

Preparation for the next COVID wave: The Enforcement Wave



MARK J. SILBERMAN
Partner, Vice Chair of Benesch
Healthcare+ Practice
312-212-4952
msilberman@beneschlaw.com



THERESA CROSS
Associate
Benesch Law
312-637-8868
tcross@beneschlaw.com

After multiple waves of COVID, most of us are ready to put it behind us. But there are remnants from the COVID pandemic that remain to be addressed. This is not a reference to symptoms of long-COVID but, rather, the inevitable COVID Enforcement Wave.

Civil investigative demands, audits, investigations and enforcement actions are popping up nationwide. Massive recoveries are inspiring, perhaps driving, government enforcement efforts. The first wave of enforcement efforts focused primarily on the worst of the bad actors who intentionally took advantage of the pandemic, seizing upon opportunities to lie, cheat, steal and profit from the public trust.

But this is just the tip of the iceberg. Like COVID, this will occur in waves and will spin off variants. Investigations will focus not just on bad actors, but also on those who did business with bad actors, and comparable business lines—each time looking for patterns, identifying conduct of sufficient similarity to warrant inquiry. The impact of these ‘adjacent cases’ can be real and costly. Even well-intentioned actors who have done nothing wrong will be viewed through the lens of those who intentionally engaged in bad acts. It is not the first time these types of enforcement efforts have happened and, if you are not prepared, navigating these investigations can be as disruptive as the pandemic itself. Where bad actors made a profit, others could end up having to pay the price.

Prepare by looking backwards

The low-hanging fruit are bad actors whose cases carry the biggest financial return and are the easiest to prove. Each case offers lessons (and incentives) that drive the next round of enforcement. Understanding the

original efforts allows the opportunity for preparation – and perhaps avoidance.

And this is not going away. The government extended its statute of limitations to prosecute COVID fraud. Bills were signed extending the statute of limitations for prosecuting Paycheck Protection Program (PPP) and COVID-19 Economic Injury Disaster Loan (EIDL) cases. The False Claims Act allows action for false claims submitted to the government for six years (a date potentially extendable up to ten years).

Healthcare is particularly susceptible to the Enforcement Wave

Enforcement focuses on healthcare because that is where most of the pandemic’s chaos existed (and it’s also where the money is). Both the catalyst and backdrop for much of the fraud committed, the conduct is not always being evaluated against the chaos of the pandemic. As with most honest mistakes in healthcare, mistakes are often only made once but repeated, again and again. A coding or billing error can result from a single mistake but can then be repeated hundreds or thousands of times until detected, audited or accused. This remained exponentially true during the pandemic.

If the government learns the right lessons from its initial enforcement efforts, it will go a long way to identify wrongdoing. But, as has happened before, if the government learns the wrong lessons from its original enforcement wave, it forces individuals who are not engaged in any wrongdoing to spend significant time and resources explaining innocuous conduct to the government. Remember, having done something wrong is not a precursor for a government investigation and the expense and disruption it causes is real.

How do we protect ourselves?

Pretending risk does not exist when it does is as effective as ignoring symptoms or just hoping that lump will go away. The worst thing a doctor can say to you is, “I wish you had come in earlier.” As someone who helps businesses navigate government investigations every day, my ‘worst-case’ summary is similar.

Ultimately, there are three choices, starting with an honest assessment.

- If you truly don’t have a problem, be prepared to explain if/when the government comes knocking.

- If you do have a problem:

- Explore self-reporting, self-disclosure, mitigation and/or corrective action to reduce or avoid the consequences of any misstep.
- Like the ostrich before you, stick your head in the sand and hope the government does not come with questions.

Some people will get away with fraud. More people will struggle to explain honest mistakes because they were unprepared.

When the government comes knocking, it will already have a narrative that, likely, does not advance your best interests. Proactivity allows you to reduce risk and control the narrative. And while that is most relevant if you have a problem, you will only know if you perform the necessary assessments.

Coordination with compliance and risk management teams or legal counsel—someone whose job it is to tell you what you need to know, not what you want to hear—can mitigate risk. The strategy ultimately becomes a question of risk tolerance that should be discussed with and navigated by counsel.

Even honest mistakes can result in substantial financial penalties, and investigations produce a strain on resources that can disrupt (or decimate) organizations. Ultimately, the choice between proactive evaluation and ‘wait-and-see’ is a roll of the dice. Don’t bet your business.

Proactivity allows for avoidance: Action vs. Reaction

Assessments supply information that helps identify answers and, ultimately, having answers matters. Honest mistakes may look similar to

fraud but are not. Decisions made during the chaos of the pandemic are being evaluated with hindsight. You need to be able to demonstrate more than good intentions to navigate these government investigations. The government doesn’t care about everything good your organization may have previously or subsequently done. Those responsible for investigating and prosecuting COVID fraud are myopically focused on recovering government funds and punishing wrongdoing. You need to be able to demonstrate when you do not fit that mold. Because the costs and disruption of an investigation – even a baseless one – are worth avoiding wherever possible.

Conduct the internal due diligence now to determine your risk. Evaluate your ‘answer’ now, when the information and explanations are readily available, rather than years from now. Staying ahead of the government’s enforcement wave is what allows you to make riding that wave as enjoyable as possible. And if you choose to ignore it – we hope no one ever looks at you and says, ‘We wish you had come in sooner.’



Benesch Healthcare+ Practice Group
is composed of nationally recognized attorneys with decades of experience representing physician group practices, hospital systems and ambulatory surgery centers. Our team includes former state and federal prosecutors and healthcare regulators. Whether you have corporate, regulatory, litigation or advocacy needs, we have healthcare law covered.

Benesch
Healthcare+
beneschlaw.com