ZPIC Use of the Medicare Fraud Prevention System

(October 20, 2015): As required by the Small Business Jobs Act of 2010, the Department of Health and Human Services (HHS) is required to conduct a review of payments for Medicare fee-for-service claims by using "predictive analytics technologies" every three years. Predictive analytics technologies employ a variety of predictive models and statistical analysts for detection of improper billing and payment patterns. Predictive analytics technologies are commonly used by credit card companies. Basically the tools use past fraudulent activities to predict future fraud. Perhaps the best known example of these "technologies" currently in use is the Medicare Fraud Prevention System (FPS) utilized by the Centers for Medicare and Medicaid Services (CMS) and the Zone Program Integrity Contractors (ZPICs) under its direction. During Fiscal Year 2014, the agency's FPS is estimated to have saved the Medicare fee-for-service program more than $133 million.

I. ZPIC Use of the Medicare Fraud Prevention System:

In order to minimize the fraud under the Medicare fee-for-service program, HHS first established the FPS on June 30, 2011. Under the Small Business Jobs Act (the "Act") of 2010, HHS is required to use "predictive analytics technologies" to (1) identify improper Medicare fee-for-service claims that providers submit for reimbursement and (2) prevent the payment of these claims. Under the Act the HHS Office of Inspector General (OIG) is required to certify the actual and projected savings regarding (1) improper payments recovered for and prevented from leaving the Medicare Trust Funds and (2) the return on investment pertaining to the Department's use of the FPS. ZPIC contractors around the country rely heavily on the FPS to identify potential audit targets.

II. Role of the ZPICs in Identifying Fraud:

ZPICs play a unique role in the government's fraud-fighting strategy. While ZPIC auditors and investigators are technically private contractors, they view themselves as an extension of law enforcement. As one former ZPIC General Counsel once indicated during an Administrative Law Judge (ALJ) hearing we were handling, "Every case we initiate is either a fraud case or a potential fraud case." This comment really says it all. ZPIC contractors take their job seriously and will not

hesitate to refer a case to law enforcement for potential civil or criminal prosecution if evidence of fraud is uncovered. How are ZPICs using leads generated from the FPS?

- ***Unannounced health care provider / practice site visits*** – Statistical analysis of a provider's billing utilization rates can be invaluable in identifying outliers. Once an outlier is identified, unannounced on-site visits, probe audits and other audit-related actions are often soon to follow.
- ***Visits with patients and their families*** -- ZPICs are increasingly relying on patient visits to obtain information regarding the type and duration of care administered by a health care provider. If the information obtained contradicts the type and / or level of service billed, the ZPIC may recommend to CMS that an adverse action be taken against the provider or practice.
- ***Prepayment reviews*** – The number of health care providers / physician practices placed on prepayment review appears to have significantly increased over the last year. From a practical standpoint, being placed on prepayment review is tantamount to cutting-off a provider's cash-flow for three to six months (unless appropriate action is taken to have the prepayment review lifted).
- ***Postpayment audit*** – While prepayment ZPIC audits are today's audit tool du jour, that doesn't mean that postpayment audits (and extrapolated damages) have gone away. In fact, ZPICs are actively conducting postpayment audits after first placing a provider on prepayment review and / or seeking CMS approval to place a provider on suspension.
- ***Suspension*** – The number of suspension actions recommended to CMS by ZPICs has steadily increased in recent years. We expect to see the number of suspension actions to continue to grow. Under the Affordable Care Act (ACA) the suspension authority of CMS has greatly expanded. Historically, CMS has been empowered to suspend payments to Medicare providers in three circumstances: 1. Fraud or willful misrepresentation; 2. An overpayment of an undetermined amount has been identified; or 3. Payments that have been made (or are scheduled to be made) may be incorrect. (42 C.F.R. §405.371(a)(1). Notably, under the ACA, CMS may now suspend payments based on a "credible allegation of fraud." Even if a credible allegation of fraud exist, CMS may choose not to suspend payments if there is "good cause" for doing so. CMS may suspend a provider based on allegations from any source, including: 1. Fraud hotline complaints; 2. Claims data mining; 3. Provider audits; or 4. Law enforcement investigations.
- ***Revocation*** – Take care if your health care organization or practice is subjected to a site visit. ZPICs around the country have used this opportunity to justify a revocation action. The inadvertent billing of services provided to deceased individuals will almost certainly result in a revocation action.
- ***Referral for criminal investigation and prosecution*** – ZPICs are actively referring physician practices and other health care providers (where improper or fraudulent conduct appears to have occurred) to OIG and DOJ for Civil Monetary Penalty, civil and/or criminal review.

III. ZPIC Audits -- How Can You Avoid Liability?

Now, more than ever, it is important that physician practices and other health providers have an effective Compliance Plan in place. While a ZPIC audit may ultimately occur, an effective Compliance Plan can help you better ensure that your medical necessity, documentation, coding and billing practices fully comply with applicable regulatory requirements. If your organization is facing an audit, it is important that you consult with experienced legal counsel as soon as possible.

Robert W. Liles, JD, MS, MBA serves as Managing Partner at Liles Parker, Attorneys and Counselors at Law. Robert represents home health agencies of all sizes around the country in connection with a full range of ZPIC prepayment reviews, postpayment audits, suspension and revocation actions. He also handles False Claims Act cases. For a complimentary consultation, please call Robert at: 1 (800) 475-1906.