

Blog Post

When a Gift Becomes a Kickback: Gifts from Florida Pharmacies to Long-Term Care Facilities

May 22, 2024

By Martin R. Dix

The Florida Board of Pharmacy permits pharmacies serving residents and patients at long-term care facilities (nursing homes, ALFs, homes for DD residents, etc.) as either Special Closed System Pharmacies or Community Pharmacies. Normally the pharmacy and the long-term care (LTC) facility have a written agreement that governs the relationship between them. The pharmacy sends the patients' prescription medications to the facility for administration, but the facility does not actually pay for pharmacy services itself. Instead, the pharmacy relies on patients/residents and their insurance plans for reimbursement.

While the LTC facility can recommend the contracted pharmacy to their patients/residents, the patients/residents are free to choose their own pharmacy. With that said, most choose the pharmacy selected by the facility as their pharmacy provider. For that reason, we often see multiple pharmacies competing to serve the same facilities, and there is temptation for the pharmacy to offer, or for the facility to demand, free products or services to induce the facility to select one pharmacy over another. Of course, cash payments from the pharmacy would be illegal. However, other in-kind inducements can range from likely legal to clearly illegal, and no one wants to guess wrong and end up

Related People

Martin R. Dix

Related Work

Healthcare
Pharmacy, Drugs, and
Medical Devices

Related Offices

Tallahassee

Health Law Rx

Akerman Perspectives
on the Latest
Developments in
Healthcare Law

[Read blog posts](#)

in one of those ugly orange jumpsuits with a bunkmate named “Switchblade.” A discussion of examples of questionable gifts follows below.

Government payors such as Medicaid or Medicare pay for many patients’/residents’ pharmaceutical care, so if there are inducements to recommend or refer patients/residents to particular pharmacies, the federal Anti-Kickback Statute (AKS) can be implicated. The AKS is an intent-based statute with extremely harsh penalties, including fines of \$25,000 per violation, prison time of five years per violation, and exclusion from participation as a provider in federal health care programs. The OIG has historically taken the position that the AKS’ intent requirement is met if one purpose of the payment or service is to induce referrals. Florida also has multiple laws prohibiting fee splitting and the payment of inducements and kickbacks that impose substantial criminal penalties.

Free e-MARs and e-MORs

One area where we sometimes see issues is when a pharmacy offers or the facility demands free e-MORs or e-MARs for the facility. Kickbacks do not have to be cash and can be direct or indirect, and the government can prosecute both the giver of the gift and the recipient. There is no de minimis exception, so even a \$4 per month e-MAR can be a kickback. Moreover, the Board of Pharmacy rules specify that providing “patient medical records systems” to facilities at “no charge, below market value or below cost” in exchange for the pharmacy business is a violation. There is an AKS safe harbor for a person or entity (other than a clinical laboratory) providing electronic health records to another provider. However, there are multiple conditions that must be met for the arrangement to meet the safe harbor, including that the recipient must pay at least 15 percent of the costs of the e-MORs. It can be awkward to ask for payment for “free” e-MARs, so the parties sometimes ignore the 15 percent requirement at their peril. Not fully meeting a safe harbor does not necessarily equate to a violation of

law, but it would be unwise to pass up the chance to use an available safe harbor.

Free Over-the-Counter Drugs and Dietary Supplements

Another area that raises concerns is a pharmacy providing free over-the-counter drugs and dietary supplements (OTCs) to facilities so they can provide them to their patients/residents. The free goods can act as an inducement to both the patient/resident and the facility because the facility can use the offer of free goods to convince patients/residents to enroll in the facility.

Offers of or inducements to patients with care reimbursed by Medicare or Medicaid can also run afoul of the beneficiary inducement prohibition in the Federal Civil Money Penalty Statute (CMP). However, the U.S. Office of Inspector General has published a “de minimis exception” per gift to a patient of \$15 or less up to a maximum for all gifts of \$75 per year. The gift’s value is the value to the patient rather than the cost to the pharmacy. While this “safe harbor” helps as to the CMP, it would not help as to the offer of free OTCs to the facility under the AKS. Again, pharmacies that offer and facilities that accept such gifts do so at their own risk.

Free Training

Providing free training for facility staff is another common avenue to illegally induce facilities to hire the pharmacy for the facility. The Board of Pharmacy prohibits this conduct as a free service to the facility. Free services such as free training offered to facility staff are likely kickbacks under federal law and may constitute patient brokering under Florida law. There is not an issue with facilities paying fair market value for such training.

Both the Giver and Receiver at Risk

While this may seem like this is just a problem for the pharmacy, the facilities are also at risk. Federal

law allows prosecution of the facilities under the AKS, and Florida has laws making it illegal for nursing homes and ALFs to receive kickbacks.

What if I don't look good in orange or want a bunkmate named Switchblade?

First of all, avoid contracts that provide free goods or services from the pharmacy or other provider to the facility. Most of these contracts don't pass the smell test. If you are a member of a trade association, check with them and see if they have guidance. Or, better yet, consult with experienced healthcare counsel to help guide you in structuring these arrangements.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.