Dynamic Chiropractic

Remuneration for Referrals -- Legal or Illegal? -- Part I

FEDERAL BACKGROUND INFORMATION

Federal "illegal remuneration" statutes pertaining to individuals or entities which knowingly and willfully offer, pay, solicit or receive remuneration (i.e., compensation) in order to induce business reimbursement, under either federal or state health care programs, have been around since the late 1970s. They cover remuneration (which includes kickbacks, bribes, and rebates) made directly or indirectly, overtly or covertly, in cash or in kind, intended to induce referrals of patients, or to induce the purchasing, leasing, ordering, or arranging for any goods, facilities, services, or items paid for by federal or state programs.

In a recent case, United States vs. Bay state Ambulance and Hospital Rental Service, Inc., the United States District Court and the First Circuit Court of Appeals emphasized that the gravamen of a violation of the statute is "inducement," and not necessarily the structure of the arrangement. The First Circuit went on to say that case by case inquiries must necessarily focus on the intent of the parties.

Current Status

With regard to physician referrals, better known as the "Stark Bill," if a physician, or an immediate family member of such physician, has a financial relationship with an entity to whom referrals are made, it appears that the status will "infer" an intent on the part of the referring physician, and the person or entity to whom the patient is referred, to receive illegal remuneration.

Current penalties can include not only denial of payment for these referral services, but also, under some circumstances, criminal sanctions of up to five years imprisonment and a fine of up to $25,000 per occurrence.

Exceptions to These Federal Statutes

Effective July 29, 1991, the Medicare and Medicaid Patient and Program Protection Act implemented the final rules which specify various payment practices which, although potentially capable of inducing referrals of business under federal or state programs, are protected from criminal prosecution or civil sanctions under the so-called "anti-kickback" statutory provisions.

These "exceptions" are better known as the "Safe Harbor Regulations," which specify that in order for a business arrangement to comply with one of the 10 "Safe Harbors," each standard of that particular "Safe Harbor" would have to be met, as follows:

1. Investment Interests: To reflect the view that Congress did not intend to bar all investments by physicians in other health care entities to which they refer patients, a "Safe Harbor" provision was set up for investment interests in large public corporations (SEC registered securities available through a registered stock exchange) where such investments are available to the general public.

"Safe Harbor" provisions relating to limited and managing partnerships are similarly restrictive.

The regulations speak in terms of "active" and "passive" investors. "Active" investors are individuals equivalent to general partners or persons with similar liability and control over operations of the venture. "Passive" investors are equivalent to limited partners or stockholders of a corporation. To fall within the protection of the "Safe Harbor," all of the following eight requirements must be met:

a. Not more than 40 percent of each class of investment interests may be held by investors who are in a position to refer business to the entity.

b. The terms of the investment offer to passive investors who are in a position to refer business to the entity must be the same as the offer terms to non-referring passive investors.

c. The terms of an investment offer to an investor in a position to refer business to the offeror must not be related to previous or expected volumes of referrals to the entity.

d. There can be no requirement that the passive investor must refer business to the entity as a condition to remain as an investor.

e. The entity or any investor must not market or furnish the entity's items or services to passive investors differently than to non-investors.

f. Not more than 40 percent of gross revenues in the previous 12 months may come from referrals or business generated from investors.

g. Loans are prohibited from the entity to an investor in a position to refer business to the entity if the investor uses the loan proceeds to obtain an investment interest in the entity.

h. Return on an investor's interest must be proportional to the capital invested in the entity by the investor.

2. Space Rental: The regulations will construe or infer rental payments to be simply devices intended to mask illegal payments or induce referrals unless it can be specifically shown by the parties to the rental agreement that:

a. Access to the space is for periodic intervals, and that such intervals are set in advance in the lease, rather than based upon the number of referred patients.

b. The lease is for at least one year so that it cannot be readjusted on too frequent a basis to reflect prior referrals.

c. The rental charges reflect fair market values.

3. Equipment Rental: Since, in the past, it appears that the payment for the use of diagnostic and other medical equipment may have been merely a vehicle to provide reimbursement for referrals, the "Safe Harbor" for certain situations involving equipment rentals must be based upon the same criteria as those set forth for "Space Rentals" in #2 above.

4. Personal Services and Management Contracts: It was acknowledged by the authors of these rules and regulations that health care providers often have arrangements to perform services for each other on a mutually beneficial basis, and that some of these arrangements may vary the payment with the volume of referrals. Therefore, a "Safe Harbor" was implemented so long as:

a. There are limits on the opportunity to provide financial incentives in exchange for referrals.

b. The services are to be paid at fair market value.

c. The same criteria as set forth for "Space Rentals" and "Equipment Rentals" are met as in #2 and #3.

5. Sale of Practice: A "Safe Harbor" exists as long as the sale is not for the purpose of obtaining an ongoing source of patient referrals, and the sale occurs as a result of retirement or some other event that removes the physician from the practice itself (e.g., disability), or from the service area in which the doctor was practicing (e.g., moving to another geographical area).

6. Referral Services: A "Safe Harbor" was created for health care provider entities which refer members of the public to the participants, but with an extraordinary number of qualifications and caveats.

a. A "Save Harbor" exists for a referral service run by a professional organization which requires only that the participant be a dues-paying member of that organization to qualify for participation, but the referral service must apply the eligibility criteria equally to all participants in the referral service.

b. The referral service must disclose to all persons seeking a referral, the criteria it uses to determine who is qualified as a participant, such as how the "pool" of participants is selected, and how a particular participant is selected for referral.

c. Fee payments should be related only to the cost of operating the referral service, and the referral fees may not be based on the volume of referrals to the practitioner or provider.

7. Warranties: A "Safe Harbor" protection is proper where a manufacturer or a middleman/vendor does not pay or reimburse the health care provider for uncollected "co-payments" due from the patient, nor offers a price reduction on the item itself to the practitioner as a part of the "warranty."

8. Discounts: Discounts, employees and group purchasing organizations are specifically included under the "Safe Harbor" as exemptions, but does not protect marketing incentive programs such as cash rebate, free goods or services, redeemable coupons or credits.

a. Discounts are distinct from across-the-board price reductions offered to buyers where the inducement made is so diffuse that it does not appear intended to encourage a particular buyer to purchase a particular item or service. Where a laboratory or other provider of health care products offers a discount to doctors who then bill the patient, but who does not offer the same discount to the federal or state program which is picking up the tab, the discount does not benefit the payer, and is therefore inconsistent with the statutory intent for discounts, and is therefore not covered by a "Safe Harbor."

b. Another area in which a "Safe Harbor" does not exist is when an entity, which is a provider or supplier of items or services and a joint venture partner with the referring health care provider, makes discounts to the joint venture as a way to share its profits with the referring partners. These arrangements are not arm's-length transactions where the joint venture entity shops around for the best price on an item or service. Rather, it will be construed as having entered into a collusive arrangement with a particular provider or supplier of items or services that seeks to share its profits with the referring partner.

"Discounts," therefore, are clarified to permit only transactions made on an arm's-length basis.

9. Employees: Any attempts to circumvent the federal guidelines on illegal remuneration through the "employment" of individuals or entities will fall outside the "Safe Harbor" areas established unless the employee is engaged in a bona fide employment relationship with the employer, as defined by the IRS. The only way in which health care providers may obtain "Safe Harbor" protection for payments to these individuals or entities is to draft their personal/personnel employment contracts to satisfy the "Save Harbor" provisions for personal services and management contracts as set forth in #4 above.

10. Group Purchasing Organizations ("GPO"): This "Safe Harbor" exception is designed to apply to payments from vendors to entities authorized to act as a GPO for individuals or entities who are furnishing health care services, which are paid for by federal or state programs. This "Safe Harbor" requires a written agreement between the GPO and the individual or entity that specifies the amounts vendors will pay the GPO. Where the exact fee cannot be ascertained at the time that the contract is entered into, the contract must state the maximum amount that could be paid to the GPO by the vendor.

Watch for Part II in a future issue of Dynamic Chiropractic.

Rodney M. Phelps, J.D., D.C.
Dallas, Texas

JULY 1992

©2024 Dynanamic Chiropractic™ All Rights Reserved