

Subject: FW: air ambulance working group call: 8/22/16

From: Jesse Riddle [mailto:jesseriddle@amrg.com]

Sent: Thursday, August 18, 2016 5:28 PM

Re: Honoring the membership of a competitor

It is my understanding that offering "reciprocity" may violate federal law, and a provider who honors a membership may subject both a company and individuals to civil and criminal penalties. Violation of a federal law may also lead to civil damages. You will find that larger companies honor memberships-- but only with affiliated companies that fall within their ownership structure.

A membership is one of the limited exceptions that permits a company to waive a copay, because there has been advanced consideration paid to the company waiving the copay (air medical companies generally have a 24-72 hour period before the membership is activated). According to the Department of Health and Human Services (HHS), Office of Inspector General (OIG), "It is unlawful to routinely waive co-payments, deductibles, coinsurances or other patient responsibility payments" (67 Fed. Reg. 72,896 (Dec. 9, 2002)) except in limited circumstances where consideration has been paid. This applies to health care and services paid by Medicare, TRICARE/CHAMPUS, and any other program paid partially or in full with federal funds.

The federal Civil Monetary Penalties Law ("CMPL") prohibits offering or transferring remuneration to federal program beneficiaries if the provider knows or should know that the remuneration is likely to influence the beneficiary to order or receive items or services payable by federal or state healthcare programs (e.g., Medicare) from a particular provider. (42 USC 1320a-7a(a)(5)). Violations may result in penalties of \$10,000 per item or service provided, treble damages, repayment of amounts paid, and exclusion from federal programs. (Id.; 42 CFR 1003.102). The CMPL specifically defines "remuneration" to include waivers of copays and deductibles. (42 USC 1320a-7a(l)).

The federal Anti-Kickback Statute ("AKS") prohibits knowingly and willfully offering, paying, soliciting or receiving remuneration to any person to induce such person to order or receive any items or service for which payment may be made under a federal healthcare program unless the arrangement fits within a regulatory safe harbor. (42 USC 1390a-7b(b)). The AKS is violated if "one purpose" of the remuneration is to induce federal program business. (United States v. Greber, 760 F.2d 68 (3rd Cir. 1985)). Violations may result in a five year prison term, \$25,000 criminal penalty, \$50,000 administrative penalty, treble damages, and exclusion from Medicare and Medicaid. (Id.; 42 CFR 1003.102).

The Affordable Care Act also made an AKS violation an automatic violation of the False Claims Act, which may result in additional penalties of \$5,500 to \$11,000 per claim submitted, and repayment of amounts improperly received. (42 USC 1320a-7a(a)(7); 42 CFR 1003.102). The Office of Inspector General ("OIG") has interpreted the Anti-Kickback Statute to apply to waiving patient cost sharing amounts if "one purpose" of the waiver is to induce or reward federal program business, a difficult standard to defend against.

Although air medical providers are not generally members of the American Medical Association ("AMA"), the AMA has suggested that this conduct may be "fraud."

By way of example, the Texas Medical Association has warned:

Many physicians routinely waive deductibles and copays for friends, relatives, other physicians, and their families and employees. If any of these individuals are covered by Medicare, these physicians could be facing fraud charges by the federal government. <https://www.texmed.org/Template.aspx?id=1929>

These references are not intended to be inclusive, but to provide to you some direction as to the risk in encouraging an unsuspecting person to ask for reciprocity.

If fines, penalties and imprisonment weren't enough, this conduct appears to be actionable. The insured has paid a membership fee to a specific company. There is a contract that establishes a mutually agreed upon deductible and copayment amounts. That contract has a financial incentive for the patient to use the services of that company, as well as a financial disincentive to use other providers. Because this is a legal binding agreement between two parties, by "honoring" a membership, and by presumably unilaterally and illegally waiving a patient deductible and copay in order to direct business away from the contracted entity to another, I would suggest that this would be a classic interference of a contract claim.

As most medical providers do not waive copays and deductibles, there is scant case law relating to the criminal prosecution of these cases. It would not be advisable for an air medical company to be the trendsetter violating what otherwise appears to be a compelling federal law to the contrary.

I would suggest a deletion of any language that encourages a person to possibly violate federal law (by asking if the company will honor a membership) and I would encourage the deletion of any implication that those companies who attempt to comply with federal law (and do not honor another's membership) somehow contribute to a higher cost of service. I would also suggest that those companies that honor the membership of another company seek legal advice regarding that continued practice.

Hope this helps in the dialogue.

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From: Mazanec, Nick [<mailto:NMazanec@mt.gov>]
Sent: Thursday, August 18, 2016 3:46 PM
Subject: RE: air ambulance working group call: 8/22/16

All,

Attached is the most recent version of the air ambulance brochure, along with a link to the latest version of the transparency website:

www.csimt.gov/airambulance

The latest modifications to the rate tables can be seen on the "fixed wing" subpage.

Thanks,

Nick