

Primer on Medicare/Medicaid Fraud and Abuse - Part I

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There are many types of fraud and abuse in the Medicare/Medicaid and other state and federal health care programs. Two of the most important areas of concern for providers, including private duty home care providers, and case managers/discharge planners are: (1) illegal remuneration or kickbacks and rebates, and (2) false claims.

Primer on Fraud and Abuse

The basis for enforcement action against providers for illegal remuneration or kickbacks and rebates is a federal statute that says:

“(1) Whoever knowingly and willingly solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind --

- A. in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under this subchapter, or
- B. in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter,

shall be fined not more than \$25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person

- A. to refer an individual to a person for the furnishing or arranging for the furnishing, or any item or service for which payment may be made in whole or in part under this subchapter, or
- B. to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under this subchapter, shall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both...”

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In short, this statute makes it clear that providers and case managers/discharge planners may risk criminal prosecution if they either offer to give or actually give anything to anyone in order to induce referrals of patients.

The next important development in this area of the law came in the form of regulations that gave the primary enforcement agency, the Office of the Inspector General (OIG) of the U.S. Department of Health and Human Services, the authority to pursue violations of the statute civilly, as well as through criminal prosecution. These regulations allow the OIG to suspend or exclude providers from participation in the Medicare and Medicaid programs. The OIG also has the power to levy civil money penalties or fines for violations of the statute.

Because the statute governing kickbacks and rebates is extremely broad and vague, Congress asked the OIG to issue regulations to help to clarify what constitutes a kickback or rebate. In response, the OIG published a number of exceptions or "safe harbors" to the statute. Providers who bring their conduct within a "safe harbor" are assured that they will avoid violations of the statute. Providers that elect to remain out on the "open sea," so to speak, are not necessarily doing anything illegal, but they might be engaging in violations. Exceptions, or "safe harbors," were initially developed to cover investment interests, and personal services and management contracts, for example.

Providers and case managers/discharge planners that want to ensure compliance with the law must bring their conduct within the requirements of these safe harbors when they engage in conduct that may otherwise violate the statute.

Remember, when concerned about kickbacks and rebates, there are two essential questions that must be asked:

- (1) Is there a kickback or rebate?
- (2) If so, can the arrangement meet the criteria of an applicable safe harbor?

If the answer to the first question is "yes," the second question must be addressed. If the answer to (2) above is also "yes," then the arrangement is permissible even though it would otherwise violate the statute.

(To obtain more information about this topic in a book entitled Preventing Fraud and Abuse, 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. To obtain an 80-minute video or DVD to use to train staff, send a check for \$105.00 that includes shipping and handling to the above address.)

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