

Looking a Gift Horse in the Mouth (or how to deal with holiday gifts)



(December 8, 2015): Last month we discussed performing audits in your practice. With the winter holidays just around the corner, we are going to take a detour from our process through establishing a compliance program. November, December, January and February bring many holidays and parties. These are usually an opportunity for happiness and cheer, but they can also be present problems for physicians and practices. One of the biggest concerns at this time of year is whether to give or receive gifts. Many practices will receive gifts of food, such as cake, cookies or the ubiquitous popcorn tins. Some will come from grateful patients. How should you react if a patient brings in a gift of food for you and / or your staff?

I. Gifts of Food from Patients:

Assuming these are of nominal value, it is fine to accept such perishable gifts from patients. However, it is a very good idea to share such food gifts from patients with the office or departmental staff.

II. Non-Perishable Gifts from Patients:

Non-perishable gifts from patients present a bit more of a problem. Often these gifts are hand-made. But by their very nature they often can't be shared by office personnel. And refusing such gifts would offend, insult, or disappoint the patients, who have sometimes spent considerable time and effort on the gifts. In such cases, it is permissible to accept the gift from the patient. However, depending on the nature of the gift, the practice should consider donating the gift to a suitable charity. For example, a quilted wall hanging may be accepted and displayed. A crocheted shawl might be donated to a charity. In the case of something that might be donated and to avoid hurting patient feelings if they don't see their handiwork later, practice personnel should be appreciative and thank the patient, but explain that the practice policy does not allow them to accept gifts of such value and that they will be donating it to an appropriate charity.

III. Gifts of Food or Perishables from Vendors, Suppliers, other Health Care Providers or Third-Parties:

Let me start this section by saying that any gifts from vendors, suppliers, other health care providers or entities or third-parties are more problematic than gifts from individual patients. Gifts from patients do not implicate the Anti-kickback Statute. Gifts from vendors, suppliers or other health care providers do. Remember that the Anti-kickback Statute prohibits the giving, offering, accepting or receiving any remuneration whether in cash or in kind, in exchange for the referral of services or patients whose care may be reimbursed by federally funded programs such as Medicare. The Anti-kickback statute has no exception for gifts of nominal value or for items such as cookies or cakes.

That said, no physician practice will be prosecuted solely for accepting a holiday gift of food items, provided certain guidelines are kept in mind. As with food gifts from patients, food gifts from non-patients should be of nominal value and should not be a routine event. The food item should be of nominal value. The food should be delivered to the office and not in the form of coupons or paid-for expensive meals at a fancy restaurant. Thus, a tin of popcorn or a platter of mixed cookies from a local deli might be acceptable.

IV. Gifts of Non-Perishable Items from Vendors, Suppliers, other Health Care Providers or Third-Parties:

Gifts of non-perishable items should never be accepted. As noted above, there is no de minimis value of a “remuneration” that is acceptable. The history of Anti-kickback Statute cases is full of examples of “gifts” that were really meant to be payments for referrals. A number of years ago, I was involved in a case where a marketing rep for an ancillary health care provider meticulously documented the Christmas gifts purchased for physicians and nurses who referred to the ancillary care provider and submitted that documentation for reimbursement as a marketing expense. The gifts ranged from simple small gift baskets of cosmetics to video game units plus games to expensive jewelry for the female physicians or the male physicians’ wives. Unfortunately, the rep’s documentation also included explicit notes as to the expense of each gift and comments that the higher value gifts were for physicians and nurses who referred more business. Partially as a result of this documentation, the ancillary health care provider was forced to make a self-disclosure to the OIG and entered into a five-year Corporate Integrity Agreement, in addition to refunding significant amounts of Medicare reimbursements.

V. Gifts between Family Members who may be in a Referral Position:

Finally a question often arises is whether it is acceptable for an individual who is in a position to benefit from a physician’s referrals to give a gift to a family member who is a physician. This situation often arises with in-laws of physicians who are health care marketing personnel or ancillary or downstream health care providers, such as home health agencies or an imaging center. For example, a home health care agency owner may wish to give his brother-in-law, a physician, a gift. If the gift is within reasonable limits, is not excessive in kind or value, and is of the kind typically exchanged by family members, and there are no other indications of an improper

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business relationship, I find it hard to believe that the government would prosecute such an act. Thus a sweater is likely acceptable, but a new car is not.

VI. Final Remarks:

As with many subjects in this arena, intent is key. Accordingly, providers should have a policy in place that deals with gifts. If a practice chooses to accept gifts, a written policy incorporating the above aspects helps establish a lack of improper intent. It also provides staff members with cover when they refuse gifts. If this path is followed, all staff members will have a stress-free holiday season.



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