Dellinger is a Shareholder in Littler Mendelson’s Charlotte office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com or Mr. Dellinger at sdellinger@littler.com.*

---