Beneficiary Inducements

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Overview

- Understanding Illegal Inducements
  - PPACA Changes

- Sources of Guidance
  - 1991 Special Fraud Alert
  - 2002 Special Advisory Bulletin
  - Compliance Program Guidance
  - Advisory Opinions

- Risk Areas
What is an illegal inducement?

- Offering or transferring remuneration to a beneficiary of Medicare or a State health care program (including Medicaid) that is likely to influence the beneficiary to order or receive from a particular provider, practitioner, or supplier any item or service covered under Medicare or a State health care program. 42 U.S.C. Sec. 1320a-7a(a)(5).

- Requires intent (knew or should have known, which equals actual knowledge, deliberate ignorance or reckless disregard)
What is remuneration?

- Transfers of items or services for free or for other than fair market value.
- Waiver of coinsurance and deductible amounts (or any part thereof), unless they meet certain conditions:
  - Not offered as part of an advertisement or solicitation
  - Waivers are not routine
  - Good faith determination of beneficiary financial need
  - Failed to collect after reasonable efforts.
What else isn’t an inducement?

- Inexpensive, non-cash gifts of less than $10 each and no more than $50 in the aggregate on an annual, per patient basis (no inflation adjustments to date).
- Incentives to individuals to promote the delivery of preventive care services
  - Cannot be tied to the provision of other Medicare or State health care program services
  - No cash or “instruments convertible to cash”
  - No disproportionally large incentives
What else isn’t an inducement?

- Properly disclosed copayment differentials in health plans
- Practices permitted under the federal Antikickback Statute
- Waivers of hospital outpatient co-payments in excess of minimum co-payment amounts
How did PPACA change inducements?

New additional remuneration exceptions:

- Remuneration that promotes access to care and poses low risk of harm to patients and the Federal health care programs.
- Certain transfers of coupons, rebates, or retailer awards.
- Unadvertised transfers of items or services, connected to medical care, based on financial need.

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How did PPACA change inducements?
(cont.)

Final additional remuneration exception to be implemented no earlier than Jan. 1, 2011:

- Waiver by Prescription Drug Plan sponsor or Medicare Advantage Plan organization of any copayment for the first fill of a covered Part D generic drug for individuals enrolled in its PDP or MA-PDP.
What are the penalties?

- Civil monetary penalty of not more than $10,000 for each item or service ("wrongful act" per regulations)
- Assessment of not more than 3 times the amount claimed for each item or service; OR 3 times the amount of the remuneration (if also AKS violation)
- Exclusion
- Injunctive Relief
- Agency liability
- May also be violation of Antikickback Statute (FCA liability, CMPL liability, criminal liability)
How does the government enforce prohibitions?

- Document and testimonial subpoena authority
- CMPL: Administrative proceeding before an administrative law judge with appeal to Departmental Appeals Board and then federal Circuit Court.
- AKS: Criminal or civil proceeding in federal District Court.
- Settlements (or plea agreements) can be with either DOJ, OIG, or both.
Why does the government care?

- Quality concerns - offset cost of illegal inducement by reducing quality
- Cost Concerns - offset cost of illegal inducement by providing medically unnecessary services
- Favors larger providers who can better afford inducements and disadvantages smaller providers.
- Sign of other compliance problems
1991 Special Fraud Alert

- Addressed routine waivers of Part B copayments and deductibles.
- Concerned about false claims, AKS violations, excessive utilization.
- Focused on charge-based (as opposed to cost-based) providers because routine waivers misstate actual charges.
- Beneficiaries who have cost-sharing obligations are better health care consumers
- Introduced hardship exception
1991 Special Fraud Alert (cont.)

- Cautioned against advertising:
  - “Medicare Accepted As Payment in Full”
  - “Insurance Accepted As Payment in Full”
  - “No Out-of-Pocket Expenses”

- Routine use of financial hardship waivers without good faith attempt to assess need or reasonable collection efforts

- Sham “insurance programs” to cover copayments and deductibles
2002 Special Advisory Bulletin

- Announced the $10/$50 limits for nominal value
- Expect to limit favorable advisory opinions to situations very close to existing exceptions
- Provider funding of independent patient advocacy group or other organization to help beneficiaries okay so long as independent determination of need and receipt of remuneration not dependent on use of a particular provider
- Concern about indirect or word of mouth promotion or passive marketing
2002 Special Advisory Bulletin

- No special exception for beneficiaries with chronic medical conditions.
- Expressed concern about escalating inducement
- At time, was considering new exceptions for:
  - Complimentary local transportation
  - Government-sponsored clinical trials
  - Purchase of Medicare supplemental insurance by dialysis providers for persons with ESRD.
Compliance Program Guidance

Examples include --

- Hospital CPG: Addresses free transportation, cost-sharing waivers, discounts to uninsured patients (which are often confused with beneficiary inducements), and preventive care services.

- DMEPOS CPG: Addresses gifts to beneficiaries and marketing practices that potentially implicate CMPL.
Advisory Opinions

- Advisory Opinion 10-18 (favorable - free one-night post-surgical accommodations for pediatric tonsillectomy patients)
- Advisory Opinion 09-11 (favorable – free blood pressure screenings to walk-in visitors at hospital)
- Advisory Opinion 09-01 (favorable – complimentary local transportation program for friends and family of SNF residents)
Advisory Opinions (cont.)

- Advisory Opinion 08-03 (favorable – prompt pay discounts)
- Advisory Opinion 06-01 (unfavorable – free preoperative home safety assessments)
- Advisory Opinion 01-14 (favorable – waiver of copayment related to certain cancer screening services)
Risk Areas

- Transportation
- Health Fairs/Baby Showers/Free screening
- Patient Discounts
- Patient gifts and marketing practices

**Rule:** Use common sense and assess how likely a proposed inducement will be to influence beneficiaries.
Resources

- Beneficiary Inducement Civil Monetary Penalty, 42 U.S.C. Sec. 1320a-7a(a).
- Antikickback Statute, 42 U.S.C. Sec. 1320a-7b(b).
- 42 CFR Part 1003
- Special Fraud Alert: Routine Waiver of Copayments or Deductibles under Medicare Part B (May 1991).
- Special Advisory Bulletin, Offering Gifts and Other Inducements to Beneficiaries (Aug. 2002).
- OIG Advisory Opinions.
Questions?
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