

Are Potential Kickback Issues Resolved by Payment of Fees to Third Parties Instead of Hospitals to Get on “Vendor Lists” or to Participate in “e-Discharge” Systems?

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Payments by post-acute providers to be placed on “vendor lists” or to participate in “e-discharge” systems may constitute prohibited kickbacks in violation of the federal anti-kickback statute. First, payments to be placed on vendor lists in order to get referrals are inappropriate because post-acute providers are not vendors. Since they are not vendors, such payments more clearly constitute prohibited kickbacks. With regard to e-discharge systems, Conditions of Participation (COP’s) of the Medicare Program for hospitals require them to provide discharge planning services, including initial implementation of discharge plans, subsequent modification of discharge plans, and communication of all necessary medical information.

In addition, 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, stated in a Special Fraud Alert published in August of 1995 that post-acute providers may not perform services for discharge planners/case managers that discharge planners/case managers are supposed to perform. Such free services, says the OIG, are clearly prohibited kickbacks. As a practical rule of thumb, the OIG says that providers should recognize that their conduct is a prohibited kickback when they bear the cost of things for which referral sources are obligated to pay, such as discharge planning services.

Suppose that payments from post-acute providers are made to third-parties; not directly to hospitals from which post-acute providers receive referrals? Are such payments still prohibited kickbacks? Does it make a difference that hospitals are not paid directly?

It is likely that such payments are prohibited kickbacks, even though hospitals do not receive the payments directly. Regardless of whose name appears on the check, the fact remains that post-acute providers are not vendors and hospitals must bear the entire cost of the discharge planning process. When providers make such payments, they bear a portion of the costs of credentialing vendors and for discharge planning services that are clearly the obligations of hospitals.

In fact, to the extent that such payments ensure that post-acute providers receive referrals or enhance the likelihood of receiving referrals, they are more clearly prohibited. Some e-discharge systems, for example, permit post-acute providers who do not make payments to continue to receive referrals. Providers who pay fees, however, receive referrals first or on an expedited basis so that they are able to respond more quickly, thereby receiving more referrals than providers who have not paid fees.

The pressure on post-acute providers to pay vendor fees and pay to participate in e-discharge systems is great. The risks must be carefully assessed.