Voluntary repayments: Contractual clawbacks

By Daniel F. Shay, Esq.

Every month, DermWorld *covers legal issues in "Legally Speaking." This month's author, Daniel F. Shay, Esq. is a health care attorney at Alice G. Gosfield and Associates, P.C.*

The failure of dermatology groups to return Medicare overpayments that they receive can expose them to harsh penalties. When such overpayments are retained for more than 60 days after they were — or should have been — identified, the overpayments become false claims under the federal False Claims Act (FCA). This means that the group could be subject to up to three times the amount of the overpayment, plus between $11,181 and $22,363 per claim. While dermatology practices cannot completely insulate themselves from FCA liability arising from the actions of their employees, they can include "clawback" provisions in employment contracts to reclaim money paid to the employee to cover the cost of overpayments. These clauses are becoming more common in employment contracts, but including them raises complex issues that could impact dermatologists in their roles either as an employer or an employee.

Clawback provisions typically require the employee to either repay the overpayment amounts or have their ongoing compensation withheld (either completely or partially) until the employer has been made whole. From the practice's perspective, these provisions are a necessary form of self-protection: They have an affirmative obligation to return overpayments. Moreover, why should an employer be required to bear the cost of an overpayment caused by the employee's actions? Clawback clauses may also deter employees from non-compliant actions and encourage adherence to compliance guidance.

Nevertheless, dermatology practices should be prepared for the possibility of pushback by employees when including such terms in their contracts. Unsurprisingly, the employee will not want their compensation to be at risk over such issues, but may accept inclusion in a contract given how common such provisions are becoming. However, an employee is likely to request that certain protections be included in the clawback provision.

For example, the employee may want the precise language of the clawback clause to specify that they are only subject to clawbacks for their **errors or willful misbehavior**, rather than merely their **actions**. An "action" could be literally anything the employee does, including actions taken at the company's direction. By contrast, an "error" could be defined as a violation of company policy or guidance, or an action taken contrary to instructions. In addition, the employee may want to dispute the employer's determination. To that end, the provision can be worded to permit the employee to engage an outside consultant to review the basis for the overpayment and present a statement challenging the total amount, or whether an overpayment even exists.

Another point of contention may be what counts as an "overpayment." The employee

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may argue that only overpayments determined by Medicare Administrative Contractors or similar entities should count. Commercial payers also engage in audits and request refunds of overpayments. But the employer will want to include overpayments identified through internal compliance efforts as well. Because employers have an affirmative legal duty to return Medicare overpayments after discovery, and a duty to investigate potential overpayments, they have a strong incentive to include self-identified overpayments in the definition. On this issue, our firm ultimately sides with the employer; their duty and exposure necessitate including internally identified overpayments in the compensation subject to clawback.

Relatedly, the employee may want the opportunity to dispute the amount of overpayments, or whether an overpayment even applies. They may want to use their own auditor to examine the data and challenge the findings. To limit any disputes, clawback clauses may also include dollar amounts below which the employer's decision is final. For example, if the disputed amount is less than $1,500, the employer may say that their decision stands.

When deciding whether to include a clawback provision, the employer may want to consider the nature of the employee's compensation. For example, it may make more sense to attempt to recoup payments where compensation is based on productivity, rather than when the employee receives a fixed salary. When the employee is salaried and receives no additional compensation for their productivity, they may not have the same incentive to engage in activities that could generate overpayments.

Another factor to consider is who controls the billing and coding of services. If the employee has no say in how billing is conducted (e.g., when the practice has its own billing department that codes for the employee or an outside billing company has that responsibility), the employee understandably will either want no clawback provision at all, or one that is limited only to the employee's errors. If the employee codes their own services, however, it makes sense for the employer to be able to recoup overpayments from the employee in the case of the employee's erroneous billing or failed documentation for the level of code billed. If the employer does the coding, then the employee may also request that the employer indemnify them for the employer's errors and omissions in such coding.

Regardless of the precise contours of the clause, dermatology practices should strongly consider including such language in their employment agreements. In this era of increased documentation requirements, intensified scrutiny, and declining payment rates, practices need to protect themselves from the mistakes of their employees. Experienced legal counsel can assist with the crafting of the necessary contractual language. DW

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