

# Gift-giving Guidelines

The Stark Law and the Anti-Kickback Statute serve as guidance when offering gifts and discounts

By DEVON BERNARD

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**WHEN DISCUSSING GIFTS OR** discounts intended for referral sources or patients, the conversation will eventually lead to the Stark Law and the Anti-Kickback Statute. The two rules often are confused for each other or used interchangeably because they both have the intent to control financial incentives that may influence the outcomes or type of treatment a patient may receive. However, the two laws are different in their scope, structure, and approach in curtailing financial incentives.

This month's *Compliance Corner* provides a quick comparison of the two regulations and explains what is allowed, what is not allowed, and the difference between restrictions on gifts and discounts for patients and referral sources. It's important to make sure gifts and discounts are not misconstrued as inducements, and that they don't inadvertently violate laws or regulations.

## The Stark Law Versus the Anti-Kickback Statute

The Stark Law was introduced in 1989, with the intent to halt or end the practice of self-referrals. The 1989 version of the law dealt only with physicians' referrals to clinical labs; however, it was later revised to expand the list of services, called "designated health services," to include nine additional types of care—including orthotic and prosthetic services. Specifically, the Stark Law is a civil statute that:

1. Prohibits physicians from making referrals for clinical laboratories or other designated health services (e.g., orthotics and prosthetics) to entities in which the physician has an ownership or financial interest.
2. Prohibits entities from presenting or causing to be presented [with] claims or bills to any individual, third-party payor, or other entity for designated health services (e.g., orthotics and prosthetics) furnished pursuant to a prohibited referral.

In a nutshell, physicians may not refer patients to an outside business with which they or their family members have a direct financial relationship. The punishment for violating the Stark Law may range from civil monetary penalties of \$15,000 for each violation (referral) to exclusion from federally funded programs.

On the flip side, the Anti-Kickback Statute, which was originally enacted in 1972 and has been modified and amended over the years, is a criminal statute that "prohibits the knowing and willful offer, payment, solicitation, or receipt of remuneration to induce federal health-care program business." In plain English, it is illegal to provide anything of value or perceived value, regardless of the monetary value, if the intent is to receive referrals of patients who are enrolled in government-funded health-care programs.

The penalties for violating the Anti-Kickback Statute are a little more severe than for the Stark Law, and



### For More Information

In addition to the directives discussed in this *Compliance Corner* article, AOPA has published its own document regarding the provision of gifts to referral sources. The 2009 document is based on guidance originally published by the Pharmaceutical Research and Manufacturers of America and is a valuable resource in determining how to offer gifts of minimal value to referral sources without running afoul of federal Anti-Kickback statutes.

The *American Orthotic and Prosthetic Association Code of Interaction With Health-Care Professionals* is available on AOPA's website, [www.aopanet.org/about-aopa/privacy-policy](http://www.aopanet.org/about-aopa/privacy-policy). This document is not legally binding but is to be used as a guideline, and it is intentionally stricter than the directives found in the Stark Law and the Anti-Kickback provisions.

may involve both a criminal and a civil penalty. On the criminal side, a violation of the Anti-Kickback Statute could lead to up to a five-year prison sentence and up to a \$25,000 fine per violation. On the civil side, violators could experience expulsion from federally funded programs and up to \$50,000 in fines per violation of the statute.

### Gifts to Referral Sources

When considering offering a gift to a referral source and/or its office staff, remember that gifts of cash or cash equivalents of any kind are prohibited. Cash equivalents include items such as gift certificates, gift cards, and even free samples of products.

If cash and cash equivalents are not an option, what types of gifts are acceptable? Nonmonetary gifts are allowed. However, there is a limit to the amount, or aggregate total, of nonmonetary gifts that is acceptable. This limit is increased annually to reflect inflation and is adjusted according to the increase in the Consumer Pricing Index. The aggregate limit for 2015 is \$392—and this is a limit, not an entitlement.

In addition to the value limit on nonmonetary gifts to referral sources, several other restrictions govern the provision of gifts.

First, the value of the gift may not be tied to the volume of referrals received from a physician's office. For example, you cannot provide a gift of

higher value to your regular referral sources than you do to practices that only refer patients periodically. While you are not required to offer the same gift to all of your referral sources, you cannot base your decision on the number of referrals you receive.

Second, gifts may not be solicited by referral sources. If a physician's office requests a specific gift and you provide it, the Office of the Inspector General (OIG) considers it an inducement in the hope of receiving future referrals and classifies it as a violation.

### Gifts to Medicare Patients

The Social Security Act (Section 1128 A(a)(5)) states: "A person who offers or transfers to a Medicare/Medicaid beneficiary any remuneration that the person knows or should know is likely to influence the beneficiary's selection of a particular supplier of Medicare/Medicaid payable items or services may be liable for civil money penalties." This statement might be construed as disallowing any gifts to patients. However, gift giving is allowed, with several restrictions.

In August 2002, OIG published a special fraud alert that set guidelines on gifts that providers may offer to Medicare beneficiaries; these guidelines are still active today. Three main rules must be followed:

1. **Gifts cannot be cash or eligible for cash equivalents.** Gifts of

cash or cash equivalents of any kind are strictly prohibited.

2. **Gifts must be "inexpensive."** The value of gifts to beneficiaries should not exceed \$10 per gift or \$50 aggregate per calendar year, which means you may offer a Medicare beneficiary a maximum of five gifts valued at \$10 in any calendar year.
3. **You may not give a gift with the intent of "securing your services to a patient."** For example, you cannot require that a patient come in for an evaluation in order to receive a gift, or mandate that a patient may receive a gift only if he or she chooses to receive a particular service or item.

### Patient Discounts

Providing a discount to a patient is much trickier than providing a gift. Several types of discounts have received safe harbor status or have been approved by CMS and/or OIG; here, we will focus on the two that O&P providers are most likely to use.

The first acceptable discount is a waiver of coinsurance and deductibles. You are permitted to waive coinsurances and deductibles, but only in cases where a patient is financially unable to pay. If this scenario exists, providers may make a case-by-case decision to waive a patient's coinsurance and/or deductible. This decision should be well documented in your records. While it is not a requirement to take extreme measures to document a patient's overall financial status (e.g., tax returns, pay stubs, etc.), you should document that you have reason to believe that the patient cannot afford his or her deductible or coinsurance and that you have made an individual decision to waive his or her financial responsibility. The method you use to determine a patient's financial status should be consistent and be followed evenly for all patients and by all billers/practitioners.

The second acceptable discount is a cash-pay or prompt-pay discount, or the discount you may offer if a patient is paying cash at the time of service or within an established timeframe.

When considering providing a cash-pay discount, you will need to take into consideration five requirements that are based on an OIG advisory opinion for a health-care system's prompt-pay program. (Note that the results of an advisory opinion are specific to the entity requesting the opinion, but the opinion may be used as a guidepost.)

The first and second requirements for cash-pay discounts go hand and hand. The discount program may not be advertised, and the only time patients may be informed of the discount is through the ordinary billing process. In other words, the availability of the discount should not be an inducement to a patient to choose your facility or your services over a competitor; rather, the discount eases the administrative burden (no need to bill or go through the collection process).

The third requirement is that all third-party payors must be aware of the discount, and the discount must apply and be available to all payors—not just Medicare patients.

Under the fourth requirement, any costs associated with providing the discount must be absorbed by the health system (supplier/provider). In other words, you may not charge other patients more to make up the difference in the discount.

With the fifth requirement, the discount must have a reasonable relationship to the amount saved by the health system (provider/supplier), or what should be a justifiable discount. The advisory opinion mentioned that discounts in the 5 to 15 percent range would be considered reasonable, and that these discounts should be applied to the allowable amount and not the "retail amount."

Also, as with a financial hardship-waived copay discount, a cash-pay discount should have clearly set parameters establishing when and how the discount is given.

Be sure to have a strong written policy in place that outlines your company's gift-giving and discount protocols. When dealing with discounts

and gifts for your patients and referral sources, consider consulting with an attorney, as it can be very easy to slip over the line from compliance to noncompliance. You also may request that the OIG render an advisory opinion on your particular arrangement or gift-giving plan, but this service is not free. For information on OIG advisory opinions, visit the OIG website. 



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