

MARKETING HEALTHCARE SERVICES-TRAPS FOR THE UNWARY

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In a competitive healthcare system, marketing of healthcare services becomes important to not only bring new patients in the door, but also to retain existing patients. Before engaging in a marketing campaign, medical providers must be aware of the many laws applicable to the marketing of healthcare services. While not comprehensive, this article provides a summary of some of the more common laws applicable to providers so that you may avoid the traps that could negatively impact your practice and cause you to incur penalties.

ANTI-KICKBACK STATUTE

The federal Medicare and Medicaid Anti-Fraud and Abuse Law, 42 U.S.C. § 1320a-7(b) (the "Anti-Kickback Statute"), imposes both criminal and civil penalties on persons who either pay or receive illegal remuneration in exchange for the referral of federal health care program business (including services or supplies covered under Medicare or Medicaid). For purposes of the Anti-Kickback Statute, "remuneration" includes the transfer of anything of value, in cash or in-kind, directly or indirectly, covertly or overtly. Where remuneration is paid purposefully to induce referrals of items or services paid for by a federal health care program, the Anti-Kickback Statute is violated.

Providing free services to generate referrals is clearly suspect under the Anti-Kickback Statute. Whether free items are offered to a patient or to another health care provider, there is a risk that it will violate the Anti-Kickback Statute. Discounts are also suspect, though the Anti-Kickback Statute does contain an exception and a safe harbor for certain types of discounts and reductions in price that are properly disclosed and accurately reported. To be protected by the discount safe harbor, a discount given to a patient must satisfy all the safe harbor's specific requirements. Because of the complexity of such requirements, they will not be set forth herein. However, if you are considering offering patient discounts, you should have your marketing plan reviewed for compliance by a competent advisor.

Any time you have a situation where a marketing company receives a commission for business referred, you must consider whether the payment constitutes remuneration for referring individuals to the provider. Because the literal language of the Anti-Kickback Statute is so broad, the OIG has provided certain "safe harbors" which, if complied with, will shield a venture from prosecution if all of the requirements are met. One of those safe harbors applies to marketing performed by employees of the provider. Under the employee safe harbor, "remuneration" does not include any amount paid by an employer to a bona fide employee. Therefore, an employee marketer of a provider may properly receive commission-based compensation.

Providers are also permitted to hire independent contractors to serve as marketers under the personal services safe harbor. In order to qualify under this safe harbor, the following requirements must be met:

- Written agreement signed by the parties, specifying all services to be performed, the exact schedule of the services to be provided and the aggregate fair market value compensation to be paid.

- The compensation must not be determined in a manner that takes into account the volume or value of referrals or business for which payment is to be made.
- Services performed under the agreement cannot violate any state or federal law.
- Services contracted for are not in excess of those reasonably necessary to accomplish the commercially reasonable business purpose of the services.

CIVIL MONETARY PENALTIES LAW

The Civil Monetary Penalties Law ("CMP Law") prohibits offering or transferring remuneration to a Medicare or Medicaid beneficiary that the person knows or should know is likely to influence the beneficiary's selection of a particular provider, for which payment may be made in whole or in part by Medicare or Medicaid. Violation of the beneficiary inducement prohibitions of the CMP Law may be penalized by a civil fine of \$10,000 per item or service. In addition, the OIG may initiate administrative proceedings to exclude the offending party from federal health care programs. There are several exceptions to the general rule, including the following:

- Nominal gifts of a value of no more than \$10 per item and \$50.00 total per year.
- Incentives given to individuals to promote the delivery of preventive care services where delivery is not tied to the provision of others' services reimbursable by federal health care programs.
- Waiver of coinsurance and deductible amounts by a provider but only if certain enumerated requirements are met.
- Assistance to the needy.
- Remuneration which promotes access to care and poses a low risk of harm to patients and federal health care programs.

HIPAA

The Health Insurance Portability and Accountability Act of 1996, as amended, and the regulations issued pursuant thereto ("HIPAA"), requires a patient's written authorization before using or disclosing PHI for marketing purposes. For HIPAA purposes, "marketing" means making a communication about a product or service that encourages the recipient of the communication to purchase or use the product or service. HIPAA also prohibits the selling of PHI to business associates or other third parties without the prior written authorization of the patient. There are exceptions to HIPAA's general rule prohibiting marketing without a written authorization, including:

- Communications with an existing patient about the provider's own products or services.
- Communications made with an existing patient regarding the patient's treatment.
- Communications for case management or care coordination.
- Face-to-face communications between provider and patient.
- Communications about free health fair, wellness activity or discussion group.

With respect to patient testimonials, you must comply with the rules that pertain to marketing in general, as well as HIPAA. You must obtain the informed consent

of the patient to use the patient's name, story, and protected health information ("PHI") in marketing a product or service. The form of the consent must be HIPAA compliant for the release of PHI. Such a document should also limit your responsibility for compensating the patient for such services.

TELEPHONE CONSUMER PROTECTION ACT

The Telephone Consumer Protection Act ("TCPA") makes it unlawful for any person or entity to use an automatic telephone dialing system or an artificial or prerecorded voice message to call a wireless number. This also applies to text messaging. Violations can result in penalties of \$1,500 per call. Violations of the TCPA have become fertile ground for class-action lawsuits.

The TCPA has a healthcare exemption for autodialed calls to wireless numbers for certain restricted calls that have a healthcare treatment purpose. The types of calls that qualify under this exception include: appointment/exam confirmations and reminders, wellness checkups, hospital pre-registration instructions, lab results, post-discharge follow-up, prescription notifications and home healthcare instructions.

FEDERAL TRADE COMMISSION ACT

Misleading, false or deceptive advertising is prohibited by the Federal Trade Commission Act. The FTC has determined that a message is deceptive if it is likely to mislead consumers and affect consumer's behavior or decisions about a product or service. The law applies to all types of advertising including blogs, websites, and social media. The key to medical advertising is to substantiate the claim you are making with competent evidence. Testimonials and endorsements are generally not considered competent evidence to substantiate advertising claims.

AMA CODE OF MEDICAL ETHICS

The AMA Code of Medical Ethics also makes it unethical for a physician to engage in false or deceptive advertising. The American Medical Association has also considered splitting fees to be an unethical practice. Fee splitting occurs when a provider splits his or her fees for professional services in exchange for referrals. This practice is considered by the American Medical Association to be an unethical practice.

CONCLUSION

In an increasingly competitive market it is important for providers to enter into innovative marketing programs. However, given the number and complexity of the laws applicable to the marketing of healthcare services and products, it is crucial that all business arrangements and marketing programs be established and implemented properly and under the review of competent advisors.



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