

## ***What the law says about gifts and lunches***

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Reasonable amounts can be spent to educate referral sources about Medicare coverage and your services including buying them lunch.

Please notice that the term “Medicare coverage” first and “services” last. This is always a good visual in the unlikely event there is any challenges from the government.

In any case, providing education about your services is an acceptable practice, and does not violate the Anti-Kickback Statute or Stark Law. And in situations where you are required to provide education over a breakfast, lunch or other meal setting, it is acceptable to provide a modest meal to those attending the educational session. Consider Stark Law when providing meals to physicians. Stark Law indicates that gifts to physicians cannot exceed an aggregate of \$300 plus the CPI-U (\$355 for 2009 and for 2010 as there was a negative change). Food counts towards these limits.

See CPI schedule here: [http://www.cms.hhs.gov/PhysicianSelfReferral/10\\_CPI-U\\_Updates.asp#TopOfPage](http://www.cms.hhs.gov/PhysicianSelfReferral/10_CPI-U_Updates.asp#TopOfPage)

Here is the source of this information: [http://www.cms.hhs.gov/physicianselfreferral/01\\_overview.asp?](http://www.cms.hhs.gov/physicianselfreferral/01_overview.asp?)

***Bottom line:*** If payment to a referral source is not for something reasonable and necessary, payment is likely illegal.

You cannot pay or provide a gift to a referral source for something that would not be considered reasonable and necessary. You cannot offer or furnish free services to referral sources. According to this principle, you cannot offer your referral sources anything they would otherwise have to pay for in exchange for referrals.

### **THE STARK LAW § 2.03**

[b] Compensation under \$300

Because it is commonplace for physicians to receive various gifts (e.g., a holiday basket) and other items of de minimis value (e.g., a free meal) from the entities with which they do business, CMS has created a regulatory exception for such remuneration. At bottom, this exception permits annual compensation to an individual physician, provided:

The compensation, in the aggregate, does not exceed \$300 per annum, as adjusted to reflect CPI-U increases.<sup>132</sup> (The adjusted annual amount for calendar year 2010 is \$355.)

- The compensation is not in the form of cash or a cash equivalent.
- The physician (or his or her practice) does not solicit the compensation. (Thus, you may give a physician a ticket to a sporting event, provided the value of the ticket is under \$355. However, when a second physician learns about this and asks you for a ticket for himself, you may not give a ticket to the second physician).

- The compensation may not be determined in a manner that takes into account the volume or value of referrals or other business generated, nor may it violate the Anti-Kickback Law.

Although this exception ultimately is a creature of CMS's pragmatism, it requires HMEs and other DHS entities to accurately monitor their compensation arrangements with physicians. CMS's view is that such monitoring should not be "unduly burdensome."<sup>133</sup> However, compliance with this exception is only possible if the DHS entity implements a comprehensive and methodical tracking system.

130 42 C.F.R. § 411.357(j).

131 Id.

132 Such increases are posted at <<http://cms.hhs.gov/PhysicianSelfReferral>>.

133 69 Fed. Reg. 16,054, 16,112 (2004).2-33

#### [c] Staff Incidental Benefits

DHS entities routinely furnish members of their medical staff with certain incidental benefits—such as free or discounted parking or meals—thereby creating numerous direct compensation arrangements. Because such "incidental" benefits do not pose a material risk of program or patient abuse,<sup>134</sup> CMS has created an exception for items and services (other than cash) furnished by a DHS entity to members of its bona fide medical staff.<sup>135</sup> Thus, incidental benefits do not give rise to a compensation arrangement, provided certain conditions are met. These include that (1) the benefit is provided uniformly to all physicians within a specialty without regard to the volume or value of referrals or other business generated; (2) the benefit is provided and used only on the facility's campus; and (3) the benefit (in each instance) is valued at \$25 or less, as annually adjusted for CPI-U.<sup>136</sup> Note that in contrast to the exception compensation under §355 a year annum exception (discussed above), the furnishing entity does not have to aggregate annually the value of benefits and, as such, may provide its staff with unlimited incidental benefits, provided each benefit is below \$25 (as adjusted) and the other requirements of the exception are satisfied.

#### [d] Compliance Training

Because the provision of compliance training by a DHS entity to a physician (or his or her immediate family or office staff) likely gives rise to a direct compensation arrangement, CMS sought to encourage such "beneficial" conduct by creating an exception for compliance training programs offered in the DHS entity's local community or service area.<sup>137</sup> (Thus, if an Atlanta-based DHS entity sent one of its medical directors to a compliance conference in Chicago, the DHS entity could not rely on this exception to avoid the billing prohibitions of the Stark Law.)

The exception defines the term "compliance training" broadly to include training regarding the elements of a compliance program, the requirements of particular health care laws and regulations, proper coding, and the like.<sup>138</sup> It expressly excludes continuing medical education (CME) on the grounds that CME is not "primarily intended to promote legal compliance."<sup>139</sup>

The precise scope of this exclusion is unclear. It is unlikely that CMS intended to exclude compliance training that qualifies for CME credit in general (e.g., for attorneys or compliance personnel); rather, CMS probably intended to exclude training that is so clinical in nature as to qualify for CME.

134 66 Fed. Reg. 856, 921.

135 42 U.S.C. § 1375(m).

136 Id. (listing other conditions in addition to those set forth in the text).

137 42 C.F.R. § 411.357(o).

138 Id.

139 69 Fed. Reg. at 16,114.