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Client Alert: 'Tis the Season for Gift Giving

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Grant P. Dearborn

MEDIA CONTACT

Wendy M. Byrne

wbyrne@shumaker.com

Many of us are thrilled to celebrate the holidays and to share with others our excitement that the crazy year of 2020 is almost complete!

However, there are risks for health care providers giving gifts to patients, referral sources, and those who otherwise help generate business.

You should be aware that the federal Anti-Kickback Statute ("AKS"), a criminal statute that prohibits intentionally paying "remuneration" to induce or reward referrals or generation of business related to federal health care programs, can be implicated in relation to gifts. The AKS is violated if "one purpose" of the remuneration is to induce referrals to, with such violations constituting felonies, which may result in obligations to repay the federal government, civil and criminal penalties, and exclusions from participating in Medicare and Medicaid. Be aware that "remuneration" will include paying or providing anything of value. A gift of tickets, meals, bottle of wine, or gift cards are within the definition of remuneration. Furthermore, "referrals" is broadly defined to include more than traditional doctor's orders or prescriptions.

Moreover, the federal Self-Referral Law, commonly known as the Stark Law, prohibits remuneration between a physician making a referral for certain Designated Health Services ("DHS") and the entity providing or billing for that DHS unless an exception applies. There is an exception for non-monetary gifts, but the exception has a dollar cap and other conditions.

Furthermore, some states, such as Florida, have their own civil and criminal laws that also limit the providing of remuneration to referral sources.

Note that it is never advisable to provide anything to a non-employee as a reward for past or future health care referrals or the generation of business.

It is advisable to consult with experienced health care counsel regarding gifts to referral sources, so that you do not receive a gift of "coal" from a regulatory agency in the coming year. If you have not done so recently, now is a good time to review your practice's policy on gifts to patients and referral sources, and to ensure that staff is aware of and in compliance with same. If you do decide to provide allowable gifts to patients or referral sources, be sure to track and document. Furthermore, it is advisable to retain records for at least six years after.

Have a Safe and Happy Holiday as you gift appropriately.