



CLIENT ALERT

HEALTH LAW

OIG APPROVES PROVISION OF FREE/DISCOUNTED SERVICES TO LONG-TERM CARE PROVIDERS DURING PUBLIC HEALTH EMERGENCY

On Friday, April 24th, the U.S. Department of Health & Human Services (HHS) Office of Inspector General (OIG) updated its Frequently Asked Questions (FAQs) regarding the application of the OIG's Administrative Enforcement Authorities to Arrangements Directly Connected to the Coronavirus Disease 2019 (COVID-19) Public Health Emergency (PHE). The updated FAQs can be accessed [here](#).

Of note, the OIG answered a question regarding the permissibility and potential fraud and abuse implications of health care practitioners providing free or reduced rate services to skilled nursing facilities (SNFs) or other long-term care providers to assist with staffing shortages.

Previously, HHS issued [COVID-19 blanket waivers](#) with respect to Stark Law enforcement and other matters, and the OIG followed with a [policy statement](#) that it will exercise its enforcement discretion not to impose administrative sanctions under the Anti-Kickback Statute for certain COVID-19-related remuneration covered by the Stark and other blanket waivers. This FAQ is an example of enforcement discretion that goes a bit further.

In its answer to the FAQ regarding free or reduced rate services, the OIG laid out a four prong test to determine whether such practices present a low risk of fraud and abuse in the context of the COVID-19 public health emergency. We have bolded this test in the excerpted FAQ below.

“Can health care providers and practitioners furnish services, not to exceed their scope of practice, for free or at a reduced rate, to assist skilled nursing facilities (SNFs) or other long-term-care providers that are facing staffing shortages due to the COVID-19 outbreak?”

OIG's longstanding guidance makes clear that, depending on the facts and circumstances, the provision of free goods or services to an actual or potential referral source may violate the Federal anti-kickback statute; similarly, depending on the facts and circumstances, the provision of free goods or services to Federal health care program beneficiaries may implicate the Beneficiary Inducements CMP. However, we believe that there are scenarios in which health care providers could work together to fill critical gaps caused by the COVID-19 outbreak to provide necessary care to vulnerable beneficiaries receiving care in a SNF or other long-term-care facility. For example, we understand that some essential staff at SNFs and other long-term-

care providers may be unable to report to work due to a lack of childcare, and we received a question about whether a hospice vendor that is already providing services to some patients at a SNF could furnish certain basic care needs—not to exceed the scope of the hospice's or the hospice staff's licenses—for free to patients who are not the hospice's clients to help mitigate any staffing shortages. Similarly, we received a question about a SNF or other long-term-care provider filling patient-care needs as a result of staffing shortages with, for example, community dentists or podiatrists who otherwise are not practicing at full capacity during the current public health emergency and are willing to offer their services for free or at a reduced rate to the SNF's patients on a temporary basis.

In the unique circumstances resulting from the COVID-19 outbreak, we believe that these scenarios likely would present a low risk of fraud and abuse under the Federal anti-kickback statute and the Beneficiary Inducements CMP provided the services being offered are **(i) necessary to meet patient care needs as a result of staffing shortages directly connected to the COVID-19 outbreak; (ii) provided for free or at a reduced cost only when necessary as a result of the COVID-19 outbreak; (iii) limited to the period subject to the COVID-19 Declaration; and (iv) not contingent on referrals for any items or services that may be reimbursable in whole or in part by a Federal health care program, either during or after the COVID-19 Declaration period.**”

We will continue to monitor legal developments regarding COVID-19.

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