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Opioid enforcement is more than just PDMP!

Introduction

The rash of opioid overdose deaths in Western Pennsylvania, and nationwide, has caught not only the attention of the news media, but also the attention of the state legislature and both federal and state enforcement agencies. A few months ago, ACMS published our article on Pennsylvania's new opioid laws and how they impact physicians, and a very short reminder would be an appropriate introduction for this article:

- Act 122 governs opioid prescribing in hospital emergency departments and urgent care facilities and mandates that prescriptions provide no more than a seven-day supply, without refills, and that physicians are required to query the Prescription Drug Monitoring Program (PDMP) and to refer individuals for treatment if they are believed to be at risk for substance abuse.

- Act 124 amends the existing Prescription Drug Monitoring Program (PDMP) by requiring dispensers to query the PDMP system before dispensing opioid drug products or benzodiazepines to new patients, to patients who want to pay cash when they have insurance, to patients who request early refills, and to patients who are obtaining these prescriptions from more than one prescriber.

- Act 125 provides similar limits on opioid prescriptions for minors.

- Act 126 establishes programs for safe opioid prescription education and allows patients to execute directives refusing the prescription or administration of opioids.

Enforcement activity

This legislative activity has paralleled increased enforcement activity by both state and federal law enforcement agencies. While the state law enforcement agencies may focus on the criminal sale of drugs, the federal system provides a full spectrum of criminal and civil enforcement potential, i.e.:

- False Claims Act activities for inappropriate billing to federal health care programs.

- Drug diversion and violation of DEA licensing requirements.

- Violation of Medicare and Medicaid participation statutes for accepting or requesting cash in lieu of submission to insurance programs.

A common tactic of federal law enforcement is for a combination of agents from the FBI, representatives of the U.S. Attorney's Office, and agents from the Drug Enforcement Agency (DEA) to show up, with or without a search warrant or a search and seizure warrant, to confront or "interview" physicians suspect of any of the above

illegal activities.

This search warrant and the search and seizure warrant require you to allow appropriate federal agents to execute those warrants. In addition to the warrant power of these agencies, it is likely physicians have signed participation agreements authorizing some of this activity. However, the fact that you are required to honor the warrants does not mean that you are required to submit to a personal interview. You are constitutionally entitled to refuse to be interviewed by any of these agents to avoid incriminating yourself. You should insist upon contacting your lawyer to discuss how to proceed in this matter. If you decide to consent to the interview, you can always do that at a later time.

The agents also may ask to talk to employees of the practice. You do not have the right, as an employer, to insist that your employees not discuss or be interviewed by these agents, although you obviously have the right not to allow that to be conducted on your premises, and the employees have the same 5th Amendment rights to refuse to incriminate themselves. You can advise employees they are not required to speak to the federal agents, but you cannot threaten them with employment consequences; that would not only

Continued on Page 226

From Page 225

expose you to an entire set of retaliatory legal actions by the employees, but it also would very likely create a cooperative witness for the federal agencies where one may not have existed before. Furthermore, it is very likely that employees or patients already have been contacted as part of the investigation.

Another tactic of the federal agents is to ask you to voluntarily surrender your DEA license, and probably tell you that their goal is to ultimately revoke your license regardless and that it would be easier for you to simply voluntarily surrender the license. While that ultimately may be true, you usually will have the option to voluntarily surrender your license at a later date, after you have spoken to your attorney about these problems. However, once you surrender your DEA license, you forfeit the protections provided by the legal process and you can rest assured that it is unlikely the DEA will voluntarily reissue your DEA license. Therefore, you have surrendered any leverage you might have as well as the right to prescribe controlled substances as part of your practice. You should note that surrendering your DEA license does not prohibit you from practicing medicine, but it does prohibit you from prescribing controlled substances.

This federal encounter also is likely to trigger contact from the Pennsylvania Department of State/Board of Med-

icine, requesting that you also voluntarily surrender your medical license. As with the DEA license, there will be ample opportunity to discuss this at a later date, but once you surrender the medical license, you also have waived any due process you might have before the State Board of Medicine with respect to defending yourself in a licensure action. You would thereafter be limited to reapplying for a medical license and appealing any rejection.

Conclusion

This article is not intended to be a primer on compliance plans for drug prescription programs or an exhaustive list of your due process rights in these matters. It is intended to alert you to the fact that you should insist upon your right to call an attorney before you commit yourself to an individual interview. It is typically never too late to cooperate with federal and state agencies during the investigation, although offering to cooperate as a last-gasp defense could well be futile. However, it is always too late to retract any statements, which may be videotaped, that you provide to the agencies during this first encounter.

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