

Morgan Lewis

FAST BREAK: **HOLIDAY GIFTS**

Jake Harper

December 18, 2018

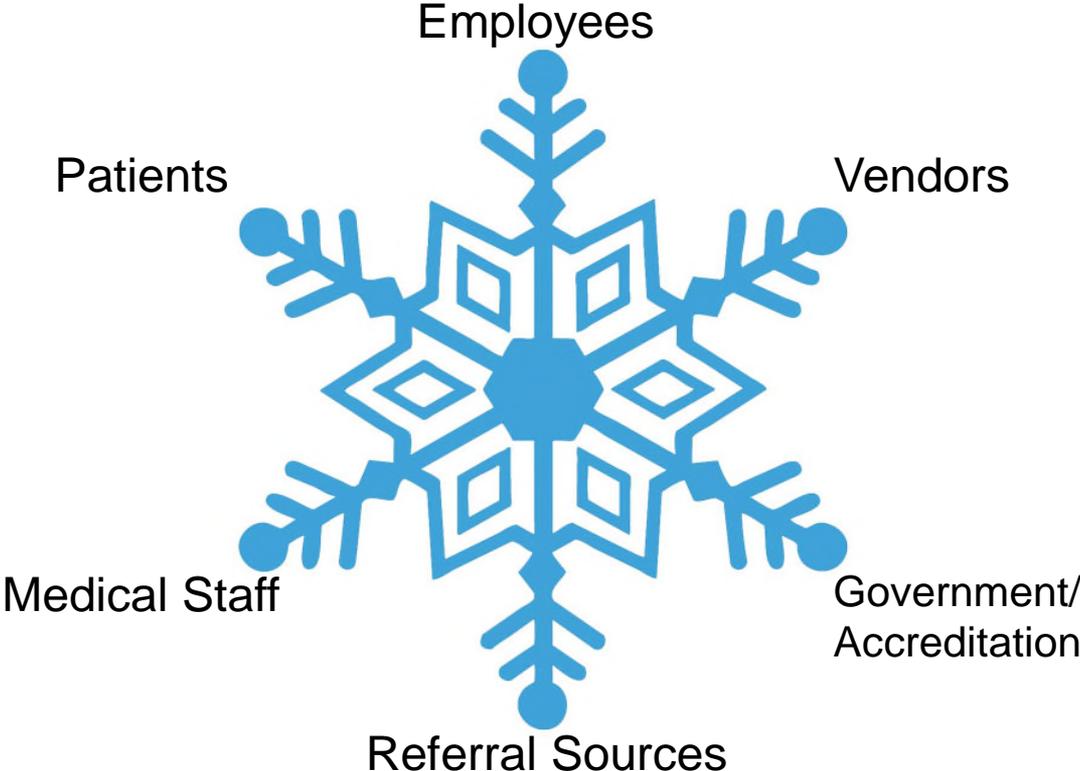


Agenda

- Holiday Gifts and the Laws They May Trigger
 - Stark
 - Beneficiary Inducement CMP
 - AKS
- “One-purpose Test” Considerations
- To Gift or Not to Gift?
- Tips to Manage Remuneration to Referral Sources



Relationships at Issue



Stark Law

- “If a **physician** (or an **immediate family member** of such physician) has a **financial relationship** with an **entity**..., then the physician may not make a **referral** to the entity for the furnishing of **designated health services** for which payment otherwise may be made under **Medicare**.
- The **entity** may not **present** or **cause to be presented** a **claim** to Medicare or bill to any individual, third party payor, or other entity for **designated health services** furnished pursuant to a prohibited referral.
- If a person collects amounts billed in violation of this prohibition, that person must **refund** those amounts on a timely basis.”

Unless an exception applies...

Non-Monetary Compensation

- DHS Entities are permitted to give gifts to physicians if the gift is:
 - Not solicited by the physician
 - Non-monetary (i.e. no cash, cash equivalents, gift cards)
 - Less than \$400 per year in the aggregate
 - Not given in a manner that takes into account referrals
 - Not in violation of AKS
- Formal medical staff parties/appreciation events also permitted and may be in addition to gifts (but still subject to \$400 per head limit)

CMP for Beneficiary Inducement

- OIG has authority to penalize health care providers for offering any “remuneration” to Medicare/Medicaid patients if the provider knows or should know this is likely to influence the patient to use a particular provider’s services
- Certain exceptions exist, including one for “nominal gifts”
 - OIG recently increased the value limit on nominal gifts to \$15 per instance/\$75 annually
 - May not be cash or cash equivalents (i.e. gift cards)
- Penalties for violations include civil fines, False Claims Act liability, and exclusion

Anti-Kickback Statute

- Prohibits knowingly and willfully soliciting or receiving, offering or paying:
 - any remuneration (including any kickback, bribe or rebate) directly or indirectly, overtly or covertly, in cash or in kind
 - to induce or reward the referral, purchase, order, lease or recommendation of
 - any item or service that may be paid in whole or in part by any federal health care program
- Broad application – applies to nearly everyone, including physicians, hospitals, pharmacies, vendors, consultants, etc.
- Two-way street – unless allegations only of soliciting or offering remuneration, usually both parties to an arrangement may have violated the AKS.

Anti-Kickback Statute

- Penalties are severe
 - Fines of \$100,000 per violation
 - Imprisonment up to 10 years
- OIG can impose civil penalties for conduct that would violate the AKS
 - Civil Money Penalties may be assessed
 - Can lead to exclusion from federal health care programs
 - Civil standard of proof
- A claim resulting for items/services resulting from violation of the AKS constitutes a false or fraudulent claim under the FCA. *ACA §6402(f)* (But even pre-2010, AKS allegations often bootstrapped onto FCA).

“One-purpose Test” Considerations

- Many Federal court jurisdictions (and the OIG) recognize that, if even one purpose of an arrangement is intended to induce or reward referrals, the AKS may be triggered
- Some jurisdictions require that inducing or rewarding referrals must be the “main purpose” of the arrangement, but this is less common
- Gift giving naturally implicates the “one-purpose test”

To Gift or Not to Gift?

- Often depends on the nature of the relationship between giver and recipient
- Although OIG has suggested that “nominal” gifts will not trigger AKS, no formal pronouncement as to value
 - No *de minimis* exception in AKS unlike Beneficiary Inducement CMP and Stark
 - “One-purpose Test” looms in the background
- Weighing values and risk tolerance of the organization



Tips to Manage Remuneration to Referral Sources

- In context of Stark law, remuneration must be accounted for on an annual basis to support application of non-monetary compensation exception
- Range of options for tracking value
 - Excel spreadsheet to compliance software to outside compliance vendor
- What if you are gifting to an office? Accounting for value can be complex, but most important approach is to be consistent in accounting
- Is giving to top 10/20 referral sources taking into account volume or value?

Join us next month!



Please join us for next month's webinar:

[Fast Break: Provider-Based Considerations in the Medicare 2018 Outpatient Rule](#)

Featuring Andy Ruskin

- January 24, 2019 3:00 PM (EST)

Check out all our webinars on our [Fast Break Series Page!](#)