PUBLICATION

OIG Approves Free Lodging and Meals Under "Promotes Access to Care" Exception to Beneficiary Inducement CMP

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In Advisory Opinion 17-01, published March 10, 2017, the Department of Health and Human Services, Office of Inspector General (OIG) approved an academic medical center's proposal to provide free or reduced-cost lodging and meals to certain financially-needy patients. Based on the specific facts presented, the OIG concluded the proposed arrangement would not constitute grounds for the imposition of civil monetary penalties under the civil monetary penalty against beneficiary inducements (Beneficiary Inducement CMP), or administrative sanctions under the anti-kickback statute.

The advisory opinion is notable in that it marks the first time the OIG has applied the "promotes-access-to-care" exception to the Beneficiary Inducement CMP. To that end, the OIG's analysis provides a roadmap for analyzing whether an arrangement "promotes access to care and poses a low risk of harm to patients and Federal health care programs," as required under the exception.

Overview of Facts

An academic medical center (Requester) sought approval to provide free or reduced-cost lodging and cafeteria meals to certain low-income patients receiving services at one of its four hospitals (the Hospital). The Hospital operates a Level I trauma center and provides specialized services such as organ transplants and advanced outpatient oncology. The arrangement would be limited to patients that meet the following criteria:

- Reside 90 or more miles from the Hospital;
- Live in either a medically underserved area (MUA) or a health professional shortage area (HPSA) of the Hospital's state;
- Have a household income of 500 percent or less of the federal poverty level (FPL) and otherwise meet the Requester's financial need criteria; and
- Are either: (a) required to be present for evaluation at the Hospital before 10:00 a.m.; or (b) have a follow-up appointment/surgery at the Hospital within 48 hours of on-site care.

The proposed free or reduced cost-lodging would consist of a single room at a modest hotel located two miles from the Hospital for one night before and up to two nights after treatment at the Hospital. Lodging would be free for participating patients whose income is at or below 138 percent of the FPL and reduced for incomes up to 500 percent of the FPL. While family members may stay with the patient in the hotel room, lodging would not otherwise be made separately available to family members.

The free or reduced-price meals would be made available for overnight stays only, and limited to $15 at the Hospital's cafeteria.

There would be no cap on the amount of free or reduced-cost lodging and meals patients could receive in a given year. That being said, the Requester anticipates only 100 to 200 of Hospital patients would qualify for the arrangement each year. Under no circumstances would cash, cash equivalents or other payments be provided to patients in lieu of the free or reduced-price lodging or meals.

Hospital staff would identify eligible patients only after they have been scheduled for treatment at the Hospital. The proposed arrangement would not be advertised, nor would any remuneration be provided to a clinician to encourage him or her to refer eligible patients to the hospital. Furthermore, the Requester certified that no costs of the proposed arrangement would be shifted to a federal health care program or costs otherwise reported on a Hospital cost report or claims.

Lastly, and of import, the Hospital agreed that it would not condition eligibility for the proposed arrangement on the receipt of any particular item or service from the Hospital. The Hospital would audit and monitor the proposed arrangement under its compliance program.

Legal Analysis

The OIG began its analysis by laying out the criteria necessary to satisfy the "promotes-access-to-care" exception to the Beneficiary Inducement CMP. To qualify for the exception, remuneration – in this case, free/reduced-price lodging and meals – must: (a) promote access to care; and (b) pose a low risk to the Medicare and Medicaid program and its beneficiaries.

Promotes Access to Care

The OIG explained that to "promote access to care," the remuneration must improve beneficiaries' ability to obtain items and services payable by Medicare or Medicaid. The OIG noted that arrangements should give patients the tools they need to remove barriers caused by socioeconomic, educational, geographic, mobility and other circumstances.

Here, the OIG concluded that the free/reduced-cost lodging and meals, which would be made available only to certain low-income patients from rural and/or medically underserved areas, would remove certain socioeconomic and geographic barriers that could prevent patients from getting necessary care, including early morning appointments and follow-up care.

Poses a Low Risk of Harm

The OIG indicated that to constitute a "low risk of harm," the remuneration provided must: (i) be unlikely to interfere with, or skew, clinical decision making; (ii) unlikely to increase costs to federal health care programs or beneficiaries through inappropriate or over-utilization; and (iii) not raise patient safety or quality of care concerns.

As applied to the free/reduced-cost lodging and meals, the OIG concluded that all three prongs of the test were satisfied.

First, the OIG held the proposed arrangement was unlikely to interfere with clinical decision making – clinicians were barred from receiving remuneration as an inducement to refer eligible patients and patient eligibility for the arrangement was not conditioned on the receipt of any particular service provided by the Hospital.

Second, the OIG determined the arrangement posed a low risk of overutilization – it was not advertised; no portion of the costs of the arrangement would be shifted to a federal health care program or reported on a cost report; and the small subset of eligible patients would be notified only *after* they were an established Hospital patient with a scheduled Hospital service.

Third, the OIG identified no patient safety or quality of care concerns – rather, it concluded the arrangement served to remove for patients logistical and financial obstacles to medically necessary care.

The OIG then noted that, although the CMP exception for promoting access to care is not directly applicable to the anti-kickback statute, the proposed arrangement would not be subject to sanctions under the anti-kickback statute based on the same reasoning outlined above.

Comments

Advisory Opinion 17-01 provides significant insight into how the OIG will apply the "promotes-access-to-care" exception under the Beneficiary Inducement CMP, and further demonstrates the exception's potentially broad reach. Of additional importance, the OIG appears to recognize that, while the exception is not strictly applicable to the anti-kickback statute, the same analysis of liability can be applied. Thus, health care providers now appear to have a fair amount of flexibility in designing programs to promote access to care.