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Free or discounted local patient transportation given the green light by OIG in a new Anti-Kickback Statute safe harbor

Recently, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) implemented revisions to the federal Anti-Kickback Statute safe harbors and the beneficiary inducement prohibition in the civil monetary penalty rules. The [Medicare and State Health Care Programs: Fraud and Abuse; Revisions to the Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements](#) Final Rule modifies certain existing and adds additional Anti-Kickback Statute safe harbors, including a newly codified safe harbor exempting free or discounted local transportation provided to patients. The Final Rule was published in the *Federal Register* on Dec. 7, 2016 and went into effect on Jan. 6, 2017.

Anti-Kickback Statute overview

The Anti-Kickback Statute was enacted in 1972 to protect patients and federal health care programs from fraud and abuse. The Anti-Kickback Statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a federal health care program.

The statute assigns criminal liability to parties on both sides of an impermissible “kickback” transaction where the required elements are met, including that of intent. For purposes of the Anti-Kickback Statute, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind. A violation of the Anti-Kickback Statute can result in criminal and civil penalties.

Due to the broad range of transactions potentially implicated by the Anti-Kickback Statute, there are several statutory exemptions for certain types of payments. OIG has adopted certain voluntary safe harbors exempting certain arrangements from the Anti-Kickback Statute, provided that they meet certain requirements.

New Anti-Kickback Statute local transportation safe harbor

The new local transportation safe harbor, codified at 42 C.F.R. § 1001.952(bb), allows “eligible entities” to provide free or discounted local transportation to federal health care beneficiaries if certain specified criteria are met. An “eligible entity” is defined as any individual or entity, except individuals or entities (or family members acting on their behalf) that primarily supply health care items including, but not limited to, durable medical equipment suppliers and pharmaceutical companies.

The safe harbor protects complimentary local transportation both to a provider/supplier of services and back to a patient's home if the following requirements are met:

- The transportation must be for the purpose of obtaining medically necessary items or services.
- The distance of the transportation cannot exceed 25 miles for patients in urban areas and 50 miles for patients in rural areas.
- Eligible entities must have a set policy regarding the availability of transportation assistance and must apply that policy uniformly and consistently.
- Transportation assistance cannot be publicly advertised or marketed to patients or other potential referral sources. OIG does not consider signage designating the source on vehicles used for the transportation to be marketing. In addition, OIG does not consider informing established patients transportation assistance services are available to be marketing.
- No marketing of any health care items can occur during the course of the transportation.
- The transportation cannot take the form of air, luxury vehicle or ambulance.
- The transportation can only be made available to established patients (and if needed, a person to assist the patient) to obtain medically necessary services (a patient is "established" as soon as the patient makes an appointment at an eligible entity, as long as the patient selected the facility on his or her own initiative). The safe harbor does not require documentation that patients receiving transportation are established patients; however, maintaining such documentation is a recommended best practice.
- The transportation must be made available to all established patients and not be determined in a manner related to past or anticipated volume or value of federal health care business. An eligible entity can transport patients to another provider or supplier that is a referral source, but the transportation offered cannot be contingent on the patient choosing a referral source.
- Accountable Care Organizations or similar entities may assist its affiliates in providing transportation.
- Eligible entities (or their affiliates) must bear the cost of the transportation they provide. A transportation program may use vouchers rather than having the transportation provided directly by the eligible entity. If transportation is offered via a driver or private company hired by the eligible entity, the eligible entity cannot pay the driver or person/entity on a per-patient transported basis (it could pay on the basis of total distance traveled by a vehicle). However, if the transportation is provided in the form of non-private transportation (e.g., bus or taxi), and the transportation can be paid through vouchers, bus fare or cash reimbursed to individual patients with a receipt to show the cost of the transportation.
- The transportation does not need to be planned in advance.

The Final Rule also allows eligible entities to provide shuttle services if the following criteria are met:

- A "shuttle" is a vehicle (not air, luxury vehicle or ambulance) that runs on a set route, on a set schedule.
- The established patient requirement does not apply to shuttle services.
- OIG refused to mandate where the shuttle can and cannot make stops, other than that the transportation must be local.
- Marketing prohibitions apply to shuttle services, except that the schedule and stops can be posted.
- The rest of the requirements of the safe harbor for individual local transportation apply.

The new safe harbor enhances flexibility for health care entities and providers to engage in health care business arrangements to improve efficiency and increased access to quality care, while also protecting health care programs and patients from fraud and abuse. Examples of patients who may benefit from the new safe harbor include those who cannot drive or take public transportation after a procedure, isolated/homebound patients, mental health and substance abuse patients and elderly or disabled patients.

If you have questions regarding the new Anti-Kickback Statute local transportation safe harbor or establishing a patient transport service, please contact:

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- Your regular Godfrey & Kahn attorney.

The information in this article is based on a summary of legal principles. It is not to be construed as legal advice. Individuals should consult with legal counsel before taking any action based on these principles to ensure their applicability in a given situation.

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