

## **Marketing Hospice Services: Part VI**

### **What Can Discharge Planners/Case Managers Accept from Providers Who Want Referrals?**

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Discharge planners, case managers and social workers certainly cannot accept cash payments from providers in exchange for referrals of patients. But what can they accept from providers who want referrals? What about non-cash items that have a relatively low value? What about acceptance of referrals to provide services in the evenings and on weekends on behalf of providers who receive referrals from discharge planners/case managers?

The key area that must be considered to answer these questions involves a federal statute that prohibits illegal remuneration or kickbacks in the Medicare and Medicaid and other federal and state health care programs. This federal statute makes it a crime for providers to offer to give or actually give anything to anyone in order to induce referrals.

Providers who are not Medicare-certified or do not participate in the Medicare program such as so-called "private" providers may be tempted to ignore this statute.

Providers must remember that the fraud and abuse prohibitions also apply to companies that participate in Medicaid programs, including Medicaid waiver programs, as well as other federal and state health care programs, such as Tri-Care.

In addition, even if providers who want referrals do not accept payments from any federal or state health care programs, the case managers, discharge planners and social workers who make referrals often work for organizations that do. So they must comply with fraud and abuse prohibitions and providers of all types should assist them to do so.

Case managers and providers who violate this federal statute may be guilty of criminal conduct and may go to jail or be forced to pay large amounts of money in the form of fines or civil monetary penalties. They may also be excluded from participation in the Medicare/ Medicaid and other state and federal health care programs. If case managers are licensed, they also face loss of licensure.

The Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services, the primary enforcer of fraud and abuse prohibitions, has stated that regulations will be published that will help to define what items of nonmonetary value may be accepted from providers who receive referrals.

Until specific guidance on these issues is provided by the OIG, providers and case managers may be wise to apply final regulations under the Stark laws, even though the Stark laws technically apply only to physicians.

Specifically, the Stark regulations indicate that free items of low monetary value are unlikely to cause overutilization, if provided within reasonable limits. The regulations further state that as long as all of the following criteria are met, such nonmonetary compensation will not violate the Stark laws:

- The annual aggregate value of nonmonetary gifts does not exceed \$300.00.
- Providers that give nonmonetary compensation must make it available to those similarly situated, regardless of whether they refer patients to the provider for services.
- The compensation is not determined in any way that takes into account the volume or value of referrals to the provider.

Providers and case managers should also be aware of the following limitations under the Stark laws:

- Protection from violations of the Stark laws is not available for gifts that are solicited.
- The exception for non-monetary compensation up to \$300.00 only protects gifts to individuals.

At least in theory, providers and case managers could comply with the requirements of the Stark laws regarding nonmonetary compensation to physicians, but still violate the kickback statute describe above.

It seems unlikely, however, that the OIG will conclude that case managers received kickbacks and rebates, if the requirements of the Stark regulations described above are met. In other words, compliance with the requirements of the final Stark regulations may provide protection to case managers and providers with regard to non-monetary compensation received from providers by case managers even though they may not technically apply.

Providers and case managers should, of course, monitor developments in this area, especially since the OIG has stated that specific regulations that apply to all practitioners will be published in the near future.

What about discharge planners/case managers who “moonlight” for post-acute providers in the evenings and/or weekends? Can they provide services to patients who they referred in their role as hospital discharge planners?

When discharge planners/case managers provide services to patients they referred to post acute providers in their “day job” as discharge planners, they are likely engaging in prohibited cross referral arrangements that also violate the anti-kickback statute described above.

According to the Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services, the primary enforcer of fraud and abuse prohibitions, cross referral arrangements can best be described as relationships in which providers agree to refer patients to another provider in return for an agreement on the part of the provider receiving the referral to refer the patient back at a certain time or under certain circumstances. In other words a cross referral arrangements is one in which providers agree as follows: “You send me your patients and I’ll send you mine.”

When “moonlighting” discharge planners are paid per visit for their services by post-acute providers for services provided to patients they referred, the OIG is likely to be extremely concerned. The more patients discharge planners refer to post-acute providers, the more money they make when they provide services to these same patients on a per visit basis.

The temptations are many but there is a great deal to be lost!

[More information about this topic is available in a book entitled *Medicare/Medicaid Fraud and Abuse: A Practical Guide for Providers*. To obtain a copy of this book, send a check for \$30.00 (that includes shipping and handling) made out to Elizabeth E. Hogue, Esq. to: Fulfillment, 107 Guilford, Summerville, SC 29483.]