

A Disruptive Conduct Conviction Can Result in a Medicare Exclusion.



(September 22, 2020): Since 1981, the Department of Health and Human Services (HHS), Office of Inspector General (OIG) has been delegated responsibility for pursuing exclusion actions against individuals and entities that have been convicted of one or more enumerated crimes, engaged in certain improper conduct or have been subjected to an adverse licensure action. Depending on the nature of the specific adverse action taken against an individual or entity, the OIG may or may not be required by law to exercise its exclusion authority. Exclusion is the most severe administrative sanction that may be taken against an individual or entity. If you are excluded from participation in the Medicare, Medicaid and other federal health benefit programs you are effectively prohibited from being paid by for any items or services that you furnish, order or prescribe. Equally important, you may not be employed or contract with an individual or entity that participates in one or more federal health benefits programs. This article examines a recent state based, non-felony disruptive conduct conviction that resulted in an individual's exclusion from federal health benefit programs.

I. Factual Basis for the Disruptive Conduct Conviction:

In a recent case out of New York, a licensed Registered Nurse was employed by a long-term care facility providing rehabilitation and nursing home services. It was alleged that in September 2015, a resident of the facility had received the wrong medications and that the Registered Nurse had failed to advise a transporting ambulance service of medication error. Ultimately, the patient's ingestion of the wrong medications contributed to her death. After an investigation of the conduct by New York's Medicaid Fraud Control Unit, a New York state grand jury indicted the Registered Nurse for:

-

Two Counts -- Endangering the Welfare of an Incompetent or Physically Disabled Person in the First Degree, a Class E Felony, in violation of Penal Law § 260.25; and

•

Two Counts -- Willful Violation of Health Laws, in violation of Public Health Law § 12?b(2), an unclassified misdemeanor.

In December 2018, the Registered Nurse pleaded guilty to a single amended count of “**Disorderly Conduct**” (in violation of section 240.20(7) of the N.Y. Penal Law, an unclassified misdemeanor). As set out under the state statute, under N.Y. Penal Law § 240.20(7):

“[a] person is guilty of disorderly conduct when, with intent to cause public inconvenience, annoyance or alarm, or recklessly creating a risk thereof . . . [sh]e creates a hazardous or physically offensive condition by any act which serves no legitimate purpose.”^[1]

As part of her plea agreement, the Registered Nurse stated that she “**recklessly created a risk of a hazardous condition by not providing adequate care to [the nursing home resident].**” Based on the Registered Nurse’s guilty plea, a New York state court sentenced her to a one-year conditional discharge and assessed fees of \$95.00.

II. Can a Disruptive Conduct Conviction be a Basis for a Medicare Exclusion Action?

In October 2019, the OIG notified the Registered Nurse that based on her New York disruptive conduct conviction, she was being excluded from participation in Medicare, Medicaid, and other federal health programs under section 1128(a)(2) of the Social Security Act (Act) (42 U.S.C. § 1320a-7(a)(2)) for the minimum statutory period of five years. As 42 U.S.C. § 1320a-7(a)(2)^[2] provides:

***“(2) Conviction relating to patient abuse.* Any individual or entity that has been convicted, under Federal or State law, of a **criminal offense** relating to **neglect or abuse of patients** in connection with the delivery of a health care item or service.” (emphasis added).**

In response to the proposed exclusion action, the Registered Nurse filed a timely appeal and sought review of the action by an Administrative Law Judge (ALJ). In her arguments, she reasonably argued that a disruptive conduct conviction was considered to be a “**violation**” **NOT** a “**crime**” under New York state law. In support of her position, she submitted written statements from several lawyers that concluded that her violation^[3] was not considered to be a criminal

offense under New York state law.

Moreover, in its pleadings, the OIG acknowledged that *“the disorderly conduct statute under which Petitioner pled guilty does not, on its face, specifically encompass neglect of a patient. . . .”* Nevertheless, the OIG argued that the *“allegations forming the basis of [Registered Nurse’s] guilty plea establish that her conduct clearly relates to neglect.”*

In deciding this case, the ALJ examined both the **“criminal offense”** and **“patient neglect”** issues discussed above to determine whether OIG was mandatorily obligated to exclude the Registered Nurse from participation in federal health care programs pursuant to 42 U.S.C. § 1320a-7(a)(2). As the ALJ decision found:

*“Pursuant to section 1128(i) of the Act (42 U.S.C. § 1320a-7(i)), an individual is convicted of a **criminal offense** when: **(1) a judgment of conviction has been entered against him or her in a federal, state, or local court, regardless of whether an appeal is pending or whether the record of the conviction is expunged;** (2) there is a finding of guilt by a court; (3) a plea of guilty or no contest is accepted by a court; or (4) the individual has entered into any arrangement or program where judgment of conviction is withheld.” (emphasis added).*

Based on 42 U.S.C. § 1320a-7(i)(3), the ALJ ruled that the action against the Registered Nurse did, in fact, meet the federal definition of a “conviction” of a criminal offense, even though the ultimate plea (to an “Information”) would not be considered a criminal offense under New York state law. Furthermore, since the Registered Nurse’s disruptive conduct conviction resulted from her failure to report a medication error (which contributed to the death of a resident), the conviction took place in connection with the delivery of a health care item or service. **As such, the action required that the Registered Nurse be mandatorily excluded from federal health benefits programs for a minimum statutory period of five years under 42 U.S.C. § 1320a-7(a)(2).** For additional information on the impact of “exclusion” on a health care provider’s ability to seek payment for services provided to individuals covered by a federal health benefit program, we recommend that you review the following linked [article](#).

III. Recommendations:

As this case reflects, for the purposes of making an exclusion action determination, the definition of what constitutes a criminal offense under federal law is broadly defined and is not subject contradictory definitions under state law. As a result, a New York state conviction that constitutes a

Liles Parker PLLC

A National Health Care Law and Business Transactions Firm that Primarily defends Health Care Providers in Audits & Investigations

<https://www.lilesparker.com>

mere violation and is not considered to qualify as a criminal offense ***still*** triggered the imposition of a mandatory exclusion from federal health benefit programs.

This case illustrates one of the many unexpected adverse consequences that a health care provider or supplier may face when accepting a plea deal in a criminal case. Although the imposition of a mere violation by the state of New York was a likely viewed as a significant victory by both the defendant and her legal counsel, it ultimately resulted in the Registered Nurse's exclusion from participation in federal health care programs for a period of five years. From a practical standpoint, being excluded from the Medicare and Medicaid programs will make it extremely difficult for the Registered Nurse to find employment.

How should you respond in a case like this? First and foremost, you need to fully be advised of the various implications you may face if you accept a plea deal from the state that results in a misdemeanor or felony conviction. Although on its face a plea deal may appear to be a significant "win" for a defendant, the implications of accepting such a plea may effectively derail a health care provider's career for many years.

Are you a health care provider or supplier currently considering a plea agreement? We recommend that you seek the advice of experienced legal counsel before taking a plea. You need to fully understand the administrative consequences that are likely to be triggered as a result of your plea.

For a free initial consultation, please contact Robert Liles at 1 (800) 475-1906.



Robert W. Liles serves as Managing Partner at the health law firm, Liles Parker, Attorneys and Counselors at Law. Liles Parker attorneys represent health care providers and suppliers around the country in connection with audits, investigations and prosecutions. Are you considering a possible plea agreement? Have you fully considered the possible administrative consequences of entering into a plea agreement? Give us a call. For a free initial consultation regarding your situation, call Robert at: 1 (800) 475-1906.

[1] <https://www.nysenate.gov/legislation/laws/PEN/240.20>

[2] <https://www.law.cornell.edu/uscode/text/42/1320a-7>

[3] A similar case where the OIG addressed the impact of a conviction to an "Information," please see the [article](#) titled "A State Conviction for "Patient Neglect" Will Result in Mandatory

Liles Parker PLLC

A National Health Care Law and Business Transactions Firm that Primarily defends Health Care Providers in Audits & Investigations

<https://www.lilesparker.com>

Exclusion from Participation in Federal Health Benefit Programs.”