
Gratitude or Gift: The Perils of Physician Gifts to Patients and Referral Sources (Part 1 of 2)



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“In some industries, it is acceptable to reward those who refer business to you. However, in the Federal health care programs, paying for referrals is a crime.” U.S. Dept. of Health & Human Services Office of the Inspector General, *A Roadmap for New Physicians: Avoiding Medicare and Medicaid Fraud and Abuse*.

“The Anti-Kickback Statute prohibits in the health care industry some practices that are common in other business sectors, such as offering gifts to reward past or potential new referrals.” *OIG Supplemental Compliance Guidance for Hospitals*, 70 Fed. Reg. at 4861 (Jan. 31, 2005).

Expressing gratitude and appreciation through gift-giving is usually considered a virtue. Giving gifts to clients, customers, or referral sources in most industries is also considered smart business. For physicians and other healthcare providers, however, even the most innocuously intended gifts to or from patients and referral sources can expose them to significant consequences.

While the regulatory landscape governing gifts to or from referral sources and patients is complex and nuanced, from the viewpoint of governmental regulators, complexity is not an excuse for non-compliance. As a result, health care providers should consult with an experienced health care attorney before giving or accepting gifts of more than nominal value to or from patients or referral sources.

However, just because a thorough analysis of the risks raised by gift-giving should involve legal counsel doesn't mean that physicians can't spot potential compliance issues. In fact, health care providers' gut reactions and commonsense approaches are the first lines of defense. To support physicians in their detection of compliance risks before they mature into expensive compliance problems, this article seeks to provide a brief and helpful summary of the laws that may apply, as well as some fundamental considerations to keep in mind when gifts are exchanged between physicians and their patients or referral sources.

The Legal and Regulatory Framework

Reimbursing over \$2 trillion every year to healthcare providers for the care and treatment of beneficiaries of Medicare, Medicaid, and other federal health care programs, federal and state governments respond aggressively to what they term “fraud, waste, and abuse.” That includes any arrangements that could corrupt medical decision-making and billing, lead to improper referrals or patient steering, and increase program costs.

At the federal level, three primary laws govern the giving or receiving of gifts to or from patients and referral sources:

- The Anti-Kickback Statute (“AKS”)
- The Ethics in Patient Referrals Act (the “Stark Law”)
- The Civil Monetary Penalties Law (“CMPL”)

The Anti-Kickback Statute

The AKS establishes criminal penalties for knowingly and willfully soliciting, offering, giving, or receiving remuneration (including non-monetary gifts) in exchange for referrals for items or services reimbursable under any federal healthcare program, including

Medicare and Medicaid. Referral sources covered by the AKS include (but are not limited to) fellow physicians and providers, groups, patients, staff, and vendors. The Department of Health & Human Services Office of Inspector General (“OIG”) has interpreted the AKS as covering any arrangement where even one purpose of the remuneration is to compensate for, or induce, referrals.

Violations of the AKS are felonies punishable by steep fines and imprisonment, constitute automatic violations of the federal False Claims Act (“FCA”) (which raises the specter of whistleblower suits, additional fines, and treble damages), and invariably lead to exclusion from participation in federal healthcare programs, including Medicare and Medicaid. While the AKS does not expressly apply to referrals for services reimbursed by private payors, the OIG has warned that offering remuneration even for private-pay referrals may violate the AKS if it otherwise induces federal program business.

Gifts to or from sources of referrals for items or services reimbursable under government health care programs, whether such gifts are in cash or in-kind, or are overt or covert, constitute “remuneration” subject to the AKS. Furthermore, while the AKS contains “safe harbors” that protect many common health care business arrangements from AKS liability, safe harbor protection is unavailable for most gifts. Of note, the OIG has stated that the AKS does not prohibit gifts of “nominal value,” but has not defined that term under the AKS. Because the OIG enforces both the AKS and CMPL (discussed below), however, gifts that fit within the parameters of the OIG’s CMPL guidance (in particular, the CMPL’s \$15/\$75 limit for non-monetary gifts) likely pose a low risk under the AKS.

The Stark Law

The Stark Law prohibits physicians from referring patients to receive “designated health services” (“DHS”) payable by Medicare from entities with which the physician (or an immediate family member of the physician) has a “financial relationship,” subject to specific exceptions. In addition, entities receiving referrals prohibited by the Stark Law are not entitled to submit claims for reimbursement of the referred items or services. The Stark Law defines “financial relationship” to include both direct and indirect ownership and investment interests and compensation arrangements.

“DHS” include:

- Clinical laboratory services
- Physical therapy, occupational therapy, and outpatient speech-language pathology services
- Radiology and certain other imaging services
- Radiation therapy services and supplies
- DME and supplies
- Parenteral and enteral nutrients, equipment, and supplies
- Prosthetics, orthotics, and prosthetic devices and supplies
- Home health services
- Outpatient prescription drugs

- Inpatient and outpatient hospital services

The Stark Law is a strict liability statute, meaning that no intent to violate the law, or even to engage in prohibited conduct, is required. Indeed, many Stark Law violations are unintentional. In addition to repayment obligations associated with prohibited claims for reimbursement, Stark Law violations can give rise to severe financial penalties and, in some cases where a violation is committed knowingly or a repayment obligation is not timely satisfied, liability under the FCA.

Any monetary or non-monetary gift between a physician and an entity performing or billing for DHS reimbursable by Medicare potentially creates a “financial relationship” triggering the Stark Law’s prohibition on referrals. Unlike the AKS, however, the Stark Law contains a specific “de minimis” exception for certain non-monetary gifts. Under this exception, entities may give physicians (and their immediate families) non-monetary gifts that do not exceed an aggregate of \$489 for calendar year 2023 (the permitted amount is indexed for inflation and changes every year on January 1) per physician, if both the following apply:

- The gift is not determined in any manner that takes into account the volume or value of referrals or other business generated for the entity by the referring physician.
- The gift is not solicited by the physician or physician’s practice (including staff) and does not violate the AKS or other state or federal laws.

The Civil Monetary Penalties Law

The Civil Monetary Penalties Law (“CMPL”) prohibits, in relevant part, offering or transferring a gift (or other remuneration) to a Medicare or Medicaid beneficiary (i.e., a patient) if the gifter knows or should know that the gift is likely to influence the beneficiary’s choice of a particular provider, practitioner, or supplier of items or services. As its name suggests, violations of the CMPL can result in severe monetary penalties. The prohibition applies both to potential or new patients, as well as to existing patients who may be influenced to continue using a particular provider for future services.

The OIG has interpreted the CMPL’s prohibition on patient gifts to allow for inexpensive non-cash gifts with a retail value of no more than \$15 individually and no more than \$75 in the aggregate annually per patient. Additionally, it may be permissible to offer a “gift” that constitutes an incentive for a beneficiary to obtain certain pre- and post-natal preventative care or that promotes access to care (by improving a beneficiary’s ability to obtain items and services payable by Medicare or Medicaid, and not just by rewarding beneficiaries for complying with a particular regimen or plan of care) and poses a low risk of harm to the patient or government programs. Similarly, free health screening services are permitted where (1) they are not conditioned on the use of any items or services from any particular provider, (2) patients are not directed to any particular provider, (3) patients are not offered

any special discounts or follow-up services, and (4) a patient with an abnormal result is advised to see their own health care professional.

State Laws

While federal laws receive the lion's share of attention in the realm of fraud and abuse, providers and their advisors neglect state laws at their peril. Many analogous state laws prohibit or limit kickbacks, self-referrals, fee-splitting, or rebates, and some state laws require the disclosure of financial conflicts of interest. Some of these laws attempt, with varying degrees of success, to mimic federal fraud, waste, and abuse laws. Others go even further than federal laws in restricting the ability of a health care provider to exchange a gift with a referral source or patient. Further, state laws often apply even where referrals or patients involve only services reimbursed by non-governmental payors. In many cases, helpful interpretative guidance is in short supply and must be obtained through direct communication with state officials. In short, state laws are an essential part of the compliance equation, and providers must evaluate them with the same seriousness as federal fraud and abuse laws.

***To be continued...** Please see Part 2 of this article in the April Sentinel – where we will cover Ethical Obligations, Takeaways, and Specific Circumstances. If you have questions regarding gifts, SVMIC recommends contacting your corporate attorney or our Medical Practice Services Department at ContactSVMIC@svmic.com or 800.342.2239.*

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