

Are Per-Patient Bonuses Legal?

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By Michael H. Cohen

In today's video, we talk about the thorny question of whether bonusing staff on a per-patient business is legal or legally risky.

I'm Michael H. Cohen, founding attorney of the Cohen Healthcare Law Group. We help healthcare industry clients just like you navigate healthcare and wellness legal and regulatory landscape so you can launch, or scale, your business or product or service.

Let's say you have a medical office that does plastic surgery, a medical spa, a telemedicine practice, something else. You're the physician and the Registered Nurse or Physician Assistant whom you supervise is super-personable and popular. Because of this mid-level, patients come back again and again. So, they come back for an IV infusion, or Botox, an injectable or laser treatment, hair removal, or some other aesthetic medicine or anti-aging, functional medicine, integrative medicine, or some other therapeutic procedure or approach.

In fact, let's just say it's the RN or the PA that is responsible for 90% of your business. They are the magnet. They are expert at marketing and customer relations. You want to retain them long-term, obviously. Can you bonus them based on patient retention and return? Could you pay them as an independent contractor, with variable compensation depending on revenues?

The answer is a two-letter word: No, you shouldn't bonus clinical staff based on the financial story of their financial success with patients. Anti-kickback laws prohibit any compensation that varies based on the VALUE or VOLUME of patients. So, compensation that varies with the dollar revenue figure or number of patients returning, would violate these laws.

And an employment arrangement is much less risky than an independent contractor arrangement for two reasons: first, bona fide employment is a safe harbor to anti-kickback law; and second, supervision implies control, and control means the person should be classified as an employee.

Now, if you would want to bonus your staff person, what can you do? You can reward performance and productivity. The clearest way to do this, is to establish KPI, Key Performance Indicators. The KPI should not be tied to the value or volume of patients. So, for example, let's take patient satisfaction. It's a measure of performance. The more satisfied the patients the more likely they will return; you'll have more revenue – but you are measuring satisfaction and not the number of patient visits or how many dollars they generated.

You can apply this same approach to your marketing staff, and we've got blog posts on that. Set objective KPI that reward actual performance, not revenue results.

And last, ensure that compensation as always reflects fair market value for the services rendered. Fair market value should

be set according to performance—in other words, effort—not results.

As one formulation of the black-letter law, in California, Business & Professions Code Section 650(b) requires that the bonus be: *“for services other than the referral of patients”* and *“commensurate with the value of the services furnished.”*

Thanks for watching. If you still have questions, click on the link below, cohenhealthcarelaw.com/contact, to send us a message or book an appointment. Here's to the success of your healthcare venture, we look forward to speaking with you soon.

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