Beware Gifts to Healthcare Providers, Patients or Other Referral Sources

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At this time of year, healthcare providers may want to give gifts to referring providers, patients or other sources of business; however, such gifts may violate federal and state fraud and abuse laws and result in fines—or worse—to both the giver and recipient. Here are some guidelines to ensure your gift giving does not get you in trouble with the government.

1. Gifts To Referral Sources. The federal **Anti-Kickback Statute ("AKS")** prohibits soliciting, offering, giving, or receiving remuneration in exchange for referrals for items or services covered by federal healthcare programs (*e.g.*, Medicare and Medicaid) unless the arrangement fits within a regulatory exception. (42 USC 1320a-7b(b)). AKS violations are felonies, and may result in criminal and civil penalties, False Claims Act liability, and exclusion from Medicare and Medicaid programs. The AKS is violated if "one purpose" of the remuneration is to induce federal program referrals, including gifts to referring practitioners or program beneficiaries to encourage or reward their business. (OIG Adv. Op. 12-14). Significantly, the AKS applies to both the giver and recipient; thus, soliciting or receiving gifts from vendors or other providers may expose the recipient to liability. The OIG has suggested that "nominal" gifts would not create much AKS risk, but offers no guidance as to what is "nominal". (65 FR 59441). The AKS does not expressly apply to referrals for private pay business, but the OIG has warned that offering remuneration to obtain private pay referrals may also induce federal program business and thereby violate the AKS. (OIG Adv. Op. 12-06). In addition, offering gifts to induce or reward private pay business may violate state laws, including state laws prohibiting kickbacks, rebates, or fee splitting. (*See*, *e.g.*, Idaho Code 41-348 and 54-1814). In short, you should not give or accept gifts to or from referral sources (especially those referring federal program business) unless the gift is truly nominal, is clearly and completely unrelated to past or future referrals, or is very unlikely to influence referrals.

2. Gifts to Referring Physicians. In addition to the AKS, gifts to referring physicians or their family members may also implicate the Ethics in Patient Referrals Act ("Stark"). Gifts create a financial relationship under Stark; accordingly, Stark would prohibit the physician from referring patients to the giver for certain designated health services payable by Medicare or Medicaid, and would prohibit the giver from billing for those services, unless a regulatory exception applies. (42 USC 1935nn; 42 CFR 411.353). Stark violations may result in civil penalties, repayments, and False Claims Act liability. Unlike the AKS, Stark is a strict liability statute: your intent does not matter. Stark does contain a limited exception that allows an entity to give unsolicited non-monetary gifts (not cash or cash

equivalents) of up to approximately $300 per calendar year if the gift does not take into account the business generated by the physician and otherwise does not violate the AKS (*i.e.*, not one purpose of the gift is to generate or reward referrals). (42 CFR 411.357(k)). In addition, entities with formal medical staffs may provide one local medical staff appreciation event for the entire medical staff per year. (*Id.* at 411.357(k)(4)). Any gifts or gratuities provided in connection with the annual appreciation event are subject to the annual $300 aggregate limit. In short, unless you are certain that the physician will not refer designated health services to you or you will not bill Medicare for such services, or you fit squarely within a Stark exception, you should not give gifts to or accept gifts from referring physicians or their family members. In addition, some state laws may contain mini-Stark laws that prohibit similar actions.

3. Gifts to Patients. Gifts to federal healthcare program beneficiaries trigger the AKS if one purpose is to induce the patient to receive services. In addition, the federal Civil Monetary Penalties Law ("CMPL") prohibits offering or transferring remuneration to Medicare or Medicaid beneficiaries if you know or should know that the remuneration is likely to influence the beneficiary to order or receive items or services payable by federal or state programs from a particular provider unless certain conditions are satisfied. (42 USC 1320a-7a). CMPL violations may also result in civil penalties, False Claims Act liability, and exclusion from federal programs. Unlike the AKS, the OIG has approved nominal gifts if they are not cash or cash equivalents, and they have a retail value of less than $10 individually or an aggregate value of $50 per year per patient. (OIG Bulletin, Offering Gifts and Inducements to Beneficiaries (8/02); 66 FR 24410-11). As with the AKS, the CMPL does not apply to private pay patients, although state kickback, rebate or fee splitting statutes may apply. As a practical matter, providers are likely safe if they fit within the $10/$50 limits for gifts to patients.

4. Gifts from Vendors. The AKS may also apply to gifts offered by vendors: it prohibits providers from soliciting or receiving such gifts as a reward or in exchange for referring federal program business to the vendors. (*See* OIG Compliance Program Guidance for Pharmaceutical Manufacturers, 68 FR 23738). As with other gifts between referral sources, you should not accept gifts of more than nominal value if you have referred or may refer federal program business to the vendor. In addition, such gifts may also trigger reporting requirements under the Sunshine Act regulations. (42 CFR part 403).

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