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LogixHealth’s Business Intelligence tools enable effective compliance monitoring.
Overview of the Anti-kickback Statute

With so many medical service and equipment companies available to choose from, health care providers have important and varied choices to make when selecting vendors to enable the delivery of cost effective, quality health care. Many supply and service companies provide valuable services to health care providers, such as accounts receivables management, physician staffing, software licensing, inventory control, emergency response, on-site compliance and monitoring, customized packaging, staff training, and the list goes on and on. If you are a health care provider and you treat Medicare or Medicaid patients, you have an obligation to create a compliance program under federal health care reform laws. Additionally, the need for a compliance program to monitor your vendors is important for many other reasons.

While medical suppliers are a growing and often profitable sector of the economy, there are federal and state laws that specifically regulate these businesses, limiting the kinds of arrangements they can make. What appears to be a savvy and ethical business decision to an accountant or customer service expert could be a health care compliance pitfall. As fraud in the context of durable medical equipment (DME) and other services has become a more common subject of government enforcement actions, health care providers should be more diligent in their compliance efforts. It is important to understand common compliance hazards and recognize red flags early. If you think you’re getting a great bargain from your vendor you might want to carefully review your relationship.

When Discounts Are Bad Business

In the health care context, certain business arrangements are prohibited because these arrangements create incentives for the provider to bill government programs for unnecessary services. The statute that prohibits certain financial arrangements is known as the Anti-Kickback Statute (AKS). This statute makes it a criminal offense to offer or accept any kind of “remuneration” or bribe that could potentially lead to increased billing to federal programs. Because this is a criminal statute, the punishment may be monetary sanctions, jail time, and exclusion from government programs.

The most obvious example of an AKS violation would be a hospital that bribes a physician to refer patients for expensive hospital services that are not necessary. Unfortunately, not all AKS violations are this obvious or this intentionally fraudulent. Today, many AKS violations occur when a profitable business opportunity does not translate into a legally permissible relationship in the health care world. Any time a provider enters an arrangement with a third party like a supplier or management company, the provider is exposing itself to AKS liability when money changes hands. Sometimes, the violation hinges on a simple term like pricing. Because it is illegal to either solicit or to receive a kickback, many violations of AKS affect both the supplier and the provider making the purchase.

The AKS applies in many situations that may appear to be simply good business or relationship-building practices. For instance, a simple discount offered to loyal customers could be viewed as a kickback that violates the AKS. Or, distributing free samples to a physician or hospital could violate the AKS, even though the primary purpose may be to promote quality products. These examples also apply to any other vendor relationship including prescription drugs, emergency and on-call services coverage, and continuing medical education. The Office of the Inspector General (OIG) has been actively enforcing AKS against DME purchasers and suppliers, having identified these arrangements as particularly susceptible to fraud and abuse.

In August of 2011, the OIG issued an Advisory Opinion on the relationship between a medical supply company and a nursing facility. When the supplier offered its services at a low price, the OIG reasoned that such a discount could induce the nursing facility to use those products more frequently, generate more referrals or orders, and bill federal programs unnecessarily. While the supplier originally considered these discounts to be a positive catalyst for sales, the OIG explained how even a “carved out” discount on only private services could directly lead to increased billing for public services.
LogixHealth is an industry leader in revenue and compliance, providing services to many of the nation’s largest hospitals.
The OIG stated that there was a nexus between: 1) the discounted, “below-cost” prices on non-Medicare goods offered by the supply company, and 2) the nursing facility’s increased orders for supplies that would be billed to Medicare. Even if the supplier set up an entirely different corporation to provide the non-Medicare goods, there was a nexus between the private discount and the federal billing. When the nursing facility was accepting bids for its supply contracts, it was most interested in saving money and taking the cheapest option. There is no denying that discounts are a popular way to increase the volume or generate new business through promotions. But, when it comes to health care, discounts on any service or good may create what is considered a highly impermissible incentive to increase volume, and all that is required for a violation is the presence of a “nexus” between the discount and federal billing.

While a discount on tangible supplies may be a clear kickback that induces a provider to charge more items to federal programs, discounts on pure “services” can also be considered bribes. In July of 2011, the OIG issued an opinion regarding an arrangement between a company supplying durable medical equipment (DME) and diagnostic facilities that were customers of the DME supplier. The DME supplier provided free services to the facility, and in turn, the facility would display the DME and educate its patients on the various DME items. It was ultimately up to the patient and physician to choose the right items, though the DME supplier created an arrangement where it would pay the facilities a monthly fee to promote certain DME products. Unfortunately, some of the physicians making these presentations to patients may have also had an interest in the particular DME offered by the supplier.

Even though the provider facility was not receiving a discount on the products, the free services and financial relationship between the provider and DME supplier was considered the kind that would induce the provider to increase its billing to Medicare. Moreover, the DME supplier was paying the physicians to promote products in which they may have already had a financial interest, which creates an additional relationship that the parties should have avoided. From the perspective of the facility, the contract was a great tool for educating patients and generating sales. But, because those sales involved Medicare patients, the parties should have better evaluated the possibility AKS violations. The OIG considers the fraud and abuse risk in this kind of relationship to be very high. Thus, while promotional activities or discounts on services may seem a like a great idea for your business, health care providers should proceed carefully.

If your company purchases medical supplies or services related to health care, you may find that some arrangements appear to violate AKS. Luckily there are some “safe harbors” that allow your company to maintain those relationships despite the fact that financial incentives to increase your purchasing volume may exist. One of the most common situations in which your company may purchase a ”discounted” item is where you are part of a health maintenance organization (HMO) or other entity that negotiates prices for a large group. Under this arrangement, the discount is typically permissible as long as it is clearly stated on the invoice and is executed as an actual discount on price, rather than as a cash gift, free services, or swap for a more valuable item. There is also a safe harbor provision for management and services contracts, which has seven requirements, including that the arrangement be set out in writing with specific terms up-front. Because the AKS is both long and difficult to follow, the OIG suggests that all financial arrangements should be detailed in writing and vetted by legal counsel before moving forward.

The OIG frequently publishes compliance guidelines for health care entities encountering common compliance problems, and many manuals are published in the Federal Register and posted on the OIG’s website as a resource for AKS compliance. The comprehensive guidelines are useful for any kind of health care provider or supplier, though most notable are the DME supplier, small practice group, and hospital compliance guides. The OIG considered input from various government agencies as well as private companies and individuals to compile a roadmap for various compliance programs. In a more recent A Roadmap for New Physicians: Avoiding Medicare and Medicaid Fraud and Abuse, the OIG further urges all physician groups to create a seven-step compliance program to prevent AKS violations and satisfy the compliance requirements of recent legislation.
Specifically regarding provider relations with vendors, the OIG recommends that all providers should stop and consider the motives of vendors in everything they do. As an additional tool, conflict of interest disclosures should become standard procedure to avoid some of the pitfalls discussed above, even when only privately reimbursed services are at issue. The OIG also identified steps that providers and suppliers should take when a compliance breach has been detected. If an entity meets the obligations of this compliance roadmap, the OIG suggests that it will be more lenient in the event that a violation does slip through the cracks.

Your Compliance Program: Taking Advantage of Technology

One of the most important aspects of compliance—as the OIG mentions in its various guidelines and throughout its publications—is standardized documentation and internal monitoring. In a recent investigation, the OIG estimated that providers and DME suppliers in a particular area of the country had not properly documented 83% of claims made on behalf of Medicare beneficiaries. The OIG’s office suggested that the regional auditor could have identified the supplier’s compliance problems early on had it implemented a basic technology to track and monitor orders. Such technology also could have identified improper payments to physicians in return for DME billing. Even if the behavior of the physicians was not motivated by desire to commit fraud, the resulting violations of AKS and other laws put the provider and individual physicians at great legal risk. To the OIG, some basic technologies are a necessary part of any compliance program.

The typical compliance program should be able to identify and track red flag entries that signal noncompliance. The OIG suggests that a simple “extent and frequency” monitor could serve this purpose, allowing compliance officers to see which providers or DME suppliers may be making inappropriate claims. The compliance program should further be able to compare all claims and providers to a standard and single out those that may require investigation. These data audits should be performed often, and all compliance efforts should be recorded with detail, as the government will reflect on the reasonableness of the compliance efforts when considering punishment for a violation. Because many health care businesses have relationships that could easily cross a line and implicate AKS, compliance programs that can quickly and effectively detect red flags will save your business a lot of time and money.

Conclusions

Compliance difficulties increase when providers fail to implement an effective and efficient compliance program. The AKS can apply to every vendor relationship a provider creates, which can make even the most legally knowledgeable provider nervous. The OIG and other government agencies continue to provide significant guidance, which your compliance program can use as a guide. With the right processes and technologies in place to catch problems early, health care providers can create AKS-compliant vendor relationships. Effective monitoring programs, such as those developed and utilized by LogixHealth can be accomplished by simply running a report. Ensure compliance early and often, utilize smart Business Intelligence tools, and your practice will be able to focus on health care delivery without worrying about AKS.

LogixHealth’s state-of-the-art data warehouse continuously monitors coding distributions and provides productivity, outlier and RVU reports.