Part B Insider (Multispecialty) Coding Alert

Compliance: OIG Ups the Ante on Holiday Gift Giving

New giving guideline offers options but also brings a heftier fine.

The old saying goes: "Tis better to give than to receive." However, in healthcare, giving and receiving can be a tricky business. Showering lavish gifts of appreciation for referrals or on important patients during the holiday season can get you into hot water, and depending on the value and circumstances of your gift, can garner a substantial fine as a violation of the Anti-Kickback Statute (AKS).

Refresher course. What is the AKS? With the possibility of both criminal and civil retribution, kickbacks are more detrimental to the offender than referral fraud. Kickbacks refer to any acceptance of reward, incentive, or payment for a referral from anyone, or in technical terms, "patient referrals or the generation of business involving any item or service payable by the Federal healthcare programs," the AKS states.

You Should Tread Lightly

Though the temptation to spread the cheer around can be overwhelming, it's wise to check yourself and follow the rules. Under the AKS, even if you have the very best of intentions, gifts suggest a financial obligation, and that's a no-no.

"Gifts from health care providers to referral sources, patients, vendors, and colleagues can create unintentional sticky situations," cautions attorney **Patricia Hofstra** with Duane Morris in Chicago. "Many businesses give gifts during the holiday season as a token of friendship and appreciation, but for health care providers, the situation is complicated by the Stark laws and the anti-kickback fraud and abuse prohibitions."

An Increase for Beneficiary Gift Giving Is a Long Time Coming

With little leeway since 2000, the government had determined that gifts with a retail value equalling $10 per gift or $50 annually per patient were acceptable. With the need to address inflation, the limits have been lifted and are now $15 per gift and $75 annually effective immediately, a Federal Register report with the final rule on these revisions from Dec. 7, 2016 suggests. (See the Federal Register report here: https://www.federalregister.gov/documents/2016/12/07/2016-28293/medicare-and-state-health-care-programs-fraud-and-abuse-revisions-to-the-office-of-inspector)

"The prior caps—$10 and $50—had been in place for 16 years. In addition to the passage of time, the modification was warranted from a fundamental fairness standpoint," **Christopher G. Janney, Esq.** of Dentons US LLP in Washington D.C. says. "If the federal government is going to increase the penalties associated with violations of the various fraud and abuse statutes—on the ground that such penalties should keep up with inflation—the same certainly holds true for the thresholds and caps included in the various exceptions and safe harbors."

Stick with the basics. Despite the slight increase related to beneficiary gift giving, it's still advisable to keep your monetary appreciation to a minimum. That may mean you have to put the kibosh on any luxurious gift baskets you were planning to give your favorite patient or referring physician. "Certain small gifts such as pens or coffee mugs are permissible, other larger gifts are not," Hofstra counsels.

What About Accepting Gifts?

You should exercise similar caution when it comes to accepting gifts, whether they come from referral sources, colleagues, or patients, suggests attorney **Ross Lanzafame** with Harter Secrest & Emery in Rochester, N.Y. Gifts from colleagues and patients can be particularly problematic, Lanzafame worries. That's because "although the gift may appear innocent, the act of giving and accepting a gift can potentially create a conflict of interest for the recipient," he says.

What's the problem? "When someone gives a gift, the social construct within which we generally operate is that the gift will in some way be reciprocated. It is the polite thing to do," Lanzafame explains. "This social construct can potentially tempt the recipient to make decisions not motivated by objective factors, but rather based on the subjective in order to reciprocate."

As Allowances Rise with Inflation, So Do the Penalties

Though the Federal Register final rule suggests that a $10,000 Civil Monetary Penalty (CMP) will be applied to each violation of the law, an adjustment from a Sept. 2016 Federal Register ruling gives the CMP as $15,024 per violation with inflation.

The CMP increase is notable, but Janney advises that providers don't need incentives to comply with the ruling. "Whether the penalty is $10,000, $15,000, or $20,000 per violation, the amounts are significant," he warns. "This, coupled with the rapid expansion of the whistleblower bar, increased state level attention to health law enforcement, and the already large and booming federal health law enforcement industrial complex, gives providers ample incentive to make every effort to comply with the law."

Tip: If you don't have a practice compliance policy that includes your gift-giving procedures, you should add that to your holiday to-do list. As with any revision to your healthcare compliance, enlisting a reputable health law expert is important to ensure that you are up-to-date on new rulings and regulations.

Bottom line: "Health care providers should consult with counsel and exercise caution when giving gifts during the holidays, or at any time, to avoid the appearance of impropriety and potential prosecution for legal and regulatory violations," Hofstra counsels.

To take a look at the Federal Register's CMP inflation changes," visit https://www.federalregister.gov/documents/2016/09/06/2016-18680/adjustment-of-civil-monetary-penalties-for-inflation.