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Compliance Is Essential for Businesses in Gov't-Funded Programs

BY MARY FRANCES GRABOWSKI
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Businesses that participate in federal and state-funded programs, and receive associated funds from the government, must be extra vigilant in complying with all requirements that apply to these programs. For years, this was not just a risk management practice; it was the right way to do business in the state of Pennsylvania. However, with the advent of the Affordable Care Act (ACA) and recent rulings from the Commonwealth Court, individuals and businesses that take public money must remember that effective compliance programs are not just a best practice, they are essential.

In a recent example, Philadelphia's Diamond Mini Market learned the hard way that government money comes with strings attached when it found itself on the wrong side of the Pennsylvania Department of Health's (DOH) Program Integrity Unit, Division of Women, Infants and Children.

MARY FRANCES GRABOWSKI *is a principal with Post & Schell's health care practice group and spent 35 years as an attorney with the Pennsylvania governor's Office of General Counsel, Department of Public Welfare, most recently as the department's deputy chief counsel and lead Medicaid attorney. She focuses her practice on Medicaid legislative and regulatory matters.*

The unit is responsible for monitoring retail stores that participate in the federally funded Special Supplemental Nutrition Program for Women, Infants and Children (WIC) for compliance with federal and state WIC program requirements. The unit uses different methods to monitor WIC stores, including conducting "compliance buys" or undercover purchases to ascertain whether the stores are adhering to applicable WIC regulations. If, as a result of the compliance buys, the unit determines that a store has overcharged the WIC program on two or more occasions, the unit will disqualify the store from participating in the WIC program for a period of three years.

Diamond was a WIC-authorized store in Philadelphia and because it had a high volume of business, the unit flagged Diamond as a "high risk" and initiated a compliance investigation that resulted in four visits to the store over approximately an 18-month period, beginning in August 2010. During these visits, a series of compliance buys were made at the store. The first found no overcharges, but other violations were noted, which prompted three more compliance buys—one in March 2011, which resulted in a 22 cent overcharge; one in October 2011, which resulted in a 9 cent overcharge; and a final one in February 2012, which resulted in a 20 cent overcharge—for a total of 51 cents in overcharges. However, because Diamond had overcharged the WIC program on more than two occasions, the unit determined that, under both state and federal regulations, Diamond must be disqualified as a WIC-authorized store for a period of three years, regardless of the amount of the overcharges.

Diamond filed an administrative appeal contesting the disqualification.

After its appeal was denied by the DOH chief hearing officer, Diamond petitioned the Commonwealth Court for review. While noting that there was no evidence that Diamond had engaged in any fraudulent behavior, the Commonwealth Court held that violations of WIC requirements need not be intentional to warrant sanctions. Finding the DOH regulations fully consistent with federal WIC regulations, and concluding that the unit acted properly under both state and federal requirements, the court affirmed Diamond's three-year disqualification in *Diamond Mini Market v. Department of Health*, No. 220 C.D. 2013 (Slip Opinion, November 7, 2013).

In doing so, the court acknowledged that "while disqualification for overcharges totaling 51 cents may initially seem harsh, it bears emphasizing that the program is publicly funded and intended for the benefit of a nutritionally at-risk population; it is not designed or intended as an entitlement or revenue-enhancing program for retail vendors. Further, while the individual overcharges here are nominal in amount, the cumulative effect of minor overcharges committed on a frequent basis could very well be profitable to the retailer, to the detriment of the program and the WIC participant, whose check will buy less because she is being overcharged for allowable food."

The *Diamond* case is a cautionary tale for any person or business that participates in a government-funded program, but particularly for providers participating in the Pennsylvania Medical Assistance (MA) program. Just this past summer, the Commonwealth Court issued two opinions in which it reminded MA providers that they are "charged with knowledge" of Department of Public Welfare (DPW) regulations governing the MA program (*Foundations of Behavioral Health v. Department of Public Welfare*, 72 A.3d 838, 858 (Pa. Cmwlth Ct 2013)), and that "substantial compliance … is not sufficient, but, rather 'strict compliance with the regulations pertaining to submission of claims is required where disbursement of public funds is at issue'" (*Grane Hospice Care v. Department of Public Welfare*, 72 A.3d 322, 327 (Pa. Cmwlth Ct 2013)).

While the DPW generally has discretion under its regulations whether to impose sanctions on a noncompliant provider, like the DOH, the DPW has authority to terminate a provider's participation in the MA program and seek restitution from a provider if the provider violates MA program requirements. The Commonwealth Court recently affirmed the DPW's decision to terminate a physician's provider agreement and preclude her participation in the MA program for a four-year period after the DPW determined that the physician failed to comply with DPW record-keeping requirements. Significantly, the court also upheld the DPW's authority to require the physician to make restitution of MA payments made to other providers for services and items she prescribed, but for which she failed to properly document medical necessity, in *Cozzone v. Department of Public Welfare*, 2012 Pa. Commw. Unpub. LEXIS 183 (Pa. Cmwlth 2012); appeal denied 2012 Pa. LEXIS 2086 (Pa., Sept. 6, 2012).

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The lesson is that casual compliance is not enough to stave off the risk and penalty associated with noncompliance under government-funded programs. Given the increased scrutiny by government regulators, and the Commonwealth Court's inclination to uphold strict enforcement of government program requirements and the imposition of sanctions, even when noncompliance results in nominal overcharges, providers may wish to revisit their compliance plans to ensure they are effective in identifying and correcting potential problem areas. •