



CLIENT ADVISORY

HealthCare Fraud and Courtesies: What to Know Before Waiving a Copayment

Introduction

Many healthcare facilities and physicians waive the insurance copayment for physicians and their families (known as professional courtesy) or other patients. Yet, despite how prevalent the practice is and the limited enforcement of the laws regulating it, waiving a copayment can be illegal under federal or state law and can result in a breach of contract with a private insurance company.

The False Claims Act

A physician has violated The False Claims Act if he “knowingly and willfully makes or causes to be made any false statement or representation of a material fact in any application for any benefit or payment under a federal health care program.”¹ If Medicare becomes aware of a physician routinely waiving a copayment, it is instructed to determine whether the waiver

constitutes a reduction in the physician's actual charge which could result in a false claim if the physician files again with Medicare for full payment.²

The Federal Anti-Kickback Statute

Anyone who "knowingly and willfully solicits or receives any remuneration (including a kickback, bribe, or rebate) in return for referring or inducing an individual to refer a person for an item or service in which payment is made under a federal health care program" violates the Federal Anti-Kickback Statute.³ A physician receives an illegal remuneration when he forgives the financial obligations of his patients by waiving a copayment for reasons other than genuine and documented hardships.⁴

Federal Ethics in Patient Referrals Act ("Stark")

Under Stark, a physician may not make a referral to an entity for furnishing certain "designated health services" if the physician or his family has a financial relationship with the entity and is covered by Medicare or Medicaid.⁵ The term financial relationship includes any compensation arrangement such as remuneration.⁶ Stark does include a limited exception by which professional courtesies may be offered if the services are rendered for free and there is a showing of financial need.

Penalties under Federal Law

Penalties include criminal, civil, or administrative liability which can include imprisonment, criminal fines, civil damages and forfeitures, civil monetary penalties and exclusion from Medicare and the state health care program.⁷

Exceptions to the Federal Laws

The Office of the Inspector General (“OIG”) has stated that practitioners or suppliers may waive a copayment in consideration of a particular patient’s financial hardship, if the hardship exception is not routinely used and addresses the patient’s specific needs.⁸ Another important exception that many lawyers and practitioners have noted is offering free services, but this can be a costly practice.⁹

Private Insurance

Many private insurers in their participating provider agreements require physicians and medical facilities to make a good faith effort to collect copayments from patients.¹⁰ Similar to Medicare, an insurance company can refuse to reimburse a physician for its regularly priced services if the physician has too frequently waived a copayment arguing it is no longer his usual or customary charge.

Complying with the Laws of Rhode Island and Massachusetts

The Rhode Island Patient Protection Act and the Massachusetts Anti-Kickback Statute function similarly as the Federal Anti-Kickback Statute but also regulate physicians who accept private insurance as well as Medicaid.¹¹ The Rhode Island Medical Assistance Fraud Act and the Massachusetts False Claims Statute act as the state counterpart to the Federal False Claims Act.¹²

Conclusion

While it is difficult for the OIG and the State's Attorney General to monitor whether a physician is waiving a copayment and there are few examples of the OIG targeting physicians for doing so, it is still inadvisable as the law clearly prohibits the practice, absent financial need.

¹ 42 U.S.C. § 1320a-7b(a)(1).

² CMS Pub. 100-04, ch. 23 § 80.8.1. *See generally* 42 U.S.C. § 1395u(b)(3); 42 C.F.R. § 405.502(a); 42 C.F.R. § 414.21; *OIG Special Fraud Alerts*, 59 Fed. Reg. 65372 (Dec. 19, 1994).

³ 42 U.S.C. § 1320a-7b.

⁴ *OIG Special Fraud Alerts*. *See generally* 42 U.S.C. § 1320a-7b(b)(3)(A); 42 C.F.R. § 1001.952(h)(5)(iv).

⁵ 42 U.S.C. § 1395nn(a)(1)(A).

⁶ *Id.* § 1395nn(h)(1). *See generally Id.* § 1395nn(h)(1).

⁷ 18 U.S.C. §§ 287,1001; 31 U.S.C. § 3729; 42 C.F.R. § 1320a-7a1; 42 U.S.C. § 1320a-7b(b); 60 Fed. Reg. 16580 (March 31, 1995).

⁸ *OIG Special Fraud Alerts*.

⁹ *Professional Courtesy Problems*, Hawley Troxell (Dec. 20, 2011), <http://www.hawleytroxell.com/2011/12/professional-courtesy-problems/>; Monroe County Medical Society, *Co-pays and Courtesy: Clearing Away the Confusion*, American Academy of Pediatrics, <http://www.aap.org/en-us/professional-resources/practice-support/financing-and-payment/Billing-and-Payment/Pages/Private/Co-Pays-and-Courtesy-Clearing-Away-the-Confusion.aspx>.

¹⁰ Marc. K. Cohen, *Health Care Providers May Waiver Patients' Copayment Obligations, But...*, Ober Kaler Health Law Alert Newsletter (2014), <http://www.ober.com/publications/2472-health-care-providers-may-waive-patients-copayment-obligations-but>.

¹¹ R.I. Gen. Laws § 5-48.1-3; Mass. Gen. Laws ch. 175H § 3.

¹² R.I. Gen. Laws § 40-8.2-3; ALM GL ch. 12, § 5B(a).

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