

Prompt Payment Discounts for Patients

Giving “cash” discounts or offering different fee schedules to different patients can be problematic, but an alternate strategy may work in your practice if it is carefully developed and implemented.

- **Contractual issues regarding discounts.** One problem with giving a cash discount is that most of the physician’s health care payment plan contracts will contain clauses providing that the plan will pay “the lesser of” the provider’s usual charge or the plan allowable. When you give a reduced price to other patients, the plan could possibly claim that that reduced price is your REAL usual charge. If the plan has been paying you more than that, it could try to recoup the difference.
- **Legal issues regarding discounts.** The second category of problems concerning cash discounts stems from various state and federal laws.
 - Texas Insurance Code Provisions. State insurance law prohibits price “discrimination” against insurance companies. *See* Tex. Ins. Code §552.001 et seq. below. This means that, absent a statutory exception, you cannot give a cash-paying customer one price while charging another *higher* price to insurers for the same service. While there are various arguments about what this law actually will allow, many of its requirements may be addressed effectively in a carefully developed “prompt payment” discount policy, as discussed below.
 - Texas and Federal Laws Against Patient Solicitation/Referrals/. In addition to the above-referenced Texas Insurance Code provisions, prompt payment discount policies have the potential to implicate state and federal laws regarding patient solicitation, referrals, and/or inducements. Relevant laws may include, but not be limited to, the federal antikickback statute, federal Civil Monetary Penalties Law, the False Claims Act, and the Texas Patient Solicitation Act.
 - It is critical that any prompt payment discount policy be developed and implemented solely for the purpose of inducing prompt payment (i.e., to reduce the practice’s accounts receivables and costs of debt collections and to boost cash flow).
 - Prompt payment discounts *cannot* be disguised attempts to induce patients to refer themselves to the practice. The federal government has stated that it “will continue to scrutinize closely ‘prompt pay’ discounts to make sure that they are not payments made for an illegal purpose cloaked under a legitimate label.” *See* 56 Fed. Reg. 35952, 35979 (July 29, 1991).
 - For more information on prompt payment discounts and the federal antikickback statute and Civil Monetary Penalties Law, *see* Office of Inspector General (OIG) Advisory Opinion No. 08-03 (posted Feb. 8, 2008; <http://oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-03A.pdf>).

In that opinion (which is limited to the facts presented and is only applicable to the requestor), the factors the government weighed as favoring a legitimate prompt pay policy (outside of the scope of the safe harbor regulations) included the requestor’s certifications that: (1) it would not advertise the discount policy but would instead inform the patient of the availability of the discount during the course of the actual billing process; (2) other third party payers would be notified of the prompt payment policies; (3) all costs of the arrangement would be borne by the requestor; and (4) the amount of fees discounted to patients would bear a reasonable relationship to the amount of avoided collection costs.

- **Carefully develop a written prompt payment discount policy for your practice.**
 - Make sure the policy is in writing.
 - Under Section 101.352 of the Texas Occupation Code, physicians are required to develop written policies for the billing of health care services and supplies and, if the physician maintains a waiting area, post a clear and conspicuous notice of the availability of the policies in the waiting area and in any registration, admission, or business office in which patients are reasonably expected to seek service.
 - Once again, it is important to be clear that the discount is for prompt payment, without discrimination against insurers and without the intent to induce patients to self-refer.
 - Offer the discounts only for services that are paid in full at the time of the service, in advance, or maybe within a certain number of days.
 - Make it clear that the discount is available to anyone who meets your terms, unless their insurer's policies or contracts prohibit it. There should be no discrimination. If an insurer can pay you in full within your terms for the discount, it receives the discount, too. (Note that in the OIG Advisory Opinion referenced above, other third-party payers were notified of the prompt payment policies).
 - Make sure the policy is written so that the discount applies to your standard fees, not to any contractually reduced fees.
 - Inform your patients of the availability of the discount as appropriate during the course of the billing process.
 - Make efforts to ensure that the amount of fees discounted to patients bears a reasonable relationship to the amount of avoided collection costs.
- **Prior to implementation, have your practice's "prompt payment" discount policy reviewed by an attorney to ensure compliance with all applicable laws.** Violations of the various patient antisolicitation laws and other relevant laws may result in hefty penalties, as well as potential criminal charges. To ensure compliance with all applicable laws, obtaining a legal review of the practice's policy is strongly recommended. A health care attorney should be able to advise you on all the factors necessary to develop a sound, legally compliant policy that is specific to your practice.

Texas Insurance Code Provisions on Illegal Pricing Practices

- Texas Insurance Code, Sec. 552.001. APPLICABILITY OF CHAPTER. (a) This chapter does not apply to the provision of a health care service to a:
 - (1) Medicaid or Medicare patient or a patient who is covered by a federal, state, or local government-sponsored indigent health care program;
 - (2) financially or medically indigent person who qualifies for indigent health care services based on:
 - (A) a sliding fee scale; or
 - (B) a written charity care policy established by a health care provider; or
 - (3) person who is not covered by a health insurance policy or other health benefit plan that provides benefits for the services and qualifies for services for the uninsured based on a written policy established by a health care provider.
- (b) This chapter does not permit the establishment of health care provider policies or contracts that violate any other state or federal law.
- (c) This chapter does not prohibit a health care provider from entering into a contract to provide services covered by a health insurance policy or other health benefit plan with:
 - (1) the issuer of the health insurance policy or other health benefit plan; or

(2) a preferred provider organization that contracts with the issuer of the health insurance policy or other health benefit plan.

- Texas Insurance Code, Sec. 552.002. FRAUDULENT INSURANCE ACT. An offense under Section 552.003 is a fraudulent insurance act under Chapter 701.
- Texas Insurance Code, Sec. 552.003. CHARGING DIFFERENT PRICES; OFFENSE.
 - (a) A person commits an offense if:
 - (1) the person knowingly or intentionally charges two different prices for providing the same product or service; and
 - (2) the higher price charged is based on the fact that an insurer will pay all or part of the price of the product or service.
 - (b) An offense under this section is a Class B misdemeanor.

Citations to Other Texas Laws

- Texas Occupations Code, §101.352. BILLING POLICIES AND INFORMATION; PHYSICIANS
- Texas Occupation Code, §102.001 et seq. (Texas Patient Solicitation Act)

Citations to Federal Law

- Federal Anti-kickback Statute — 42 USCA §1320a-7b(b)
- Federal Civil Monetary Penalties Law — 42 USCA §1320a-7a

NOTICE: This information is provided as a commentary on legal issues and is not intended to provide advice on any specific legal matter. The Texas Medical Association provides this information with the express understanding that 1) no attorney-client relationship exists, 2) neither TMA nor its attorneys are engaged in providing legal advice and 3) the information is of a general character. **This is not a substitute for the advice of an attorney.** While every effort is made to ensure that content is complete, accurate and timely, TMA cannot guarantee the accuracy and totality of the information contained in this article and assumes no legal responsibility for loss or damages resulting from the use of this content. You should not rely on this information when dealing with personal legal matters; rather legal advice from retained legal counsel should be sought.