

OIG Provides Additional Guidance about “Pre-Operative” Activities

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The Office of Inspector General (OIG) of the U.S. Department of Health and Human Services, the primary enforcer of fraud and abuse prohibitions, has issued another Advisory Opinion about so-called “pre-operative” activities of home health agencies. The home health agency that requested the Advisory Opinion provides care to postoperative total knee and joint replacement patients. The services provided by the agency to these types of patients are often paid for by the Medicare, Medicaid, or other federal or state healthcare programs.

Orthopedic surgeons usually refer patients to the agency for post-surgical care at the same time that surgeons’ offices schedule patients’ operations. Surgeons or their staff members complete written referrals and forward them to the agency. No payment of money or allotments of goods or services are provided by the agency to surgeons or their staff members in connection with the referrals for post-surgical care. Likewise, the surgeons who make referrals do not own and are not employed by the agency.

After receipt of referrals, agency staff members call each referred patient on the telephone. During these calls, patients are reminded that surgeons referred patients to the agency. Also during the call, agency staff members confirm the information they have about each patient and remind them of their right to choose a different home health provider. Preparations are also made to send patients an educational video at some point prior to surgery.

The agency produced two (2) very similar videos, one (1) for patients who are scheduled for knee surgery and one (1) for patients scheduled for hip surgery. The videos educate patients about restrictions and physical limitations that post-surgical total joint replacement patients typically encounter during their convalescence at home following surgery. The videos advise patients on issues such as optimal furniture placement, sleeping and bathing, strategies for negotiating stairs, and what clothing, durable medical equipment, and special items or tools best suit patients’ special needs. Patients are also invited to consider the possibility that they may desire or need primary caregivers during convalescence.

The content of the videos consists primarily of scenes in which individuals and families demonstrate simple advance preparations for convalescence at home after surgery. They act out certain physical challenges of recovery after surgery. Individuals identified as former patients also speak on camera about their own process of recovery from surgery.

Voiceover and visual “placards” identify the agency as the producer of the videos at the beginning and end of the videos. Otherwise, there is no mention of the agency or its services. No substantive promotional claims are made on their behalf.

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The videos do not provide either medical advice or diagnoses. Instead, they advise patients to consult their own physicians and physical therapists about various issues. The OIG concluded that similar information is available on the Internet and from other public sources without charge.

Patients typically keep the videos. The agency does not charge for the videos and, according to the agency, they have no resale value. Patients are not required to view the videos in order to receive home health services.

In view of these facts, the OIG first pointed out that these activities may violate the federal statute governing illegal remuneration. The so-called “kickback” statute generally prohibits providers from offering to give or actually giving anything to anyone, including potential patients, to induce referrals. The OIG then considered the question of whether the free educational videos are remuneration to patients who receive them and whether their value is more than nominal, since providers generally cannot give patients items worth more than \$10 at a time or \$50 per year.

Specifically, the OIG said that the value of the videos to beneficiaries is the key issue. The OIG emphasized that the videos contain no medical advice or diagnoses by surgeons, physical therapists, or other health professionals related to individual patients’ conditions. Rather, the videos make only general suggestions and recommendations to obtain the personal advice of their health professionals about various issues.

The OIG concluded, therefore, that prospective patients who receive the videos are unlikely to believe that they have received items worth more than \$10.00 or be willing to pay such an amount if the videos were not provided for free.

The second issue addressed by the OIG was whether the videos are likely to influence patients to select the agency as their provider of post-operative care. The OIG concluded that the videos were unlikely to influence patients to choose the agency for the following reasons:

- Patients do not receive videos until after their surgeons have referred them to the agency.
- Implicit endorsement of the agency by surgeons determines patients’ ultimate choices of agencies.
- The content of the videos is applicable to patients regardless of which agency they ultimately choose.
- Similar content is widely available without charge on the Internet and from other sources.
- No personalized safety or health care recommendations accompany the videos.

Although the Advisory Opinion described above technically applies only to the agency that requested it, the Advisory Opinion may also provide useful information to other agencies. The Advisory Opinion seems to support agencies' programs to engage in certain pre-operative activities consistent with policies and procedures that appropriately address applicable requirements.