

How to Structure Patient Transportation Programs

Strategies for Reducing Anti-Kickback and Beneficiary Inducement Risk

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As health care providers face mounting pressure to effectively manage the health of their attributed patients, providers have expanded their purview and started to address the social determinants of health—the factors that impact health beyond the four walls of the hospital. Providers have recognized that the effectiveness of their evidence-based disease management programs hinges in large part on engaging patients and ensuring proper follow-up care. One social determinant of health—access to transportation—has recently received focused attention from health care providers. Through complimentary local transportation programs, providers can ensure that patients lacking reliable modes of transportation still have access to needed health care services.

MSSP Fraud and Abuse Waivers Approve Transportation Programs

The laws and regulations associated with patient transportation programs have been subject to ongoing debate and revision in recent months. Most recently, on October 29, 2015, the Office of Inspector General (OIG) and the Centers for Medicare & Medicaid Services (CMS) published the final waiver for various fraud and abuse laws for accountable care organizations (ACOs) participating in the Medicare Shared Savings Program (MSSP).

Under the final waiver, ACO participants can be exempted from the federal Anti-Kickback Statute (AKS), the Stark Law, and the civil monetary penalties prohibition on beneficiary inducement (Beneficiary Inducement CMP) for ACO-related arrangements if certain requirements are met. Without the MSSP waivers, ACOs structuring transportation programs would remain subject to the limitations imposed by the AKS and the Beneficiary

Inducement CMP. The AKS prohibits the knowing payment or receipt of remuneration in exchange for referrals of federal health care program business. Remuneration is defined very broadly to include anything of value, which encompasses complimentary transportation provided to federal health care program beneficiaries. The Beneficiary Inducement CMP prohibits the payment of remuneration that a person knows or should know is likely to influence a beneficiary's selection of a particular provider or supplier of Medicare or Medicaid payable items or services. The OIG has previously expressed concern that complimentary transportation could improperly influence a beneficiary's choice of provider. Providers adhering to the requirements of the MSSP fraud and abuse waivers receive wide latitude to implement complimentary local transportation programs. The Patient Incentive Waiver waives the AKS and the Beneficiary Inducement CMP for items or services provided by an ACO, its participants, and its providers and suppliers to beneficiaries for free or below fair market value. To qualify for the waiver, the following criteria must be satisfied:

- The ACO has entered into a participation agreement and remains in good standing;
- There is a reasonable connection between the items or services and the medical care of the beneficiary;
- The items or services are in-kind; and
- The items or services relate to preventive care, the advancement of clinical goals, or the management of a chronic disease or condition.

The waiver begins on the date of the signed ACO participation agreement and ends upon expiration of the agreement or the date on which participation has been terminated. In the rule finalizing the waivers, the OIG clarified that the Patient Incentive Waiver permits ACOs to provide local transportation or pre-paid transportation vouchers as an in-kind item or service, but the waiver does not protect transportation for purposes unrelated to a beneficiary's medical care, such as for recreational events and running errands, or cash reimbursement for transportation costs.

Existing OIG Guidance Offers Framework for Structuring Compliant Programs

While the MSSP waivers offer significant latitude to ACOs structuring complimentary local transportation programs, providers not participating in the MSSP face greater uncertainty under the current regulatory framework. On their face, the AKS and Beneficiary Inducement CMP present significant barriers for providers seeking to structure transportation

programs. However, the OIG has published a series of favorable Advisory Opinions suggesting that providers may still implement these programs despite the absence of an AKS safe harbor. Programs with the following attributes have been found to present a low risk of fraud and abuse and would not face administrative sanctions under the AKS or the Beneficiary Inducement CMP:

- Services provided to patients do not account for past or anticipated volume or value of business or patients' use of specific items or services;
- The arrangement does not include air, luxury, or ambulance-level transportation;
- Drivers are not paid on a per-person or per-patient transported basis;
- Services are offered locally and do not involve transporting patients to locations outside the facility's service area to "leapfrog" competitor facilities;
- Providers do not market or advertise services to the general public;
- The provider bears the cost of the shuttle service and does not shift costs to Medicare, Medicaid, or other payers or individuals;
- The provider affirms the relative lack of available and affordable alternative means of transportation in the local area; and
- The provider has documented an individualized determination of beneficiary need, or has otherwise determined that transportation is necessary for ongoing compliance with a care plan.

Adhering to each of these requirements, while prudent from a compliance standpoint, may still expose providers to potential AKS and CMP liability because Advisory Opinions are binding only on the OIG and the party requesting the Opinion. The uncertainty surrounding future interpretations of complimentary transportation programs under different factual scenarios has caused many providers to move cautiously when implementing these programs, often limiting their scope and reach.

Recent OIG Proposed Transportation Safe Harbor Shows Softening of Position

Recognizing the hesitation among providers to structure patient transportation outside the MSSP, the OIG published a proposed rule in October 2014 that would create an AKS safe harbor for complimentary local transportation programs. In the proposed rule, the OIG made a strong pronouncement that the \$10 per item or service/\$50 aggregate per year limits applied under the "nominal value" standard may be "overly restrictive" in the context of patient transportation. Under the

proposed safe harbor, eligible entities would be permitted to offer free or discounted local transportation if the following requirements are satisfied:

- Services are offered only to established patients to obtain medically necessary items and services;
- Services are not related to past or anticipated health care business, and providers do not limit services only to patients referred from particular providers or to patients receiving a particular type of treatment;
- Transportation methods do not include air, luxury, or ambulance-level services;
- Services are not publicly advertised or otherwise marketed to patients or other potential referral sources;
- Only local transportation services are provided, which the OIG proposed to define as no more than 25 miles;
- Entities bear the cost of the service and do not shift the costs to federal or state health care programs, payers, or individuals; and
- Entities do not pay drivers or others involved in the program on a per-beneficiary transported basis and, instead, pay them on an hourly or mileage basis.

The proposed safe harbor would provide greater certainty to non-MSSP providers seeking to implement complimentary local transportation programs. The OIG has not yet finalized the proposal and has not indicated whether the safe harbor will be issued in the near future. In the meantime, providers are left with the OIG's Advisory Opinion guidance and welcome language in a proposed, but not yet finalized, safe harbor. Providers seeking to introduce complimentary local transportation programs would be well-advised to apply the standards referenced by the OIG in previous Advisory Opinions and the proposed safe harbor as the basis for limiting risk under the AKS and the CMP.

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