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Eli's Hospice Insider

Compliance: Make Sure Employee Bonuses Don't Cross The Line Into Kickbacks

New indictment casts doubt on furnishing employee incentives.

What you call a good marketing strategy, the feds might call kickbacks. So suggests a new indictment that may teach some lessons to hospices that use employee incentives to reach financial goals.

Prosecutors have indicted nurse co-owners of **Goodwill Home Healthcare Inc.** in Lincolnwood, Ill., **Marilyn Maravilla** and **Junjee L. Arroyo**, plus nurse **Ferdinand Echavia** and marketers **Jean Holloway** and **Rakeshkumar Shah**. Goodwill, Maravilla, and Arroyo paid $400,000 in kickbacks in 2009 and 2010 for new patient referrals and existing patient recerts and disguised them as bonuses, according to a release from the **Department of Justice**.

Kickback payments generally ranged from $400 to $700 for each new episode, and $100 to $300 for each recertification, the indictment says. "By offering kickbacks, Maravilla, Arroyo, and others sought to increase Goodwill's patient census and to enrich themselves and Goodwill," the release says.

Details: "In January 2009, Maravilla and Arroyo allegedly created and circulated to Goodwill employees and affiliates a memo on Goodwill's letterhead that set forth a structure for kickbacks relating to patient re-certifications, disguising the illegal payments as 'bonuses,'" the DOJ says. "The memo provided that a $100 'bonus' would be given to nurses who re-certified a patient for a third cycle, and a $200 'bonus' would be given to a nurse who re-admitted a discharged patient a month after the discharge date."

Goodwill, Maravilla and Arroyo paid about $84,000 in kickbacks to Echavia and a company controlled by her; $10,400 to Holloway, $21,500 to Shah, $20,000 to two other marketers not charged, and $58,000 to at least three other nurses, the DOJ says. Maravilla and Arroyo also paid themselves "bonuses" totaling $138,000 and $44,000, respectively.

To make certain kickback payments to marketers in cash, Maravilla and Arroyo obtained Goodwill checks payable to them and recorded on Goodwill's books as 'loans,' the DOJ alleges.

"If the indictment means what it says," it could have far-reaching implications for how providers compensate their employees, says attorney **Liz Pearson** with **Pearson & Bernard** in Edgewood, Ky. The feds appear to be charging HHA owners and employees with kickback act violations for bonuses paid for referrals and for compensation paid to the staff for services -- both nursing and marketing, Pearson notes. "Very strange and huge implications if it becomes a successful prosecution," she warns.

Bona Fide Employees Escape Indictment

But the DOJ release and related complaint are not completely clear about whether the non-owner nurse or marketers are direct employees of the agency. It appears that prosecutors may have indicted the owners and non-directly-employed nurse and marketers and let the direct employees go, even though the DOJ makes it clear it doesn't like the system of rewarding employees for referrals, notes attorney **Robert Markette Jr.** with **Benesch Friedlander Coplan & Aronoff** in Indianapolis, who has read the complaint.

Bigger concern: If you are paying your staff, particularly clinicians, to meet financial goals, you likely will end up with patients who don't really qualify for the benefit on your rolls, Markette warns. "That's a much bigger issue than kickbacks," he tells **Eli**.

Hospices have seen charges in Medicare fraud lawsuits based on paying clinicians for admissions, having them meet admission goals, etc. (See Eli's Hospice Insider, Vol. 5, No. 2 for one such case.)

The U.S. Attorney's Office may not be indicting the direct employees of Goodwill, but it clearly doesn't like a bonus structure based on marketing goals, Markette points out. The DOJ may not feel the bona fide employee distinction "is all that important," he says.

Tip: If you are relying on the direct employee exception to keep you out of trouble with the anti-kickback statute, make sure the staffer in question is actually a bona fide employee, Markette advises. "The government is really looking at this issue," he warns.

"If a 1099 sales rep (independent contractor) generates Medicare/Medicaid business for the supplier, the provider CAN NOT pay the sales rep on a commission (or other type of production) basis," stresses attorney **Jeffrey Baird** with **Brown & Fortunato** in Amarillo, Texas. "Doing so violates the Medicare anti-kickback statute," Baird emphasizes in an article for the **Healthcare Quality Association on Accreditation** newsletter.

To form a bona fide employee relationship, providers should issue the employee a W2 tax form, withhold taxes for the staffer, and exert supervision and control over the employee, Baird says.

Note: To see Baird's article on sales staff as contractors versus W2 employees, go to www.hqaa.org/docs/ChampionChat/20111109vol2qtr4.pdf.