



Office of the
Medicaid Inspector
General

Mandatory Compliance Program Requirement: Holding Company and Joint Venture Structures

Employee Vested with Responsibility for Day- to-Day Operation of the Compliance Program

Compliance Guidance

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This *Compliance Guidance* should be considered to be a general guidance to assist those subject to the mandatory compliance program obligations set out in New York State Social Services Law Section 363-d (§ 363-d) and 18 NYCRR Part 521 (Part 521). It does not set out all points that the Office of the Medicaid Inspector General (OMIG) will consider or use when assessing if compliance programs meet statutory and regulatory requirements. OMIG reserves the right to recall or change this *Compliance Guidance* at any time.

This *Compliance Guidance* does not constitute rulemaking by OMIG and may not be relied on to create a substantive or procedural right or benefit enforceable, at law or in equity, by any person. Furthermore, nothing in this *Compliance Guidance* alters any statutory or regulatory requirement. In the event of a conflict between statutes and regulations applicable to the Medicaid provider and either OMIG audit protocols or this *Compliance Guidance*, the requirements of the statutes and regulations govern.

A provider's legal obligations are determined by applicable federal and state statutory and regulatory law. This *Compliance Guidance* is not a substitute for a review of statutory and regulatory law. OMIG cannot provide individual advice or counseling, whether medical, legal, or otherwise. If you are seeking specific advice or counseling, you should contact an attorney, a licensed practitioner or professional, a social services agency representative, or an organization in your local community.

MANDATORY COMPLIANCE PROGRAM REQUIREMENT:

HOLDING COMPANY AND JOINT VENTURE STRUCTURES

EMPLOYEE VESTED WITH RESPONSIBILITY FOR DAY-TO-DAY OPERATION OF THE COMPLIANCE PROGRAM

BACKGROUND

This *Compliance Guidance* focuses primarily on those situations where multiple corporate Medicaid providers, each with a mandatory compliance program obligation as set out in § 363-d and Part 521, are organized into a holding company system or structured as a joint venture. In many cases, the holding company's subsidiaries or the joint venture partners are the primary providers of Medicaid care, services, or supplies, but there is an enterprise¹ level compliance program that is intended to cover all Medicaid activities within the holding company or the joint venture.

The holding company may not provide any Medicaid care, services, or supplies, but it may operate the compliance program that is applicable throughout the enterprise, thus covering its subsidiaries. In the alternative, the holding company may coordinate the compliance resources of its subsidiaries, which individually may not completely cover all compliance program obligations, but collectively the holding company and its subsidiary compliance obligations are being met.

The joint venture structure may involve the combination of multiple Medicaid providers with the joint venture becoming subject to the mandatory compliance program obligation, as well as some or all of its joint venture partners being subject to the mandatory compliance program obligation. The joint venture may be a corporation, partnership or other business organization, but its operations are separate from the multiple Medicaid providers that created the joint venture, except for those operations that are intended to be covered by the joint venture.

Element #2² of the mandatory compliance program obligations set out in § 363-d and Part 521 requires that the compliance program designate an employee of the Medicaid provider who is "... vested with responsibility for the day-to-day operation of the compliance program" For purposes of this *Compliance Guidance*, that employee is referred to as the "compliance officer."³

¹ For purposes of this *Compliance Guidance*, the term enterprise should be considered to be the holding company and all subsidiaries and other operations being conducted by the holding company or its subsidiaries that provide Medicaid care, services, or supplies.

² OMIG refers to the compliance program requirement that is set out at § 363-d subd. 2(b) and 18 New York Code of Rules and Regulations § 521.3(c)(2) as "Element #2."

³ The use of the phrase "compliance officer" in this *Compliance Guidance* should not be considered a direction by OMIG that the person vested with responsibility for the day-to-day operation of the compliance program be given or assume that title. The phrase is used herein for convenience.

PURPOSE OF THIS *COMPLIANCE GUIDANCE*

The purpose of this *Compliance Guidance* is to provide direction on what qualifies as an employment relationship for a compliance officer under Element #2.

COMPLIANCE OFFICER AS EMPLOYEE OF MEDICAID PROVIDER

For purposes of Element #2, OMIG considers an employee to be anyone who qualifies as an employee for New York State or federal employment tax purposes. Independent contractors, consultants, volunteers, and the like are not considered employees.

Tests to determine whether a compliance officer is an employee of a Medicaid provider may include, but are not limited to: is the compliance officer a “W-2 employee;” is the Medicaid provider required to cover the compliance officer under unemployment or workers’ compensation insurance; or is the Medicaid provider required to withhold payroll tax deductions from the compliance officer’s earnings.

In the circumstance where a holding company and one or more of its wholly owned subsidiaries are subject to the mandatory compliance program obligations of § 363-d and Part 521, an employee of a wholly owned subsidiary can be the compliance officer of the holding company, if the subsidiary’s employee:

- a. is vested by the holding company with responsibility for the day-to-day operation of the holding company’s compliance program;
- b. satisfactorily carries out all of the compliance responsibilities;
- c. reports directly to the holding company’s chief executive officer or other senior administrator; and
- d. periodically reports directly to the holding company’s governing body on the activities of the holding company’s compliance program.

In the case of an employee of a wholly owned subsidiary, for purposes of Element #2, OMIG deems the subsidiary’s employee to be an employee of the holding company due to the unity of ownership and control between the holding company and the wholly owned subsidiary.

An employee of a subsidiary that is not wholly owned by a holding company would not qualify as the compliance officer under Element #2 for the holding company because there is no unity of ownership and control between the holding company and the subsidiary. In this event, the holding company must separately employ a compliance officer. The same person could be employed as the compliance officer for the holding company and for the subsidiary(ies), however, the compliance officer must have separate employment status for the holding company and for the subsidiary(ies).

The case of a joint venture is the same as the not wholly owned subsidiary scenario described above. The nature of a joint venture does not involve the same unity of ownership and control between and among the creators of the joint venture and the joint venture itself. A joint venture required to have a compliance program must have an employee who is vested with the day-to-day operation of the compliance program. Like

the not wholly owned holding company scenario, the same person could be employed as the compliance officer for the joint venture and for one of the joint venture participants. However, the compliance officer must have separate employment status for each.

As noted in “b.” above, Element #2 requires the compliance officer’s responsibilities to be satisfactorily carried out for each employer.

CONCLUSION

This *Compliance Guidance* only addresses one requirement in Element #2. Therefore, it should not be considered to cover all requirements in that element. Those subject to the mandatory compliance program requirements set out in § 363-d and Part 521 should consider all the requirements under each of the eight elements in order to determine if their compliance program is conforming to the statutory and regulatory requirements.

If you have any questions on this *Compliance Guidance*, or any compliance issue under New York State’s mandatory compliance program obligation, please contact the Office of the Medicaid Inspector General’s Bureau of Compliance at 518-408-0401 or by email at compliance@omig.ny.gov.