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Enforcers Turn Their Attention to Possible Failures With Charity Care, Clinical Standards

By Nina Youngstrom

The potential failure of a nonprofit hospital to comply with its charity care obligations is gaining momentum as a compliance risk, as some state attorneys general focus on this area and it's featured in media accounts, according to a longtime state and federal watchdog. He suggests compliance professionals take an interest in Schedule H of IRS Form 990, where tax-exempt hospitals report patient financial assistance and other community benefits.

"I predict we will see a significant uptick in the charity care area by enforcement agencies," said former federal prosecutor James Sheehan, who is also the former New York state Medicaid inspector general and is now chief of the Charities Bureau in the New York State Office of the Attorney General (AG).

Failure to offer patients financial assistance is one of three significant compliance issues for 2021 and beyond, he said at the Health Care Compliance Association's regional conference in Philadelphia Aug. 6.^[1] The other two are in the False Claims Act (FCA) realm: billing for services that fail to comply with clinical standards and "the battle of the bots": data-driven whistleblowers vs. "corporate tracking systems to increase revenue."

How much a health system will be affected by each of the risk areas depends partly on its location. "One of the issues for a compliance officer is what's the status of each of these issues in your jurisdiction," Sheehan explained. For example, FCA theories are faring differently depending on the U.S. appeals court. "If they get a good circuit decision, [whistleblower] lawyers are more inclined to take those cases," he noted.

Some State AGs Are All Over Charity Care

In the charity care arena, Sheehan said a number of state and federal statutes, including 501(r) from the Internal Revenue Code, govern tax-exempt nonprofit hospitals and health systems, with sometimes painful consequences for noncompliance. Some state AGs, including in New York, Washington and California, "are very interested in charity care and how it is implemented." The lead case in this area is Franciscan Health System's 2019 consent decree in Washington state, Sheehan said.^[2] "The AG in Washington state found Franciscan wasn't doing what it should do under its charitable charter," he said. According to the consent decree, eight Franciscan hospitals will forgive up to \$20 million in debt, pay \$2.2 million in refunds, pay the AG \$2.46 million, and rehabilitate the credit of patients who were eligible for charity care between 2012 and 2017 but didn't get it, he said.

"What's nice about the state regulatory process as opposed to the federal one is" they're worked by two departments in the AG's office: consumer protection and charity enforcement, Sheehan said. "To get state tax exemption or to satisfy state charity requirements as exempt organizations, you need to provide charity care, and you need to tell people you will do it. We have access to automated 990s, which can tell us which hospitals are doing well or badly on charity care provisions." He also pointed out what seems to be increased media interest in this area. For example, NPR and Kaiser Health News have an ongoing series about huge bills charged to patients,

sometimes by tax-exempt hospitals.^[3]

To help protect their organizations, compliance officers should review Schedule H of IRS form 990.^[4] The 10-page form asks for a lot of information, including whether organizations (1) had a financial assistance policy during the tax year, (2) budgeted amounts for free or discounted care provided under its financial assistance policy and (3) used federal poverty guidelines in determining eligibility for free and discounted care.

“As a compliance officer, you don’t want to do the calculations, but make sure someone is responsible for making sure the calculations are accurate,” Sheehan said. Also make sure the organization is complying with requirements to inform patients about charity care, he said. “At what point in the admission and billing process are patients advised of their option to apply for charity care? How does the hospital assure that charity care patients are not billed or subject to collection activity?”

He also is concerned about the way some hospitals have recast bad debt as charity care now that they’re required to report bad debt on Schedule H. Some patients are put in a category of “presumptive eligibility,” with hospitals using commercial companies to identify patients who are eligible for charity care without informing them. That could conceivably be considered deception and potentially be part of an enforcement action, Sheehan said.

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