

PUBLICATION

OIG Approves Discount Medical Plan Arrangement with Chiropractors in Advisory Opinion 20-03

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In Advisory Opinion 20-03, published July 1, 2020, the Office of Inspector General (OIG) approved an arrangement in which a discount medical plan organization (DMPO) that receives annual membership fees from its members also pays a referral fee to chiropractors and chiropractor clinics (providers) for each new membership referred to the DMPO. The OIG determined that, while the arrangement implicated the Anti-Kickback statute, the arrangement posed a low risk of fraud and abuse.

Overview of the Facts

Under the proposed arrangement, network providers would agree to reduce their fees by 10-50 percent on certain chiropractic services for DMPO members. The network would be open to any willing provider, provided they meet certain minimum standards such as licensure, malpractice insurance, and other terms set forth in the provider agreement. Finally, providers would not be required to pay to participate in the DMPO network.

Under the proposed arrangement, DMPO members are individuals who pay an annual membership fee per household for all household members to receive the discounted rates at participating providers. According to Requestor, members may choose to participate in the DMPO network due to lack of insurance or lack of coverage for the services, high deductibles or other high cost-sharing coverage requirements. Further, Requestor certified that Medicare beneficiaries may only use the DMPO membership for non-covered services. Once enrolled, members may receive discounted rates for services at any participating network provider.

Marketing for the proposed DMPO network is directly to providers through various media, including trade magazines, public websites and educational seminars. Providers, in turn, join the network and may encourage their patients to become members of the DMPO via an online membership enrollment. Providers are not required to assist with enrollments, but they will receive a one-time \$5.00 referral fee for each new initial membership processed.

Legal Analysis

The OIG noted the proposed arrangement is composed of two separate streams of remuneration flowing to or from the DMPO. First, the DMPO pays \$5.00 per referral to network providers. Second, the DMPO receives membership fees as a result of the discounted rates offered by providers to DMPO members.

A. Payments to Providers

The OIG noted that while the \$5.00 payment is remuneration in exchange for a referral, the payment does not implicate Anti-Kickback statute because the DMPO neither furnishes nor arranges for the furnishing of items or services reimbursable in whole or in part by a federal health care program. Although the DMPO operates a network that "could influence its members to choose one of the contracting [providers] who provide federally reimbursable services," the DMPO, unlike a Medicare Advantage plan, is not arranging for such covered services. Specifically, the OIG noted the both the referral and the payment were flowing in the same direction, to the provider.

B. Discount Rates and Membership Fees

Here, the OIG noted that the discounted rates offered by the providers would give the DMPO the opportunity to earn a membership fee, and therefore is a form remuneration. Additionally, the fact that the DMPO negotiated discount rates on behalf of its members may could be viewed as "recommending" its network providers. However, for the following reasons, the OIG concluded the proposed arrangement presents low risk of fraud and abuse under the Anti-Kickback statute.

- *No federally reimbursable services and no required use of benefits:* The DMPO discount services do not include Medicare-covered services – the OIG noted that the usual concerns of channeling referrals of federal beneficiaries would not apply to the proposed arrangement. The OIG further noted the DMPO does not require members to use a particular provider nor does it require members to use DMPO benefits for all services. For example, a patient may elect to utilize insurance coverage with a lower cost-sharing responsibility rather than paying cash and utilizing the discounted network rate.
- *No patient marketing and expanded provider access:* The OIG noted that since marketing is direct to providers and not patients, patients will generally learn of the DMPO network only after selecting a provider of their choice. Since members receive network discounts from all network providers, a member's access to providers, as a result of becoming a member, may be increased rather than limited.
- *DMPO as intermediary:* The DMPO does not provide, bill or receive payment for covered items or services. It also does not recommend any particular items or services. Instead, the OIG noted, the DMPO merely acts as an intermediary by building a network of any willing providers, negotiating discounted rates for services, and then charging members an annual fee for network access to cover these administrative services.

Despite the fact that the proposed arrangement may result in some new patients who receive covered items or services, the combination of factors described above led the OIG to conclude the risk of fraud and abuse under the proposed arrangement was low.

Comments

As in Advisory Opinions in the past, the OIG noted that the specific "combination" of factors included in the proposed arrangement, rather than any one or two factors specifically, led to a finding of low risk of fraud and abuse. Additionally, on several occasions throughout the opinion, the OIG noted Medicare's limited coverage of chiropractic services. This acknowledgment seems to suggest a narrow application for this guidance to this, or other similarly limited, practice areas. It is interesting to note that the OIG differentiated marketing to providers rather than marketing to patients and that while the DMPO provides the network of chiropractors and negotiates discounts, the OIG did not consider "recommending or arranging" in this context problematic.

For additional questions, please contact any member of Baker Donelson's [Health Law Team](#).