

Basic Legal Issues in Implementing Healthcare Incentives and Pay for Performance Programs

Davis Wright Tremaine LLP 

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Overview

- **Context for P4P**
- **Antitrust**
- **Physician Incentive Programs**
- **Collection and Exchange of Data**



A Growing Trend

- **Many variations; we focus on health plan payments to providers to reward quality**
- **Examples:**
 - **Integrated Healthcare Association (California)**
 - **Bridges to Excellence (Boston, Cincinnati, Albany)**
 - **Leapfrog Group**
 - **Medicare**



Features

- **Quality measures**
 - **Clinical measures**
 - **Screening, immunization and other prevention**
 - **Patient satisfaction**
 - **Adoption of technology**
- **Payment**
 - **Incremental PMPM payment (typically < 5%)**
 - **Often competitive**
- **Scorecards**



Antitrust

- **The price-fixing concern**
- **Elements of payment**
 - **Measures**
 - **Weighting**
 - **Payment**



Antitrust

- **The case for collaboration**
- **The MedSouth clinical integration opinion**
- **The FTC/DOJ Report - Improving Health Care**



Antitrust

- **How far is too far?**
 - **Measures**
 - **Weighting**
 - **Payment**
 - **Recommended or binding**
 - **Possible anti-competitive effects**



Physician Incentives

- **Anti-kickback Laws**
- **Gainsharing**
- **Limitation of Care**
- **Physician incentive plans**



Anti-kickback laws

- **Both federal and state**
- **Prohibits the offer/receipt of remuneration for referrals**
- **Civil penalties and criminal exposure**
- **Exception for managed care**



Gainsharing

- **Alignment of financial incentives to improve efficiencies, increase quality of care, lower costs**



Gainsharing

- **Programs scrutinized by OIG**
- **Acceptable programs**
 - **identify specific cost-saving actions**
 - **must monitor quality to assure no adverse impact**
 - **no cherry-picking incentives**
 - **no hidden incentives for individual referrals**



Limitation of Care

- **Civil Monetary Penalties (CMPs)**
- **Prohibits remuneration intended to limit services to Medicare/Medicaid beneficiaries**



Physician Incentive Plans

- **Compensation arrangement that may directly or indirectly have the effect of reducing or limiting services provided with respect to enrolled individuals**



Physician Incentive Plans

- **Contracts with CMPs**
 - **no inducement to reduce of limit services**
 - **stop-loss if physicians at substantial financial risk**
 - **quality assurance/satisfaction survey**



Privacy/Confidentiality

- **Protection of individually identifiable health information**
 - **HIPAA allows disclosure to contractor for data aggregation**
- **Permissible use of aggregate data**
 - **Reporting to provider and health plan**
 - **Disclosure to others**
 - **Research**
 - **Public scorecards**
 - **Collateral uses**



Data Collection & Integrity

- **HIPAA requires reasonable measures to secure electronic data**
 - **encryption**
 - **physical safeguards**
 - **access controls**
 - **audits and monitoring**



Data Collection & Integrity

- **Issues**
 - **Who collects and verifies data?**
 - **How is accuracy of data assured?**
 - **Publication of data regarding a specific provider**



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Questions

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