Unmasking the hidden dangers of health care marketing arrangements

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The Office of Inspector General (OIG) recently released Advisory Opinion 23-15, approving a consultant's request to offer gift card incentives to customers that referred its services to other health care providers. The consultant specifically provided optimization services which could, among other benefits, result in increased Medicare merit incentive payments for health care provider customers.

While some have interpreted this advisory opinion to herald new possibilities for health care marketing arrangements, providers and vendors shouldn't throw caution to the wind just yet.

Recent enforcement activity suggests that the government will be closely scrutinizing health care marketing arrangements — specifically for their potential to generate disguised kickbacks under the Anti-Kickback Statute (AKS). While this law is commonly enforced against health care providers, it can sometimes be overlooked by parties to health care marketing arrangements, particularly among software as a service (SaaS) vendors, consultants, and marketing companies that offer referral incentives to their existing health care clients or are otherwise engaged to generate health care business.

With steep penalties for non-compliance, it's essential for health care providers and their contractors to proceed with caution to avoid a legal misstep.

Bona fide payment or disguised kickback?

The AKS prohibits any person or entity from knowingly offering, receiving, or exchanging anything of value to induce or reward the referral of items or services that are payable by a federal health care program. While there are numerous safe harbors available — such as for routine business arrangements with contractors — these safe harbors generally require that compensation for a contractor's services be fair market value and not take into account the volume or value of referrals between the parties.

When a non-heath care company engages a marketing contractor, it is not uncommon to compensate the contractor based on the amount of business it generates, such as with a percentage commission or "per-click" arrangement. Much the same, vendors sometimes reward existing clients for each new business referral it generates for the vendor. But in a health care context, these types of compensation arrangements are fraught with risk and implicate AKS and other fraud and abuse laws because the arrangement is intended to generate business that is payable by federal health care programs.

Reimbursable services can hide in plain sight

Key to the OIG's favorable determination in Advisory Opinion 23-15 was that none of the vendor's services (or its affiliates' services) were actually reimbursable by federal health care programs. In addition, while the services optimized a health care provider's operations and submissions to the government and potentially resulted in higher incentive reimbursement, there was no remuneration in return for the provider's purchase, lease, or order of any item or service payable by a federal health care program.

Recent enforcement activity suggests that the government will be closely scrutinizing health care marketing arrangements — specifically for their potential to generate disguised kickbacks under the Anti-Kickback Statute.

However, organizations may jump to follow this new advisory opinion and overlook how reimbursable services are implicated by their marketing arrangements. For example, in 2023 an electronic health records (EHR) vendor settled alleged violations of AKS for similarly offering referral credits to its health care provider customers if their recommendation to another health care provider resulted in a new EHR sale.

In this case, the EHR was not an item directly reimbursed by government programs, but the EHR system was a required component for reimbursement under the government's EHR Incentive Program, causing the arrangement to trigger AKS. Therefore, health care providers and their contractors should understand that reimbursable services may not be immediately apparent and closely evaluate how any referral reward or payment could be directly or indirectly tied to a government-reimbursable item or service.

A carve-out won't necessarily provide legal cover

This OIG's determination in Advisory Opinion 23-15 may make it tempting to set up certain marketing and referral arrangements to expressly exclude or "carve-out" federal health care business, such as a marketing company seeking a commission for each *non*-federal health care program beneficiary it directs to a health care provider.

It's well established that health care providers are legally restricted from participating in many marketing activities that would be permitted in other industries.

However, the OIG has long held that carving out federal health care program beneficiaries or business from an arrangement can trigger an AKS violation, as any payments could nonetheless be a disguised kickback for other federal health program services that are also being referred to the provider.

It's also important for both health care providers and contractors to consider that states may have their own AKS corollaries which apply to services reimbursed by insurers, state-run programs, etc., making a carve-out ineffective in mitigating regulatory risk.

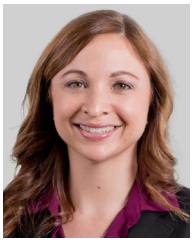
Doing indirectly what you cannot do directly will achieve the same result

It's well established that health care providers are legally restricted from participating in many marketing activities that would be permitted in other industries. Therefore, it's also crucial to understand that using a marketing contractor to carry out actions that cannot be done directly by the health care provider is also impermissible.

This could include the marketing contractor paying a kickback, disguised or not, to a referral source to induce a referral to the health care provider. If a marketing contractor engages in such activities in furtherance of generating business on behalf of the health care provider, both the marketing contractor and health care provider can be subject to legal penalties.

When contracting with a marketing vendor, it's imperative for the health care provider to negotiate appropriate compliance warranties and indemnification provisions to ensure the marketing vendor is engaging with referral sources, patients, subcontractors, and third parties in a compliant manner.

About the author



Erin Whaley is a partner at **Troutman Pepper** where she represents health care providers and payers on the full spectrum of legal issues. Her regulatory experience includes advising clients on compliance with the plethora of federal laws that govern the health care industry, including Stark, the Anti-Kickback Statute (AKS), the False Claims Act, and HIPAA, as well as state laws including state licensure, corporate practice of medicine, and certificates of need. She also assists clients with investigations and resolving compliance concerns. She is based in Richmond, Virginia, and can be reached at erin.whaley@troutman.com.

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