

“Pay Per Lead” Advertising May be Legal, But...

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On November 5, 2008, the Office of the Inspector General (OIG) released an Advisory Opinion explaining that, given certain important conditions and safeguards, chiropractors (and perhaps other healthcare providers) may pay for advertising on a “pay per call” or “pay per lead” basis (Advisory Opinion 08-19, available at: <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-19.pdf>). The conditions and safeguards described by the OIG, however, significantly narrow the universe of acceptable arrangements.

The Federal Anti-Kickback Statute makes it a criminal offense to provide or receive any remuneration to induce referrals for services covered by Medicare and Medicaid. Given the breadth of this prohibition, however, and the fact that it unintentionally encompassed many arrangements Congress recognized as both important and posing little risk of fraud, Congress directed The Department of Health and Human Services (HHS) to promulgate so called “Safe Harbor” regulations. Arrangements which meet every requirement of a Safe Harbor will not be subject to sanctions, even though they may technically violate the Anti-Kickback Statute’s prohibitions. Many arrangements, however, meet only some (not all) of a particular Safe Harbor. In those cases, the affected party may request that the OIG review the proposed arrangement and opine on its legality within the framework of the Anti-Kickback prohibitions.

Generally speaking, the OIG is adverse to issuing opinions entirely blessing a particular arrangement. Rather, they often issue opinions explaining that, while the arrangement in question may violate the Anti-Kickback statute’s broad prohibitions they will not, given the specific facts of this arrangement, seek to impose any sanctions on the parties involved. While these opinions are not applicable to any party other than the requestor (and may not, technically, be relied upon by any party other than the requestor) they provide important insight into the features that the OIG considers relevant in deciding whether or not to investigate or sanction providers involved in similar arrangements.

In this Advisory Opinion, the OIG was asked whether sanctions would be imposed against a provider of internet advertising leads who was paid by chiropractic providers on a “per call” or “per lead” basis. As is to be expected, the OIG was unwilling to state that an arrangement of this type will always be safe from government sanctions. It did, however, note that certain specific features of the arrangement in question led it to believe that the arrangement did not pose a threat sufficient to warrant sanctions.

The service being examined (which functions through a web site) asks prospective patients for their zip codes. In response, it provides a list of chiropractic providers in their geographic area, along with a contact email and telephone number. If a prospective patient contacts a particular provider through the supplied email or telephone number, the contacted provider pays the advertising service a fair market fee for their referral service.

In analyzing the arrangement, the OIG noted that it would not completely meet the requirements of any safe harbors. Accordingly, the arrangement could be subject to sanctions; as the OIG explained, advertising arrangements which involve “per patient,” “per unit of service” or other variable compensation structures are “particularly problematic.” Importantly however, the OIG specifically singled out certain features of the arrangement that it believed limited the threat of fraud or abuse posed by the arrangement:

- The advertising company is in no way involved in the healthcare industry other than as a referring advertiser (its referrals will not take advantage of a patient trust relationship, as in the case of so-called “white-coat” referrals from physicians);
- The advertising service web site does not collect any patient information, including any information regarding a patient’s insurance or eligibility for government benefits (it will not target or even distinguish federal program beneficiaries);
- The web site contains a clear disclaimer to patients that listed providers have paid to be listed on the service’s web site (a further bullwork against a patient’s potential belief that the service acts with any medical expertise);
- The price paid by the provider will be fair market value for the service provided and is not dependent on the services, including federal health care services, eventually purchased by patients (the payments will not be based on the “value” of the referral – a practice the OIG noted was specifically problematic);
- The service does not provide discounts, rebates, or other items of value to prospective patients or steer patients to any particular provider within their zip code (patient’s are not being induced to use a particular provider); and
- The service does not require providers to advertise for any set amount of time, nor will it require that providers pay any set amount of total payments – they are free to end the relationship at any time.

Given these facts, the OIG determined that it would not pursue sanctions against the parties, even though the arrangement may implicate the Anti-Kickback prohibitions.

This list, while not definitive, provides important guidance to providers of any health care service who wish to engage a similar referral service. While the opinion makes clear that such a referral relationship is possible, it also makes clear that relationships without sufficient safeguards run significant risk of government sanctions. Providers wishing to engage a referral service on a “per referral” basis should, at a minimum, ensure:

- They are paying fair market value for the “leads” they receive;
- They are paying based on the number of “leads;” not based on whether a prospective patient becomes a patient, or based on the value of services provided to a patient;
- The referral service does not in any way target, identify, or induce federal or state beneficiaries;
- The referral service does not offer to steer patients to a particular provider;
- The referral service is not:
 - Involved in the provision of healthcare (“white-coat” marketing), and
 - Does not in any way state or imply that it warrants a patient’s special trust, or that it has a unique knowledge of what constitutes a quality provider. It is worth noting that statements such as these may also invite the scrutiny of state professional boards.

Chiropractors should not mistake this opinion as allowing them to engage marketing or referral service companies on a “percentage basis of revenues” or “patients generated basis.” These arrangements besides being outside the Opinion, may be viewed as fee splitting by healthcare licensing boards and other regulatory agencies.

So the bottom line: you can contract with advertisers and referral services and pay on a per call or per lead basis, *but* the advertiser/referral services is itself not a health care provider or supplier, and that arrangement it does not target Medicare beneficiaries, is not based on whether patients actually receive care, the service is fair market value and uniform for all chiropractors and the referrals are not steered to any particular chiropractor, but are based solely on zip code or geographical proximity.