MAY 08, 2013

HEALTH CARE DAILY DEALS: GAINING NEW PATIENTS OR INVITING LEGAL HEADACHES?

"Daily deal" websites that offer discounted products and services are becoming more and more popular among health care providers for their ability to bring in new patients and attract attention among existing patients. It is estimated that one out of every eleven deals offered by daily deal websites are offering discounts on medical procedures, including dental treatments, teeth whitening, eye exams, chiropractic treatments and elective cosmetic procedures such as liposuction, treatment for varicose veins and laser hair removal. While the discounts vary, they are typically upward of 50% off the regular price. Health care providers must be aware that the offering of discounted services may violate various federal and state laws, rules and regulations, among the most significant: a risk of violating the Anti-Kickback Statute ("AKS") and the prohibition on fee-splitting. The use of daily deal websites may also affect a health care provider's relationship with third party payors.

ADVISORY OPINION 12-02

By selling discounted services and products and giving the health care provider half the amount, a daily deal website is making referrals to the health care provider through the online offer. The amount that the daily deal website collects depends on the number of discounted coupons sold, which is equivalent to the number of referrals. Therefore, the revenue split would vary depending on the volume of business, likely constituting a kickback, which is prohibited by federal law to the extent Medicare or Medicaid covers any of the services the patient receives.

The Office of Inspector General ("OIG") addressed this topic in Advisory Opinion 12-02, issued on March 27, 2012. Although the OIG did not directly address daily deal websites, it stated that the "proposed arrangement," which would allow health care providers and suppliers to offer coupons and advertisements on a website, would not lead to administrative sanctions or civil monetary penalties ("CMPs") under the AKS or the prohibition against providing inducements to beneficiaries because of certain characteristics of the proposed arrangement.

ANALYSIS OF PROPOSED ARRANGEMENT

The OIG found that the proposed arrangement was sufficiently low risk under the AKS due to a number of factors, including: (1) the company is not a health care provider or supplier; (2) the payments from providers and advertisers to the company do not depend in any way on consumers using the coupons or obtaining services from the providers or advertisers; (3) the consumers remain relatively anonymous, and other than through a consumer's use of a keyword search, no advertisement would be specifically directed at any particular consumer; and (4) the proposed arrangement required no up-front investment by the patient. Thus, according to the OIG, the health care provider is less likely to be improperly influenced to render medically unnecessary or inappropriate services.

Additionally, the OIG stated that the content of the coupons and the other safeguards mitigated the risk of improper inducements because the discount would also be passed to third party payors, including Medicare and Medicaid, and would apply to the entire item or service, rather than just the consumer's cost-sharing amount. As a result, the OIG concluded that the proposed website was more of a general conduit for advertising, rather than a website providing remuneration to a beneficiary to influence the choice of a particular provider or supplier.

While the OIG ultimately concluded that the proposed arrangement presented a low risk for violating the AKS and CMP provisions, it is possible that a payment made to, or retained by, a daily deal website could be determined to be an illegal payment in exchange for referrals. Further, offering discounted services or products may violate the prohibition against inducement to beneficiaries under the CMP provisions. The fact that a beneficiary is already a patient is irrelevant because the discounted service or product may improperly influence the beneficiary's future choice of a particular health care provider. Thus, it is critical for health care providers to understand the risks associated with participating in a daily deal program. Failure to conduct this element of due diligence creates heightened risk of violating the AKS and the CMP provisions.

FEE-SPLITTING PROHIBITIONS AND RECENT DECISIONS RELATING TO DAILY DEAL SITES

In addition to the AKS concerns, the use of daily deal websites may create potential fee splitting arrangements, which are prohibited by many states and considered unethical by the American Medical Association. Because the website retains a portion of the original payment, which technically represents a portion of the fee that the health care provider would have generated for his or her professional service, this arrangement, depending on the state, may constitute illegal fee-splitting.

Notably, however, several state licensing agencies have issued rulings regarding fee splitting of health care services offered on these sites. For example, on April 10, 2013, the Illinois Department of Financial and Professional Regulation issued a ruling that stated that advertising via vouchers was not considered fee-splitting as long as providers incorporated certain conditions in their arrangements with the daily deal websites. In order to meet these conditions, all voucher advertising in Illinois must include the following: (1) a description of the discounted price in comparison to the actual cost of services; (2) a disclosure that patients should not make health care decisions in haste; and (3) a disclosure to prospective patients that the patient's purchase price will be refunded in its entirety if it is later determined that the patient is not a candidate for the vouchered service. These conditions only apply to daily deal vouchers in the State of Illinois; however, other state licensing agencies, such as North Carolina, have issued similar statements. Likewise, some daily deal websites have worked alongside the Oregon State Board of Dentistry and Board of Chiropractic Examiners to develop a daily deal voucher model that would not constitute fee-splitting for Oregon health care providers. This included the creation of a flat fee arrangement where the health care provider pays an advertising fee to the daily deal website, and as a result, all fees paid by the beneficiary are passed through directly to the health care provider.

THIRD PARTY PAYOR CONTRACT VIOLATIONS

Health care providers considering daily deal arrangements should also ensure that they are not violating their contracts with insurance companies. Some of these contractual arrangements contain a "most favored nation" clause, which traditionally require a health care provider to give the best price for a particular service to beneficiaries of the insurer. If a health care provider offers a daily deal promotion for a particular service, an insurer could invoke this clause to compel the health care provider to offer the same discounted price for that particular service to all patients covered by the same insurer or potentially claim a breach of contract.

PRACTICAL TAKEAWAYS

Health care providers should be cautious when contemplating advertising or offering a coupon on a daily deal site. It is possible that a payment made to, or retained by, the website could be determined to be an illegal payment in exchange for referrals. Additionally, health care providers should determine whether there is a prohibition on fee-splitting in the state in which they practice and whether creating a coupon through a daily deal website may violate a contract with an insurance company. It is recommended that health care providers consult the advice of a health care attorney before partnering with any daily deal website.

If you have any questions or would like additional information about this matter, please contact:

- Gregg M. Wallander at 317-977-1431 or gwally@hallrender.com;
- Jennifer P. Viegas at 317-977-1485 or jviegas@hallrender.com;
- Susanne E. Crysler at 248-457-7843 or scrysler@hallrender.com;
- P. Peter VanLaan at 248-457-7828 or pvanlaan@hallrender.com; or
- Your regular Hall Render attorney.

Special thanks to Alyssa James, Law Clerk, for her assistance with the preparation of this Health Law News article.