

Home Health Care Agency Relationships with ALFs:

Beware of the Anti-Kickback Statute and "One Purpose Test"

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ENCOMPASS HOME HEALTH

In an effort to sustain and grow patient census, many home health care agencies ("Agencies") focus a great deal of attention on assisted living-type facilities (ALFs), where most of the residents are age-eligible for Medicare home health services if and when the need arises and the qualifications are met. While ALFs may be considered a fertile environment for potential home health care referrals, there are a myriad of opportunities for activities by Agencies which may fall into the category of Medicare 'fraud and abuse.'

The federal Anti-Kickback Statute (AKS) prohibits offering, paying, soliciting and accepting remuneration, directly or indirectly, in cash or in kind, overtly or covertly, to induce or reward the referral of Medicare, Medicaid or federal health care program-sponsored patients. The prohibition covers kickbacks, bribes, free services and other remunerative relationships (such as space rental) between a provider and patient referral source, extending to arrangements which are intended to induce or reward the ordering or arranging for services or products which are to be paid for by federal health care programs.

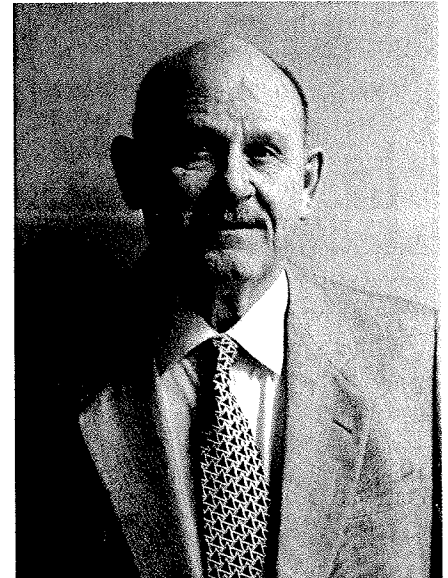
To obtain as many ALF patient referrals as possible, some Agencies rent space in ALFs and/or provide free services to the ALFs and their residents. The Office of the Inspector General (OIG) addressed the "space rental" issue in a Special Advisory Opinion in February 2000. Though the specific subject of the Opinion was the rental of space in physicians' offices by DME

providers, the principles of the Opinion apply today with regard to Agencies renting space in ALFs where the potential referral source is the landlord:

"...in such arrangements, the rental payments may be disguised 'kickbacks' to the (referral source-landlord) to induce referrals; payments that are either unnecessary or not at fair market value, in order to access the (landlord's) potential referrals."

To avoid an overt violation of the federal AKS, some Agencies rely on the space rental 'safe harbor' of the AKS, which permits a rental arrangement with a referral source if six specific qualifications are met. The key provisions of the 'safe harbor' are that the arrangement is at fair market value, in an arms length transaction, which does not take into account the volume or value of any referrals or other business between the parties; and there is a commercially reasonable business purpose for the rental arrangement, which does not attribute value to the space as a result of its proximity or convenience to sources of referrals.

As the business of an Agency is to deliver home health care services to qualified patients wherever they may reside, the OIG is likely to find it difficult to imagine a valid "commercially-reasonable business purpose" for an Agency to rent space in an ALF especially in light of the prohibitions on the elements of "convenience or proximity" to referrals. An Agency renting space in an ALF begs the question: If an Agency merely needs additional office space or a branch office in which



to conduct business, would it ordinarily, objectively choose to rent "commercially reasonable" space inside an ALF from a purely "business" perspective?

It is far more likely that an Agency rents space in an ALF with the intent and purpose of capturing the ALF's home care referrals, hiding behind the 'safe harbor' in an effort to justify the financial arrangement with the ALF, which plays along with the arrangement, most likely unaware of its potential liability under the AKS because it may be good for the ALF's business to have an in-house Agency.

Under the AKS, as amended by section 6402 of the Health Care Reform Law, culpability under the AKS now only requires that the parties to a remunerative arrangement intended to engage in an activity that is prohibited by law (i.e., paying or receiving rental payments with the intent and purpose of giving or receiving patient referrals).

Moreover, the Federal Courts' "one purpose test" holds that even if a rental arrangement has some basic legitimate business purpose, if even one

of those purposes is to knowingly induce, reward or arrange for a Medicare or Medicaid referral, the arrangement is illegal under the AKS, with both the Agency and the ALF subject to liability under this criminal statute. An illegal purpose cannot be a "commercially-reasonable business purpose" for protection under the "safe harbor."

Thus, a space rental arrangement in an ALF that some Agencies try to legitimize as having a "commercially-reasonable business purpose" may be trumped and negated by the federal "one purpose test." Any claims for payment to a federal health care program for services rendered to a patient in violation of the AKS may also be considered a violation of the False Claims Act, which carries additional criminal penalties.

In July 2010, the Texas Association for Home Care and Hospice commissioned the Gardere law firm to prepare the Anti-Referral and Anti-Kickback Laws: A Guide for Home Health Agencies and Hospices Operating in Texas. In discussing the space rental "safe harbor," the publication included the following caution regarding the safe harbor:

["Comment: Home health agencies and hospices renting space in assisted living facilities, hospitals, or physicians' offices must comply with the 'safe harbor.' Please pay particular attention to items (5) and (6) of the 'safe harbor': The home health agency or hospice must be able to show that the space is needed for its business purposes and the rental rate is at fair market value with no "kicker" for its proximity to potential referrals."]

A co-author of the Gardere publication later elaborated that "the one purpose rule should be met first and foremost" before a party can claim immunity from AKS liability under the space rental "safe harbor."

There are other creative scenarios where Agencies and ALFs have arrangements in which the ALF residents receive free services or benefits (read "remuneration") from the in-house presence of an Agency; such arrangements may be highly suspect for

violation of the illegal beneficiary inducement regulation, which prohibits an Agency from (1) giving cash-value gifts or services to a Medicare beneficiary which exceeds \$10, or (2) where an Agency develops a pre-admission personal or professional relationship with a beneficiary which the Agency knows or should know will influence the beneficiaries' choice of a home health services provider; this is a violation of both the illegal beneficiary statute and the AKS, giving rise to a potential violation of the False Claims Act.

In light of the revised 'intent' standard of the amended AKS and the prohibitions of the "one purpose rule," which casts a pale over the protection offered by the "safe harbor," Agencies should be very cautious and seek competent legal counsel when entering into any type of arrangement with an ALF or other referral source which involves space rental, the provision of free or discounted services to the referral source or non-patients and other arrangements which could be


suspect under the AKS and/or the illegal inducement statute.

Enforcement of the federal anti-fraud and abuse statutes is aggressively being stepped up by the OIG and Department of Justice through the Health Care Fraud Prevention and Enforcement Action Team (HEAT) and other programs in Texas and other states with a high incidence of fraud and abuse in federally-funded home health and other health care programs.

Report fraud and abuse to the OIG by calling (800) HHS-TIPS.

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