Avoid Sham Telehealth Arrangements

by Jeffrey S. Baird, Esq.

Pharmacies are aggressively engaged in marketing, and it is not uncommon for a pharmacy to dispense drugs to patients residing in multiple states. When a pharmacy is marketing to patients in multiple states, the pharmacy may run into a "bottleneck." This involves the patient's local physician. A patient may desire to purchase a prescription drug from the out-of-state pharmacy, but it is too inconvenient for the patient to drive to his physician's office to visit with the physician and obtain a prescription. Or if the patient is seen by his local physician, the physician may decide that the patient does not need the drug and so the physician refuses to sign a prescription. Or even if the physician does sign a prescription, he or she may be hesitant to send the order to an out-of-state pharmacy.

To address this challenge, we are witnessing some pharmacies enter into arrangements that will get them into trouble. This has to do with "telehealth" companies. A typical telehealth company has contracts with many physicians who practice in multiple states. The telehealth company contracts with and is paid by self-funded employers that pay a membership fee for their employees, health plans, and patients who pay a per-visit fee.

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Where a pharmacy will find itself in trouble is when it aligns with a telehealth company that is not paid by employers, health plans, and patients, but instead is directly or indirectly paid by the pharmacy. Here is an example:

pharmacy purchases leads from a marketing company …the marketing company sends the leads to the telehealth company …the telehealth company contacts the leads and schedules audio or audio/visual encounters with physicians contracted with the telehealth company …the physicians sign prescriptions for drugs …the telehealth company sends the prescriptions to the pharmacy …the marketing company pays compensation to the telehealth company for its services in contacting the leads and setting up the physician appointments …the telehealth company pays the physicians for their patient encounters …the pharmacy mails the drug to the patient …the pharmacy bills (and gets paid by) Medicare.

There can be a number of permutations to this example, but you get the picture. Stripping everything away, the pharmacy is paying the ordering physician.

The Medicare anti-kickback statute (AKS) is a criminal statute, and it applies to all federal health care programs. The statute says that a person/entity cannot pay anything to another person/entity in exchange for referring, or arranging for the referral of, a patient covered by a government health care program. This is a very broad statute, and the Department of Justice has substantial latitude in determining whether or not to enforce it against a person or entity. Courts have enumerated the "one purpose" test. This states that if "one purpose" behind a payment is to reward a person/entity for a referral, then the AKS is violated notwithstanding that the "main purpose" behind the payment is to pay for legitimate services.

To the extent that a pharmacy directly or indirectly pays money to a telehealth company, which in turn writes a prescription for a drug that will be dispensed by the pharmacy and reimbursed by a federal health care program, the arrangement will likely be viewed as remuneration for a referral (or remuneration for "arranging for" a referral). Said another way, the arrangement will likely be viewed as a kickback.

CONCLUSION

A sham telehealth arrangement differs from a proper telehealth arrangement in a critical aspect: the direct or indirect payment by the pharmacy to the telehealth company. In a proper telehealth arrangement, the telehealth company does not receive any compensation from a health care provider; its revenue comes from self-funded employers that pay a membership fee for their employees, health plans, or patients who pay a per-visit fee. Accordingly, in a proper telehealth arrangement, there is no direct or indirect financial relationship between the person or entity prescribing the drug (such as the telehealth company) and the entity furnishing the product (such as the pharmacy). ■

Jeffrey S. Baird, Esq. is chairman of the Health Care Group at Brown & Fortunato, P.C., a law firm based in Amarillo, Texas. He represents pharmacies, infusion companies, home medical equipment companies, and other health care providers throughout the United States. Baird is board certified in health law by the Texas Board of Legal Specialization. He can be reached at 806-345-6320, or at jbaird@bf-law.com.