

SUMMARY OF CALIFORNIA LAW ON DISCOUNTING

Practices that are common and accepted in the business world are often illegal in healthcare. The following summary of California law governing the offering of discounts by physical therapists is not intended as legal advice. For a legal opinion concerning a specific situation, consult your personal attorney.

Both California and federal law prohibit kickbacks and fee-splitting by physical therapists and other health care professionals. Lawmakers understand that payments made or accepted in return for the referral of patients could result in actual or threatened patient harm, overutilization, and/or increased health care costs, and therefore should be forbidden. For example, if money that should be directed to providing physical therapy services is instead diverted to the person who is referring patients, the patient may not get the level of service that they should. Not only can this harm the patient, but it may ultimately increase the total cost of care if the patient is required to receive additional therapy, or even a surgical intervention that would not otherwise have been required. Potential penalties for engaging in these activities include, but are not limited to, exclusion from federal and state health care programs, loss of license, large fines, and even imprisonment.

As will be discussed below, these laws prohibit physical therapists from offering discounts in exchange for the referral of patients, unless the physical therapist receives a benefit *other than the patient referral* that is equal to the amount of the discount.

California laws prohibiting the payment or receipt of “consideration” for the referral of patients

Numerous California laws prohibit the payment or receipt of anything of value for the referral of patients. This law expressly prohibits the offering of discounts in exchange for patient referrals. Business & Professions Code §650, provides in pertinent part:

...the offer, delivery, receipt or acceptance, by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person..., is unlawful.

* * *

A violation of this section is a public offense and is punishable upon a first conviction by imprisonment in the county jail for not more than one year, or by imprisonment in the state prison, or by a fine not exceeding fifty thousand dollars (\$50,000) or by both that imprisonment and fine. A second or subsequent conviction is punishable by imprisonment in the state prison, or by imprisonment in the state prison and a fine of fifty thousand dollars (\$50,000).

See *People v. Guiamelon*, 205 Cal.App.4th 383 (2012) (pediatrician who paid a marketing agent \$20 per referred patient found guilty of violating Business & Professions Code §650 even though she had no intent to violate the law).

This prohibition has been expanded over the years to apply to all parties to such a transaction in connection with insurance claims (*See* Insurance Code §§750 and 754). Similar laws also apply to prohibit all parties from engaging in such transactions with respect to workers compensation claims (*See* Labor Code §§139.3, 3215, and 3820.)

When is it legal to offer a discount to a referral source?

Physical Therapists who are considering offering discounts to a payer, PPO or other entity that refers patients should consider what they are receiving in exchange for the discount.

Discounts in exchange prompt payment and/or increased volume

California law expressly authorizes PPO contracts. See Insurance Code §10133. Healthcare professionals are authorized to contract with PPOs at a discount off their retail rates because they receive “value” for the discount beyond the referral of a patient. Generally speaking, discounts are authorized by virtue of two benefits: 1) prompt payment and 2) increased volume (patient steerage (including a listing in the PPO’s provider directory), often coupled with a financial incentive for patients to use listed providers). Indeed, courts have recognized that contracts with PPOs that only offer prompt payment are not “worth” as much as those that offer both prompt payment and increased volume. See, *First Health Group v. BCE Emergis Corporation* (7th Cir. 2001) 269 F.3d 800.

Discounts in other circumstances

Physical therapists who are considering offering discounts in situations where they will not be guaranteed prompt payment or increased volume would be best advised to consider what value – aside from the referral of the patient – they are receiving. In the absence of a benefit that is separate from the patient referral, the offering of discounts would appear to violate the anti-kickback laws described above.

Physical therapists should also consider the size of the discount as compared to discounts they may have agreed to in PPO or other managed care contracts. If the value to be received in a particular transaction is lower than that received in relation to in those contracts, discounts that equal or exceed those contracted rates would appear suspect – what is the discount for other than the patient referral? Indeed, in the context of the Federal anti-kickback law which applies to Medicare, Medi-Cal and other programs funded by the federal government, the federal enforcement agency has refused to approve discounts that are greater than the cost savings. See OIG Advisory Opinion 99-13.¹

Indeed, presumably to protect themselves, companies that offer referrals of individual patients have included language in their agreements whereby the physical therapist expressly agrees in advance of offering a discount for any particular patient that any discounts the physical therapist offers “are not intended as a reward or inducement for the ...referral of any patient.” Especially given the additional administrative burden associated with bidding on individual patient referrals,

¹ Physical therapists should also consider the terms of their managed care contracts which may prohibit the physical therapist from discounting below the discount contained in that contract.

to protect themselves from potential liability, physical therapists must consider the justification for any discount they offer – what value are they receiving other than the referral of the patient?

How to avoid illegal discounting

As the health care delivery system moves toward increased price transparency and value-based payment models, physical therapists should consider reevaluating their current retail fee-schedule as it relates to their costs of doing business and their current managed care contracts. With that information, decisions about new contracts, including those that involve discounts for individual patient referrals, can be made in context, based on economic factors other than the patient referral.