

Memorandum

VIA E-MAIL

TO: New Jersey Academy of Ophthalmology Members

FROM: Debra C. Lienhardt, Esq.
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DATE: July 30, 2010

SUBJECT: Gift Cards

It was recently brought to our attention that several New Jersey physicians offer gift cards to patients for eyewear, eye services and other medical services. The provision of such gift cards raises federal and state kickback issues. Set forth below is a reminder of the applicable laws:

1. Federal Law.

Under federal law, a person who offers or transfers to a Medicare or Medicaid beneficiary any remuneration that the person knows or should know is likely to influence the beneficiary's selection of a particular provider or practitioner of Medicare or Medicaid payable items or services may be liable for civil money penalties. According to the Office of Inspector General of the Department of Health and Human Services' (the "OIG") 2002 Special Advisory Bulletin:

Offering valuable gifts to beneficiaries to influence their choice of a Medicare or Medicaid provider raises quality and cost concerns. Providers may have an economic incentive to offset the additional costs attributable to the giveaway by providing unnecessary services or by substituting cheaper or lower quality services. The use of giveaways to attract business also favors large providers with greater financial resources for such activities, disadvantaging smaller providers and businesses.

However, the OIG has interpreted the prohibition to permit Medicare or Medicaid providers to offer beneficiaries inexpensive gifts (other than cash or cash equivalents) or services. For enforcement purposes, the OIG considers inexpensive gifts or services as those that have a **retail value of no more than \$10 individually, and no more than \$50 in the aggregate annually per patient**. Therefore, unless a provider's practices fit within a specific exception to the federal law, or the provider's practice of providing gift cards is the subject of a favorable advisory opinion, any gifts or free services to beneficiaries should not exceed the \$10.00 per item and \$50.00 annual limits.

In 2008, the OIG issued an Advisory Opinion (No. 08-07) approving a proposal in which a health care system would provide \$10.00 gift cards to patients whose service expectations were not met. In approving the health care system's proposal, the OIG concluded that the proposal would not constitute grounds for sanctions under the civil monetary penalty ("CMP") provision under the Social Security Act. The OIG's opinion also

concluded that while the proposal could potentially trigger CMP under the federal anti-kickback statute, it would not impose sanctions due, in part, to the number of safeguards put in place including, but not limited to:

- the individual cards would have a value not exceeding \$10.00;
- the cards would be redeemable at specific vendors that do not sell items or services paid for by Federal healthcare programs;
- the cards would not be redeemable for cash or for items or services provided by the health care system;
- the health care system would implement a method for tracking the issuance of the cards, for the purpose of ensuring that individual beneficiaries do not receive multiple cards having an aggregate value in excess of \$50.00 in one year.

2. New Jersey Anti-Kickback Regulations.

New Jersey Board of Medical Examiners' regulations provide that a physician:

shall not, directly or indirectly, give to or receive from any licensed or unlicensed source a gift of more than nominal (negligible) value, or any fee, commission, rebate or bonus or other compensation however denominated, which a reasonable person would recognize as having been given or received in appreciation for or to promote conduct by a licensee including: purchasing a medical product, ordering or promoting the sale or lease of a device or appliance or other prescribed item, prescribing any type of item or product for patient use, or making or receiving a referral to or from another for professional services. N.J.A.C.13:35-6.17(c).

Gift cards could be construed as a communication which may intimidate, exert undue pressure, or undue influence on a patient, as well as be construed as a violation of the New Jersey anti-kickback regulation set forth above.

Please keep the foregoing in mind if you choose to provide patients with gift cards. Feel free to call us if you have any questions regarding the foregoing.