

Beneficiary inducements: What's permissible?

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Every month, Dermatology World covers legal issues in Legally Speaking. This month's author, Alice G. Gosfield, Esq., is a health care attorney at Alice G. Gosfield and Associates, P.C.

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The anti-kickback statute with its criminal and civil penalties, fines, and exclusion options is incredibly broad. It implicates a wide range of behavior among health care system participants and patients. It is applicable not just to Medicare and Medicaid, but to all federal health care programs. A long-standing prohibition under the statute has been against any person offering or giving remuneration to a patient that the giver knows or should know is likely to influence the patient to order or receive services from a particular provider. Virtually anything a physician might give to a patient could be seen as an inducement (42 CFR §1003.1000(a)).

Fortunately, there are federal regulations and a Special Advisory Bulletin that address permissible inducements. Before there were regulations, there was a bulletin that indicated that a physician could offer patients inexpensive gifts of up to now \$15 each with an annual limit of \$75 per patient. That remains in effect even though there are more recent regulations that permit additional specific inducements.

Local transportation

There is a safe harbor regulation — under the anti-kickback statute — that allows a physician to offer local transportation to a patient to get medically necessary services. 'Local' means no more than 25 miles in urban areas and no more than 50 miles in rural areas (42 CFR § 1001.952(bb)). The practice may not advertise the availability of the service and may only offer it to established patients. A patient who has made an appointment with the practice but has not yet been seen is considered established. A caseworker or social worker making the appointment does not make the patient established! It is permissible to use

vouchers with a third-party service or to reimburse the patient for travel expenses incurred based on a receipt. Signage on the transport, indicating who is sponsoring it, is permitted.

If local transportation will be made available, it must be pursuant to a formal policy which is applied uniformly and consistently setting forth the criteria for when the transport will be made available. Examples of factors that might be taken into account include:

- When it is unsafe for the patient to drive home after a procedure.
- When patients have a history of missed appointments.
- When it is based on financial need — the basis for determining such need must be stated.

The regulations also allow a shuttle service to be provided for free as well. The service is defined as "a vehicle that runs on a set route on a set schedule." This can be made available to new patients, not just established patients, along with family members and visitors. The same prohibitions pertain to marketing its availability and to using it only locally.

Access to care

There is also an exception to the inducement prohibition for promoting access to care, where the inducement poses a low risk of harm to patients and to the federal programs (42 CFR §1003.110). Here, there is more interpretive analysis that should be applied and obtaining legal advice would be wise. The remuneration must increase the beneficiary's ability to obtain care, which is defined as services or items payable by Medicare or a state health care program.

The factors that apply are that the items or services:

- Must support or help patients get access to care or make access more convenient.
- Eliminate socio-economic, educational, geographic, mobility, or other barriers to access to necessary care, which includes preventive care or following through on a treatment plan.

The form of remuneration does not matter as long as it is neither cash nor cash equivalents (like gift cards). So what types of things are they talking about? The regulators have offered examples which require some close scrutiny. The following are permitted:

- Providing free participation in smoking cessation, nutritional counseling, or disease-specific support groups.
- Providing free child care so a patient can attend an educational program.
- Providing a free blood pressure monitoring device or a purchase code for a smartphone app.
- Providing an item that dispenses medication at a predetermined time.
- Reimbursing parking expenses or providing free child care during office visits.

Free dinners or movie tickets, or offering a free debit card are not permitted.

Other inducements

In addition to the regulations which provide relief from the prior restrictive nominal value only policy, a number of OIG Advisory Opinions have approved various inducements that might be applicable by analogy to dermatology practices. These have included free educational videos to prospective patients, motivational incentives to reward patient achievement of goals at a substance abuse treatment center,

free oral nutritional supplements from a dialysis facility for malnourished dialysis patients, and free hearing tests for prospective hearing aid patients.

There is yet another exception to the civil money penalties for inducement based on financial need and these are broader than what is permitted above (42 CFR § 1103.110 (a)(7)). The determination of need must be an individualized assessment made in good faith on a case-by-case basis, although no specific documentation is required. There should be a policy which is uniformly applied. Need must be established based on independent data and not merely the patient's assertion of need. But allowable are car seats for infants, a health center offering items to incentivize preventive care — like a stroller or school supplies to patients who attend necessary preventive care appointments. Giving a diabetic compression stockings or offering a disease-management program are both legitimate as well.

Conclusion

What is permitted turns on context, but there is a fair degree of discretion for physician practices to curry favor with their patients. It is not hard to imagine what dermatology practices might offer — educational videos for treatment of various conditions, skin treatment accessories to enhance the application of prescribed drugs and lotions, providing sunscreen to pediatric patients. The point is that more is now allowed than has been before, but it would be important to obtain legal advice before initiating a program of beneficiary inducement. Any inducements should be the subject of a formal policy. In addition, how such inducements are made and who has authority to make such judgments should be included in the practice's compliance program. *dw*

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