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Some Providers Take Risks With 60-Day Rule; Gap in Visits May Cause Incident-To Errors

By Nina Youngstrom

Some providers are rolling the dice with the Medicare 60-day overpayment return rule, fixing the errors they identify for future compliance without paying back any money. They educate the physicians, coders and other people who caused the overpayment or fix a system glitch, but don't audit the six-year lookback period required by the CMS regulation that interprets the Medicare 60-day rule, which requires providers to report and return overpayments 60 days after identifying them, according to an attorney and consultant .

"Very often providers will say, 'I am willing to assume that risk.' The attitude is, 'Why look for past trouble if we can just fix things moving forward?'" said attorney Lester Perling, with Nelson Mullins in Fort Lauderdale, Florida. "They will sometimes make the business decision that they don't think they have a high risk of being sued under the False Claims Act." That's up to the provider, but it's a calculated risk. "To have an effective compliance program and live up to CMS's expectations in the final rule, providers need to do more than that and need to do compliance auditing and look back in certain circumstances." There's also a bigger-picture gamble in writing off the past: If the government investigates the provider for something else and the provider asserts that it has an effective compliance program as part of its defense, when the government asks to see the compliance program documentation, it will reveal the provider consciously decided to sweep the overpayment under the rug, Perling said. "The government lawyer would look at you and chuckle. That would be the end of the discussion," he explained at a Health Care Compliance Association webinar Sept. 30. Your compliance program wouldn't be seen as effective and wouldn't mitigate damages if the Department of Justice pursued an enforcement action.

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