

PUBLICATION

HHS: Providers May Be Able to Subsidize Premiums For Uninsured in Marketplace Plans

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An announcement October 30 from Health and Human Services Secretary Kathleen Sebelius could remove the first hurdle for providers wishing to offer premium support for individuals eligible for health insurance on the Health Insurance Marketplaces.

Secretary Sebelius's letter to Rep. Jim McDermott (D-Wash.) clarified that hospitals will not be subject to liability under the federal Anti-Kickback Statute (AKS) for subsidizing plan premiums when they assist uninsured patients in enrolling in qualified health plans (QHPs) through the Health Insurance Marketplaces.

The announcement that QHPs are not federal health care programs for the purposes of the AKS broadens the possibility that providers, including hospitals and pharmaceutical companies, may be able to subsidize patients' QHP premiums as an alternative to providing uncompensated episodic care.

The Affordable Care Act provides for cost-sharing subsidies by the federal government to assist individuals in purchasing QHPs on the Marketplaces. However, despite these subsidies, some individuals may not be able to afford, or may choose not to purchase, health insurance. In these cases, when an uninsured patient seeks care at a hospital, it may be more economical for the hospital to assist the individual in enrolling in a QHP through the Marketplace, and pay some or all of that individual's plan premium, than to provide uncompensated care.

Until Secretary Sebelius's announcement, though, there was concern that because the federal government in many cases subsidizes individuals' enrollments in QHPs by paying part of the premiums directly to the QHPs, those QHPs, or even the Marketplaces themselves, may fall within the AKS's definition of "Federal health care programs."

Anti-Kickback Statute

The AKS broadly prohibits the knowing and willful offer or payment of any remuneration (directly or indirectly, in cash or in kind) to induce any person "to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program." The Health and Human Services Office of Inspector General (OIG) has long taken the position that remuneration to program beneficiaries may implicate the AKS.

Although the beneficiary inducements prohibition in the Civil Monetary Penalties law applies only to Medicare and Medicaid beneficiaries, as noted above, the AKS potentially applies more broadly to beneficiaries under any "Federal health care program." "Federal health care program" is defined to include "any plan or program that provides health benefits, whether directly, through insurance, or otherwise, which is funded directly, in whole or in part, by the United States Government" (other than the Federal Employee Health program).

The legality under the AKS of a hospital or other health care provider paying or subsidizing an insured's premium under a QHP thus presents the threshold issue of whether the QHP is a "Federal health care program." In concluding that QHPs are not "Federal health care programs," Secretary Sebelius effectively

determined that the AKS will not apply to such payments or subsidies, and removed the principal potential legal impediment to this practice.

Secretary Sebelius's letter to Rep. McDermott, which was drafted in consultation with the Department of Justice, also stated that, for the purpose of the AKS, "Federal health care program" does not include any Health Insurance Marketplaces; cost-sharing reductions and advance payments of the premium tax credit; Navigators for federally facilitated Health Insurance Marketplaces and other federally funded consumer assistance programs; consumer-oriented and -operated health insurance plans; or the risk adjustment, reinsurance, and risk corridors.

Other Legal Issues Remain

Despite the fact that the AKS will not apply to provider subsidies of QHP premiums, legal concerns still exist for providers that seek to provide such subsidies. For example, tax-exempt hospitals must still comply with general restrictions and requirements for Section 501(c)(3) organizations and Section 501(r) hospitals, satisfy a "community benefit standard," and avoid "private benefit" transactions that do not adequately serve public interests. Additional questions have been raised regarding the tax implications for individuals receiving the premium support and whether providers offering premium support may direct individuals to plans where the provider is in network.

The Secretary's letter emphasized ongoing law enforcement and consumer protection measures for Affordable Care Act programs, including the involvement of the Department of Justice, the OIG, the Federal Trade Commission, and state departments of insurance. For example, the OIG and the Department of Health and Human Services have authority to audit, investigate, and evaluate certain Affordable Care Act programs, including Health Insurance Marketplaces; the False Claims Act does apply to payments that include federal funds made in connection with a Health Insurance Marketplace; and additional federal and state criminal or civil authorities may apply to certain conduct.

State Insurance Laws

Case law in many states has established the kinds of relationships which are required for an insurable interest to exist. As a result, state insurance laws may also impact whether providers in a particular state may pay for an individual's premium subsidies. Providers located near state borders could find themselves dealing with differing state laws on this issue.

Marketplace Implications

Wednesday's clarification from HHS could clear the way for various forms of patient assistance and support paid directly or indirectly by providers. In September, the American Hospital Association announced that many of its members were considering ways to subsidize plans for eligible patients. The AHA publicly called for guidance from HHS, the OIG and Internal Revenue Service on whether hospitals could subsidize health insurance plans for patients off the Marketplaces either directly (by paying the premiums for the patient) or indirectly (by making a donation to a charitable foundation that would pay the premiums for the patient). Earlier this month, AHA published a Legal Advisory for members entitled "Potential Barriers To Hospital Subsidies For Health Insurance For Those In Need" which outlines some of the legal challenges that providers may face in offering premium support.

The initial open enrollment period presents a window of opportunity for individuals to obtain coverage through the Marketplace plans, with only a short waiting period. Plans purchased on or before December 15, 2013 will be effective January 1, 2014. Plans purchased between December 16, 2013 and January 1, 2014 will be

effective February 1, 2014. Plans purchased between January 1, 2014 and March 31, 2014 will be effective (a) the first day of the following month if purchased between the first and 15th day of each month or (b) first day of the second following month for plans purchased between the 16th and last day of the month. After the initial open enrollment period, individuals will only be able to obtain coverage on the Marketplaces during annual open enrollment (October 15 through December 7 of each year) or during special enrollment (upon the occurrence of a significant life or coverage event). This short waiting period during the initial open enrollment period could lead providers to select individuals with frequent or chronic medical needs for enrollment and premium subsidies. Significant legal questions remain regarding how providers may target patients and approach them for enrollment and/or premium subsidies.

Hospitals are not the only providers that are evaluating premium support arrangements. Pharmaceutical manufacturers are considering copay coupons available to patients who purchase insurance through the Marketplaces. Specialty health care providers, like dialysis companies, are also considering direct or indirect premium support offerings for patients.

Payers have expressed concerns about providers offering premium support to patients eligible for insurance on the Marketplaces. Many fear that providers will target individuals with frequent or chronic medical needs, leading to enrollment of patients with significant (and immediate) health care needs and an increase in the number of unhealthy individuals enrolled in the Marketplaces.

If you have any questions about how this HHS announcement may affect your business, please contact the Baker Donelson attorney with whom you regularly work, or any of the attorneys in the Firm's Health Law group.