

# Five Things Every Physician Needs to Know About Freebies and Discounts

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It's still true—Mom was right: there is no such thing as a free lunch. Below are 5 things every physician needs to know about freebies and discounts.

## 1. Do not Offer Routine Waivers of Co-Pays and Deductibles

Physicians should not routinely reduce or waive co-payments and deductibles for insured patients, including Medicare and Medicaid patients. Routinely waiving co-pays and deductibles is considered a fraudulent misrepresentation of physician charges against payors, as well as an improper inducement of patients to use the provider. Such waivers are prohibited by Wis. Stat. §146.905(2)<sup>1</sup> and by the federal Anti-Kickback Statute (AKS)<sup>2</sup> and Civil Monetary Penalty Law.<sup>3</sup> Furthermore, most insurance contracts require providers to bill and collect all copayments and deductibles, and to waive is therefore a breach of contract.

Waivers and other discounts are allowed on a case-by-case basis for a patient's financial hardship.<sup>4</sup> The following rules should be followed for hardship waivers/discounts:

- Have a written policy defining "hardship" (e.g. meeting federal poverty levels, eligible for Medicaid, etc.) and apply the

policy uniformly.

- Waive the co-pay and/or deductible only after determining in good faith that the individual is in financial need or after making reasonable (but failed) collection efforts.
- Do not advertise the waiver program or solicit patients for the program.
- Do not make waivers routinely.

The foregoing laws apply only to insured patients (commercial and governmental); waivers may be offered to self-pay patients.

## 2. Offer Patient Discounts Only to Self-Pay Patients

Discounts, such as prompt-pay and cash-up-front discounts, should not be given to insured patients in Wisconsin. Interestingly, the federal AKS allows legitimate discounts reflecting actual savings to the provider.<sup>5</sup> However, such discounts would be considered a reduction or elimination of cost-sharing amounts, which are prohibited by Wis. Stat. §146.905 except in cases of financial hardship. The discounts could also violate Wisconsin's insurance fraud law, Wis. Stat. §943.395, which could be avoided if the insurer was notified of the discount. However, nothing in Wis. Stat. §146.905 indicates that notice of the discount to the insurer will cure a violation, and that is why such discounts are not allowed in Wisconsin.

Be wary of an unpublished

2004 Wisconsin Attorney General Opinion stating that prompt pay discounts are allowed under §§943.395 and 146.905, so long as the insurer is fully informed of the discount and the discount is offered without discrimination. The opinion rests on public policy and cannot be harmonized easily with the actual language in Wis. Stat. §146.905 and should not be relied on.

So, the only patients who can be offered these types of discounts in Wisconsin are self-pay patients.<sup>6</sup> However, even with self-pay patients, physicians must be careful of offering discounts so often or so large that they affect the physician's "usual and customary" charge. This could lead to liability under the Wisconsin insurance fraud law<sup>7</sup> as well as federal law, which allows OIG to exclude providers from Medicare or Medicaid if they submit bills for amounts that are "substantially in excess" of their "usual charge."<sup>8</sup>

Follow these rules for a compliant discount plan:

- The discount must bear a reasonable relationship to the amount saved by the practice.
- Offer the discount only to self-pay patients.
- Do not advertise the discount.

## 3. Give Only Very Small Gifts to Patients

As a general rule, physicians should avoid giving gifts to patients. Three important laws prohibit gifts from physicians to patients: the federal

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anti-inducement provisions of HIPAA,<sup>9</sup> the AKS, and Wis. Stat. §49.49 (Medical Assistance anti-kickback statute), all of which prohibit remuneration that is likely to or intended to influence the patient's choice of provider.

It is permissible to give inexpensive non-cash gifts,<sup>10</sup> but consider these rules:

- Keep the gift nominal (no more than \$10 per gift/\$50 annually, per patient).
- Track the gifts by patient and amount.
- Do not advertise the giveaways.
- Do not give cash or cash equivalents.

It is also allowable to offer preventive care if it is (1) covered by Medicare or Medicaid and (2) either prenatal or postnatal well-baby care or services described in the *Guide to Clinical Preventative Services*.<sup>10</sup>

The above laws apply only to government-pay patients. While there are no laws that specifically prohibit gifts to commercially insured or self-pay patients, we recommend that all patients be treated equally, which means using the same limited gift policy for all patients.

#### 4. Avoid Gifts to and from Referral Sources

Physicians should ignore the old saying "it is better to give than to receive" and refrain from gifting to or from referral sources and business partners.

Gifts between physicians and referral sources or business partners may implicate the federal AKS. A gift can violate the AKS even if only 1 of its purposes is to induce referrals or business payable by a federal health program. There is no AKS "safe harbor" that covers the giving or receiving of gifts. Therefore, physicians should graciously say "no" to the cruise vacation offered by the drug rep, and send a nice

card to the neighboring physician in lieu of an expensive gift certificate.

Further, if the gift-giver provides any "designated health services" (eg radiology, physical therapy, lab, etc), the gift will be considered "compensation" under the federal Stark self-referral law and regulations,<sup>11</sup> thereby prohibiting Medicare referrals from the recipient to the gift-giver unless a Stark exception is met. While there is a Stark exception that covers nonmonetary compensation under \$300 per year per physician recipient, the compensation must not be:

- Related to the physician's referrals or business to the giver
- Solicited by the physician
- Violative of the AKS

Most gifts between physicians and referral sources would not meet these requirements (particularly the no-AKS violation requirement), and therefore would be prohibited.

#### 5. Proceed with Caution on Professional Courtesy

Professional courtesy is a time-honored tradition of providing medical care to physician colleagues or their families free of charge or at a reduced rate. However, the skeptic might see it as an inducement to the recipient to refer patients to the provider, in violation of the AKS and also the Stark law (if the physician offering the courtesy is a provider of designated health services). There is no AKS safe harbor for professional courtesy, and the applicable Stark exception covers only courtesy plans offered by entities with "formal medical staffs." Therefore, physicians take some risk when offering professional courtesy. Best practice would be as follows:

- Offer professional courtesy

on a non-discriminatory basis, meaning not just to those professionals who send business or patients to you.

- Require that the courtesy be reciprocal, so that it can be shown that the giver is receiving something of equal value in return.

#### References

1. Wis. Stat. §146.905 provides, "(1) A health care provider...that provides a service or product to an individual with coverage under a disability insurance policy... may not reduce or eliminate or offer to reduce or eliminate coinsurance or a deductible required under the terms of the disability insurance policy. (2) Subsection (1) does not apply if payment of the total fee would impose an undue financial hardship on the individual receiving the service or product."
2. 42 USC §1320a-7b(b).
3. 42 USC §1320a-7a(i)(6)(A) (expanded the definition of "remuneration" to include routine waivers of coinsurance and deductibles, for purposes of imposing civil monetary penalties).
4. Section 1128A(a)(5) (exception to definition of "remuneration" for non-routine waivers for financial hardship).
5. See OIG Advisory Opinion 08-03 favorably addressing a prompt-pay discount to Medicare and other insured patients.
6. Discounts could also be offered to patients who are insured, but the physician practice does not have a contract with the insurer, and the insurance company remits payment directly to the patient.
7. Wis. Stat. §943.395.
8. 42 USC §1320a-7(b)(6)(A) (note that regulations clarifying "usual charge" were proposed in 2003 but later withdrawn).
9. Section 1128A(a)(5) of the Social Security Act; 42 CFR 1003.101.
10. 42 CFR §1003.102(b)(13) (anti-inducement regulations).
11. Section 1877 of the Social Security Act; 42 CFR §411.351 et seq.

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