

Insights

OIG Issues Favorable Advisory Opinion on Waiver of Cost-Sharing Amounts for Charitable Pediatric Care

February 17, 2019

By: Marc T. Quigley and Andrew W. Breck

The OIG recently published favorable guidance in Advisory Opinion No. 19-01 regarding the waiver of cost-sharing amounts for charitable pediatric care in limited circumstances ("Arrangement"). While OIG concluded that the pediatric clinic's Arrangement could potentially generate prohibited remuneration, OIG stated that it would not impose sanctions under either the Anti-Kickback Statute or the Civil Monetary Penalties law because the arrangement impacts a limited number of patients and contains a variety of safeguards to reduce the risk of fraud and abuse.

Background

The pediatric clinic provides medical, psychiatric, and dental care to children residing in an area lacking sufficient local health care infrastructure. The clinic's patient eligibility guidelines include a geographic residential requirement, age requirement (from birth to 19 years old), and a financial need standard whereby the patient must either participate in a State health care insurance program or present evidence that his or her family's income does not exceed 200 percent of the Federal Poverty Level. A patient satisfying this criteria is identified as an "Enrolled Patient".

Clinic's Arrangement

In certain circumstances, the clinic may provide limited health care services to pediatric patients who do not satisfy the financial need standard ("Non-Enrolled Patients"). The clinic indicated that the limited services it provides Non-Enrolled Patients represents a small percentage of the total care it provides. Furthermore, the clinic indicated that it refers Non-Enrolled Patients receiving these limited services to other providers for any necessary follow-up care.

Under the clinic's Arrangement, it waives applicable patient cost-sharing amounts but bills and accepts payment from third party payors, including Federal health care programs. Of those patients who are Federal health care program beneficiaries, the substantial majority also participate in State health care insurance programs and, thus, owe no cost-sharing amounts under federal and state law. Therefore, a patient receiving care from the clinic would only owe Federal health care cost-sharing amounts in connection with services paid for by either TRICARE (for military members and their families) or Medicare (for the comparatively small population of children eligible for Medicare coverage in treating end-stage renal disease). Even then, cost-sharing amounts would be owed only

in the narrow circumstance when the patient's services are not also covered by a State health care insurance program.

OIG Analysis

Waivers of cost-sharing amounts may implicate prohibited remuneration under the Anti-Kickback Statute if the amounts waived relate to items or services reimbursed by Federal health care programs. Cost-sharing waivers may also implicate the Civil Monetary Penalties law if it is offered or paid to induce Medicare beneficiaries to select a specific provider, practitioner, or supplier. Due to a combination of the following factors, OIG concluded that the Arrangement presents a minimal risk of fraud and abuse:

1. The clinic waives Federal health care program cost-sharing amounts for very few patients, and the limited services provided to any Non-Enrolled Patients represent a small percentage of the clinic's aggregate services.
2. The clinic does not offer the waiver of cost-sharing amounts as part of any advertisement or solicitation.
3. The clinic does not offer any financial incentives to its providers either to order unnecessary care or to steer patient referrals to the clinic. The compensation it provides does not vary based on the volume or value of services provided or referrals made.
4. The clinic provides care to a vulnerable patient pool comprised of children living in poverty in an area lacking adequate local health care infrastructure.
5. The clinic does not consider a patient's medical condition or insurance coverage when determining eligibility and developing a treatment plan.
6. The clinic never ties the delivery of services to the provision of other services reimbursed by Federal health care programs.
7. The clinic does not claim the patient cost-sharing amount that it waives as bad debt or otherwise shift the burden of cost to Federal health care programs.

Conclusion

The waiver of cost-sharing amounts should only be considered after a thorough analysis of the facts and circumstances of the program at issue. The OIG's analysis focused on the limited situations in which waivers of cost-sharing amounts would be permissible. As such, health care organizations should carefully design and closely monitor any programs offering waivers of cost-sharing amounts to patients in order to structure such arrangements in a manner consistent with all applicable fraud and abuse laws.

The full Advisory Opinion can be accessed here: [Advisory Opinion 19-01](#). If you have any questions related to the Advisory Opinion or would like additional information about this topic, please contact Andrew W. Breck at abreck@kdlegal.com or Marc T. Quigley at mquigley@kdlegal.com.