

or (iii) does the provider fail to pass to the payor its proportional share of the discount. Giving an *occasional* discount, especially if based upon financial need, will not necessarily violate False Claims prohibitions. However, the OIG indicates that discounting, even when done occasionally, requires that the payor (e.g., Medicare, Medicaid or any other private payor) receive its proportional share of the discount or reduction.

II. Professional Courtesy Raises Similar Concerns

Even the time-honored tradition of professional courtesy falls under similar scrutiny. Although professional courtesy has not been expressly prohibited, it should be extended with caution in light of the HIPAA provisions discussed above and the OIG's repeated advisories regarding waivers and discounts. The discounting should not be routine, and when done occasionally, it should be based on financial need and there should be good faith efforts made to collect fees. These parameters make it extremely difficult to avoid fraud and anti-kickback concerns and still extend professional courtesy because it is less likely that the professional courtesy recipient truly qualifies for discounting based on financial need. Moreover, to avoid false claims issues, a total fee discount should be given (by passing onto the payor its proportional amount of the discount).

Furthermore, a much greater risk of prosecution under the anti-kickback statute arises when the recipient of professional courtesy is in a position to make referrals. Of particular concern is when the person providing services is a specialist, who typically is dependent on other physicians or entities for referral of Medicare and Medicaid patients. When potential for inducement of referrals is present, even total fee discounting will not cleanse the professional courtesy transaction of the supposed inducement.

III. Discounting May Violate Clauses in Contracts With Payors

Health care providers also need to be aware of the fact that discounting services to some patients, even private pay patients covered under no health plan, may trigger "most-favored-nation clauses" in contracts with various third-party payors. These clauses require contracting providers to bill the payor for a given service or item no more than the lowest rate charged to *any* patient. Hence, even occasional discounting or waivers may trigger these types of provisions and cause problems for providers.

CONCLUSION

With the express inclusion of waivers and discounts in the definition of remuneration, the imposition of civil penalties for anti-kickback violations and the increased civil penalties for both false claims and kickbacks, health care providers must be even more cautious in their billing practices. Routine discounting, whether for patients or as a professional courtesy, simply should not be done. However, if discounts are extended on occasion, careful attention should be given to making individualized assessments of financial hardship and making good faith efforts to collect all amounts owed by patients. To avoid false claims concerns, it may also be advisable to pass on to payors their proportional share of any discount given. And finally, all discounting should be avoided when there is any possible perception that the discount is given to induce referrals of patients that a federal health care program covers.