

Insights

Protect Yourself from Anti-Kickback Statute Liability When Donating PPE

May 18, 2020

By: Brandon W. Shirley and Marc T. Quigley

The HHS Office of Inspector General ("OIG") recently updated its COVID-19 FAQ page to clarify its view of donated Personal Protective Equipment ("PPE") during the COVID-19 public health emergency. Specifically, the OIG clarified that donations to actual or potential referral sources made during the public health emergency would not violate the Anti-Kickback Statute ("AKS"), so long as the donations are made consistent with the OIG's guidance.

In general, the AKS prohibits payment of "remuneration" to induce patient referrals or to generate business payable by federal health care programs (e.g., Medicare and Medicaid). The AKS defines "remuneration" broadly, and it could include the donation of PPE between such providers. The OIG analyzed this issue in response to a question from a physician group interested in donating PPE to a nursing facility experiencing a PPE shortage due to the COVID-19 outbreak. While the facts concerned donations to nursing facilities, the OIG's analysis applies broadly and provides a roadmap for donations of PPE between many health care providers.

The OIG acknowledged that the provision of free or reduced services to an actual source of health care referrals may violate the AKS. However, given the unique circumstances of the COVID-19 outbreak, the OIG concluded that donating PPE would pose a low risk of fraud or abuse under the AKS, provided that:

- the decision to furnish PPE for free or at a reduced cost is directly connected to addressing the impact of the COVID-19 outbreak;
- the PPE is furnished only during the COVID-19 public health declaration;
- the donor does not market the PPE as being free or reduced in price; and
- the donation is not made contingent on the recipient's referrals to the donor of any specified item or service or patient referrals that may be reimbursable by a Federal health care program.

The OIG did not specify how to providers should facilitate such arrangements. To demonstrate compliance with the OIG's guidance, parties should document the arrangement in writing and carefully monitor the donations to ensure that it is made according to the terms of the arrangement and that it does not continue beyond the Federal COVID-19 public health declaration.

The OIG's position is a timely reminder to federal health care program providers to carefully analyze proposed arrangements with health care partners, including arrangements that are intended to address immediate concerns related to the COVID-19 emergency. Please contact Brandon W. Shirley or Marc T. Quigley if you have any questions regarding your organization's compliance with the state or federal fraud and abuse laws.