

Waiving Copays and Reducing Fees

NOTE: The following information is intended only as general information and should not be used as a substitute for legal advice. The legality of waiving co-payments and reducing medical fees can and will vary depending on the facts of each situation. Physicians and clinic managers with specific legal questions should seek the advice of their attorney.

LEGAL ISSUES AND OPTIONS ASSOCIATED WITH WAIVING COPAYMENTS FOR UNDERINSURED PATIENTS AND REDUCING FEES FOR UNINSURED PATIENTS

INTRODUCTION

Given the current economic climate, many health care providers are looking for ways to help make medical treatment more affordable for their patients. Some wonder if they can legally waive an insured patient's copayments or reduce their fees for the uninsured. The answer to these questions depends on the type of insurance that the patient has (public versus private); the frequency with which the physician seeks to reduce the copayments and/or fees; and the physician's reason for making the waiver or reduction.

CAN PHYSICIANS WAIVE COPAYS FOR PATIENTS WITH PUBLICALLY-FUNDED INSURANCE?

Patients who receive insurance through a federally-funded program (i.e., Medicare or Medicaid) generally may not be granted a copayment waiver except under limited circumstances. There are several laws that prohibit routine waivers of this type, including:

- The federal and state anti-kickback statutes;
- The federal and state false claims laws;
- The Civil Monetary Penalties law; and
- HIPAA.

■ Violation of Anti-kickback Statutes

Physicians who receive payment through the Medicare or Medicaid programs and who routinely waive copayments and/or deductibles may be held in violation of federal and state anti-kickback statutes.

The federal anti-kickback statute prohibits the payment of remuneration (meaning any kickback, bribe, or rebate) when it is knowingly used to induce business paid for with federal money.¹ By routinely waiving copayments or deductibles (i.e., without taking each individual patient's financial situation into account²), physicians could be providing an incen-

¹ 42 U.S.C. § 1320a-7b(b)

² See Addendum to "Hospital Discounts to Patients Who Cannot Afford to Pay their Hospital Bills (02/02/2004)" (6/18/07). The beneficiary's "financial need" will depend on the individual's circumstances. Providers should consider factors such as the local cost of living, the patient's income, assets and expenses, and the scope and extent of the patient's medical bills. Providers are encouraged to establish an indigency policy,

tive for patients to choose their practice over another one at the expense of the Medicare and Medicaid systems and, thus, they would be in violation of the federal (and state) anti-kickback statutes. These types of violations can result in significant civil and criminal fines, imprisonment, and/or both.³

That being said, the Office of the Inspector General stated that waiving Medicare and Medicaid copays or deductibles would not violate the Anti-kickback Statute if:

- The waiver is not offered as part of any advertisement or solicitation;
- The provider does not routinely waive coinsurance or deductibles; and
- The provider waives the coinsurance and deductibles after determining in good faith that the individual is in financial need or reasonable collection efforts have failed.⁴

With regard to state law, the Minnesota Provider Conflict of Interest law makes the same prohibitions that the federal anti-kickback statute provides, and it extends the federal statute to all persons in the state, regardless of whether they participate in any state health care program.⁵

■ False Claims Act

The federal False Claims Act is a whistleblower law for employees, patients, and other individuals who suspect that false or fraudulent claims are being submitted to the government.

The U.S. Department of Health and Human Services Office of Inspector General has stated that a routine waiver of copayments and/or deductibles is equivalent to misstating charges to government programs including Medicare and Medicaid.⁶

make an individualized determination of financial need consistent with that policy, and then document the financial need.

³ 42 U.S.C. § 1320a-7a(a)(7)

⁴ <http://oig.hhs.gov/fraud/docs/safeharborregulations/072991.htm> and <http://oig.hhs.gov/fraud/docs/alertsandbulletins/121994.html>

⁵ Minn., Stat. § 62J.23, subds. 1 and 2

⁶ Department of Health and Human Services Office of Inspector General 1991 Special Fraud Alert: <http://oig.hhs.gov/fraud/docs/safeharborregulations/072991.htm> visited July 29, 2009. <http://oig.hhs.gov/fraud/>



These types of waivers would, therefore, constitute a violation of the federal False Claims Act.

Persons found to be in violation of the federal False Claims Act will be assessed a civil penalty in addition to three times the amount of damages that the government sustains due to the submission of the fraudulent claim.⁷ Private parties who suspect a violation of the federal False Claims Act may also bring a lawsuit against the suspected violator. If the private party proves that an illegal violation of the Act occurred, they may be awarded up to 30 percent of the proceeds of the lawsuit.

Minnesota adopted a false claims statute⁸ in 2009 that will become effective July 1, 2010. The Minnesota statute is similar to the federal Act in that the damages are identical, and a whistleblower who files a lawsuit can obtain up to 30 percent of the recovery, depending on whether the state intervenes in the action. Given the recent adoption of this law, it is undetermined whether a routine waiver of copayments and/or deductibles would constitute a violation of the statute. That seems likely, however, given the Office of Inspector General Opinion stated above.

■ Civil Monetary Penalties Law

Under the Civil Monetary Penalties Law, a physician may not offer or transfer remuneration (including the waiver of coinsurance and deductible amounts, and the transfer of items or services for free or for other than fair market value⁹) to a patient who is eligible for Medicare or Medicaid if the physician knows or should know that the waiver is likely to influence the patient to order or receive an item or service that will be paid by a government program.¹⁰

A violation of this law can result in fines for each wrongful act.¹¹

There are some exceptions to this rule. Remuneration will not be found if the waiver meets the following three criteria:

1. It is not offered as part of an advertisement or solicitation;
2. The physician does not routinely (i.e. more than 50% of the time) waive co-insurance or deductible amounts; and
3. The waiver is granted after a good faith determination has been made that the patient has a financial need (or the physician is otherwise unable to collect coinsurance or deductible amounts after making reasonable collection efforts).¹²

■ Health Insurance Portability and Accountability Act (HIPAA)

The relevant portions of the HIPAA law are identical to the Civil Monetary Penalties Law, listed above.¹³

In terms of exceptions, according to an Office of Inspector

General Special Advisory Bulletin published in August 2002, gifts and services (other than cash or cash equivalents) with a retail value of no more than \$10 individually and no more than \$50 in the aggregate annually per patient may be provided by physicians to patients without being in violation of the HIPAA statute.¹⁴

CAN PHYSICIANS WAIVE COPAYS OR REDUCE FEES FOR PATIENTS WITH PRIVATELY-FUNDED INSURANCE?

Physicians may routinely waive co-pays, deductibles and/or reduce fees for patients with privately-funded insurance provided that the insurance carrier knows of the waiver and/or reduction, and agrees to it. If the insurance carrier does not agree to it, a physician risks being accused of insurance fraud.

For example, assume that a physician's usual and customary fee for a particular procedure is \$100. If an insurance company agrees to pay 80 percent of that fee (\$80.00) with the understanding that the remaining 20 percent will be paid by the patient, and then the physician routinely waives the patient's portion of the bill, the insurance company could claim that the physician was acting fraudulently because the usual and customary fee actually charged was 80% of the price originally quoted. This could result in the insurance company making the accusation that the it had been defrauded out of \$16.00 and that it only owes 80% of the \$80.00 it originally agreed to pay (\$64.00).

Health insurance companies are likely to be more lenient if the waiver of copayments and deductibles is only done on occasion to address the special financial needs of a particular patient, or when a good faith effort to collect the deductibles and copayment has been made.

CAN PHYSICIANS REDUCE FEES FOR UNINSURED PATIENTS?

The answer to this question depends on what your contracts with insurance carriers say. Some contracts contain clauses that prohibit providers from charging the insurance company more than what physicians charge other payers (including uninsured patients). Providers are encouraged to review their contracts for this type of provision prior to reducing their fees.

CONCLUSION

Physicians may on occasion waive copayments and deductibles for insured patients as well as reduce fees for uninsured patients. It is important that in doing so, they stay within the parameters of the laws and contracts summarized above.

docs/alertsandbulletins/121994.html visited August 5, 2009.

⁷ 31 U.S.C. § 3729 (a)

⁸ Minn. Stat. §§ 15C.01 – 15C.16

⁹ 42 U.S.C. § 1320a-7a(i)(6)

¹⁰ 42 U.S.C. § 1320a-7a (a)(5)

¹¹ 42 U.S.C. § 1320a-7a (a)(7)

¹² 42 U.S.C. § 1320a-7a(i)(6)(A)

¹³ 1128A(i)(6) of the Act; 42 CFR 1003.101.

¹⁴ <http://oig.hhs.gov/authorities/docs/FRversionofSABonOfferingGifts.pdf> (site visited August 17, 2009).