# New Rules for Beneficiary Inducements at Urgent Care Centers

ALAN A. AYERS, MBA, MAcc

**Urgent message:** Unlike other retail businesses, which commonly provide gift cards and other incentives in marketing or as remediation for unsatisfactory service, urgent care operators must be aware of various statutes prohibiting "inducements" to patients.

People in the U.S. love the idea of getting something for nothing. Businesses across the spectrum leverage this to promote their products, attract new customers, and increase sales.[1]

This tactic is also common among urgent care centers. For example, an urgent care operator in Massachusetts recently announced that new patients would receive a $10 CVS e-gift card.[2] As one might imagine, a single $10 gift card most likely wouldn't cause trouble. However, there are rules about giving gifts to patients and prospects. Using giveaways in urgent cares can be effective in marketing to new patients to draw them to try the center's services; however, owners should be aware of the rules concerning remuneration and beneficial inducements.

Under §1128A(a)(5) of the Social Security Act, enacted as part of HIPAA,[3] "a person who offers or transfers to a Medicare or Medicaid beneficiary any remuneration that the person knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier of Medicare or Medicaid payable items or services may be liable for civil monetary penalties (CMPs) of up to $10,000 for each wrongful act."[4]

**Alan A. Ayers, MBA, MAcc** is Chief Executive Officer of Velocity Urgent Care and is Practice Management Editor of *The Journal of Urgent Care Medicine*.

## Pitfalls of Inducements

Federal statutes stipulate that any remuneration which "promotes access to care and poses a low risk of harm to patients and federal healthcare programs" doesn't constitute "remuneration" under the beneficiary inducement federal civil monetary penalty statute.[4] However, as mentioned above, such payments may run afoul of payer contracts prohibiting discounting of copays, as well as statutes on federal health programs.

The beneficiary-inducement statute prohibits providing free or discounted items or services to a Medicare or Medicaid beneficiary that are apt to influence the beneficiary to seek such reimbursable services from a particular provider. For these federal and other state healthcare programs, there is a concern that a gift card is an inducement to use services that are billed to the government—thus adding to the nation's healthcare costs. Specifically, the statute prohibits offering or transferring remuneration to a beneficiary of Medicare or a state healthcare program (including Medicaid) when that person "knows or should know is likely to influence" the patient to order or receive a service from a particular provider, practitioner, or supplier.[4]

For urgent care owners, it's critical to note that the objective standard includes what the provider *should have* known vs only what they *actually* knew, creating a broader canvas for noncompliance.

## Exceptions

Several regulatory exceptions to the beneficiary inducement statute drafted by the HHS Office of the Inspector General (OIG) went into effect in January 2017.[5]

It's essential to understand that the new "access to care" exception protects the provision of remuneration that promotes access to care and *poses a low risk of harm* to patients and federal healthcare programs.[6] Remuneration would pose a low risk of harm to Medicare and Medicaid beneficiaries and the programs by:

> *"The fact that urgent care operators are complying with an exception to the beneficiary-inducement provisions doesn't guarantee the arrangement will be protected from prosecution."*

- being unlikely to interfere with, or skew, clinical decision-making
- being unlikely to increase costs to federal healthcare programs or beneficiaries through overutilization or inappropriate utilization
- not raising patient safety or quality-of-care concerns[7]

The Civil Money Penalties statute states that "remuneration" doesn't include the offer or transfer of items or services for free, or less than fair market value, if:

- the items or services consist of coupons, rebates, or other rewards from a retailer
- the items or services are offered or transferred on equal terms available to the general public, regardless of health insurance status
- the offer or transfer of the items or services is not tied to the provision of other items or services reimbursed in whole or in part by the program under Title XVIII or a state healthcare program[7]

The OIG has specified that items potentially covered by this exception include free or discounted medications, supplies, or devices; food vouchers; and coupons or rebates.[8] The OIG went on to state that "[t]he concept of 'other reward' is broad: if the item or service meets the three criteria listed in the regulation, it can be protected."[8] However, the reward can't be in the form of a copayment waiver, as these do not meet the third criterion of the exception.[8]

While this exception appears to be quite broad, the OIG warned that it may be challenging to satisfy the "low risk of harm" requirement if a more applicable exception or one of the safe harbors to the federal Anti-Kickback Statute (AKS)[9]—which also may be leveraged to protect arrangements implicating the beneficiary-inducement statute—was available and not utilized.[10]

### Promoting Access to Service

The OIG also explained that providing incentives in return for receiving care or for complying with a treatment plan would not qualify for this exception; these incentives would be considered a *reward* for accessing care rather than *promoting* access to care.[11] Thus, remuneration that may entice a beneficiary to receive care wouldn't qualify for the exception; however, items that make it possible for the beneficiary to access care will qualify for protection under this safe harbor.

An urgent care owner is wise to structure any offerings in a way that *facilitates* care rather than *rewarding* treatment adherence.

### Monetary Limits Revised

In addition to the exceptions for promoting access to care, the OIG reexamined the monetary limits it had previously implemented on the provision of beneficiary inducements "of nominal value." These inducements do not to violate the beneficiary inducement statute.

The OIG increased the limit for individual items from $10 to $15, and the annual aggregate limit per patient from $50 to $75.[12]

However, cash or cash equivalents wouldn't be considered low risk.[8] The OIG defines "cash equivalents" as items that can be converted to cash—such as checks—or that are used like cash—like general-purpose debit cards. The OIG would not consider "gift cards that can be redeemed only at certain stores for a certain purpose, like a gasoline gift card" as cash or cash equivalents.[8]

Thus, the $10 CVS e-gift card offered by the urgent care facility in Massachusetts wouldn't be deemed cash or a cash equivalent because it can only be redeemed at that retailer and is of nominal value.

### Analysis

The OIG noted that one of its objectives in soliciting comments on its interpretations of the beneficiary-inducement CMP exceptions was to "ensure that we protect low-risk, beneficial arrangements without opening the door to abusive practices that increase costs or compromise patient choice or quality of care."[8] As one observer wrote, the fact that the OIG, in most cases, merely codified the existing statutory exceptions without adding any clarification or guidance evidences "how difficult it is to balance the broad prohibitions in the law with actual business practices and the particular needs of patients."[11]

Hence, urgent care providers who create and implement patient incentive programs should understand that the fact that they are complying with an exception to the beneficiary-inducement provisions of the CMP doesn't guarantee that the arrangement will be protected from prosecution under the Anti-Kickback Statute. This may serve as a potential Catch-22 for urgent care providers; by offering a beneficiary inducement that promotes a patient's access to medical services that arguably poses low risk of harm to the patient and federal healthcare

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The OIG said that it would "continue to monitor the changing landscape and could consider new or revised safe harbors in the future." Until then, urgent care owners should stay abreast of OIG actions that give further insight on the safe-harbor exceptions to the beneficiary-inducement prohibitions as they impact the Anti-Kickback Statute and perform a separate review of any proposed programs for compliance with both the AKS and CMP statutes. ■

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