Prompt pay, cash discounts, dual fees legal for healthcare providers (physicians, chiropractors, acupuncturists)? (Part 2)

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Are prompt pay, cash discounts, dual fees legal? In this Part 2, let's focus on differential payment schemes. When physicians, chiropractors, acupuncturists, and other healthcare providers provide prompt pay discounts to patients, or cash pay discounts to non-insured patients, are these legal?

California's allowance for prompt pay and cash pay

The legal rules differ by state.

California law, for example, allows healthcare providers to charge a **prompt payment discount**.

Business & Professions Code, Section 657 provides:

(b) To encourage the prompt payment of health or medical care claims, health care providers are hereby expressly authorized to grant discounts in health or medical care claims when payment is made promptly within time limits prescribed by the health care providers or institutions rendering the service or treatment.

(c) Notwithstanding any provision in any health care service plan contract or insurance contract to the contrary, health care providers are hereby expressly authorized to grant discounts for health or medical care provided to any patient the health care provider has reasonable cause to believe is not eligible for, or is not entitled to, insurance reimbursement, coverage under the Medi-Cal program, or coverage by a health care service plan for the health or medical care provided. Any discounted fee granted pursuant to this section shall not be deemed to be the health care provider's usual, customary, or reasonable fee for any other purposes, including, but not limited to, any health care service plan contract or insurance contract.

We mentioned in our prior blog post on Prompt Pay, Cash Pay & Dual Fees that it is straight-forward when a statute tells you in plain language what is allowed. Here, Business & Professions Code 657(b) allows healthcare providers and institutions to "**grant discounts in health or medical care claims** when payment is made promptly within time limits prescribed by" the healthcare provider or institution (hospital, clinic, etc.).

So the **prompt pay discount** is expressly allowed.

Business & Professions Code 657(c) allows healthcare providers to "grant discounts for health or medical care provided to any patient the health care provider has reasonable cause to believe is not eligible for, or is not entitled to, insurance

reimbursement … or coverage." So the **cash pay discount** is allowed **for non-insured patients**.

The statute is even so clear as to say that the discount "shall not be deemed to be the health care provider's usual, customary, or reasonable fee for any other purposes, including, but not limited to, any health care service plan contract or insurance contract." So there can be no argument that the discount is somehow insurance fraud.

Contrast New York

Contrast this with the somewhat intricate discussion of one of New York's enforcement authorities, below. Really, what they are saying is that New York does not have a clear allowance like California, and therefore the provider who engages in such a practice is at risk.

This is a good example of state-by-state variations.

The variation also shows how the language of the statute can either be unambiguous in either allowing or prohibiting something, or ambiguous in leaving things up to the enforcement authorities.

New York's more somber approach

One physician asked about the legality of charging non-insured patients in New York a lower rate for the same service.

bottom line is that the practice seems risky, as expressed by the Office of General Counsel ("OGC") of the New York Department of Financial Services ("NYDFS"), which regulates insurance in New York.

Insurance Fraud Concerns

In a 2000 opinion entitled, Chiropractic Group Office, OGC asked:

2) May a chiropractic group charge its uninsured patients a lower rate than it charges its insured patients for the same services?

3) May a chiropractic group charge its patients who pay by cash lower rates than it charges patients who pay by credit card for the same services?

OGC concluded:

2) A chiropractic group that charges its uninsured patients lower rates than it charges its insured patients for the same services may be in violation of N.Y. Penal Law § 176.05 (McKinney 1999).

3) A chiropractic group that charges patients who pay by cash lower rates than it charges patients who pay by credit card for the same services may be in violation of N.Y. Penal Law § 176.05 (McKinney 1999).

OGC explained:

If the insurer is paying the chiropractic group a percentage of the usual and customary fee, then the waiving of co-payment fees on a regular basis and the charging of lower rates to non-insureds, or to patients who pay by cash, may be construed as insurance fraud because these practices may suggest that the chiropractic group's ususal and customary fee is not being accurately reported to the insurer. When a rate discount is provided, the question arises as to whether the discounted rate is actually the service provider's usual and customary charge, making the non-discounted rate an inflated rate. Thus, waiving co-payment amounts and charging higher rates to insureds than to non-insureds, or to those who pay by credit card, for the same

services may constitute insurance fraud under N.Y. Penal Law § 176.05(2) (McKinney 1999).

OGC expressed its views again in 2007 in Fees charged by a chiropractor; insurance fraud? However, OGC's positive take on the practice, was limited to a situation involving a non-participating provider.

OGC stated:

Question Presented:

If a chiropractor were to charge a lower fee for services to "non-insurance" patients – that is, patients without insurance or whose contractual benefits under an insurance policy have been exhausted – than to patients whose cost of services is covered by insurance, could the chiropractor's conduct alone constitute insurance fraud?

Conclusion:

No. If a chiropractor charges a lower fee to non-insurance patients who pay cash, that activity would not constitute insurance fraud, because neither the chiropractor nor the insured would submit any claim for services to an insurer, self-insurer, purported insurer, or any agent thereof. **However, if a chiropractor submits a claim to an insurer for an insured patient, or issues a bill to an insured patient for services knowing that the bill will be presented to the insurer, then the chiropractor would be wise to fully disclose to the insurer that it charges non-insurance patients who pay cash a lower fee.**

Note the sentence we have bolded above.

The background facts included:

The inquirer proposes to charge a patient without insurance who pays cash a lower fee for services than an insured patient. The scenarios presented assume that the inquirer would be a "non-participating" provider vis-à-vis any insurer involved, and would have no contractual relationship with the insurer.

OGC further explained:

The inquirer proposes to charge a non-insurance patient who pays cash a lower fee for chiropractic services than he charges an insured patient. With respect to non-insurance patients, neither the chiropractor nor the patient submits any claim for chiropractic services to an insurer, self-insurer, purported insurer, or any agent thereof. Accordingly, in processing such a claim, there is no insurance act involved, fraudulent or otherwise.

This part seems, in one sense, tautological—i.e., there is no insurance fraud where no bill is submitted to any insurer. But note the next sentence (which we bold):

However, if a chiropractor submits a claim to an insurer for an insured patient, or issues a bill to an insured patient for services knowing that the bill will be presented to the insurer, then the chiropractor runs the risk of being charged with a fraudulent insurance act if the chiropractor were to mislead the insurer by, for example, failing to disclose that he charges non-insurance patients a lower fee for the same services he provides to insured patients. Thus, the prudent chiropractor should fully disclose to the insurer that it charges non-insurance patients who pay cash a lower fee.

Note that there are two messages here. First, OGC warns that "the chiropractor runs the risk of being charged with a fraudulent insurance act." Second, OGC cuts back on this warning, by saying that "the prudent chiropractor should fully disclose to the insurer that it charges non-insurance patients who pay cash a lower fee."

This seems to suggest an allowance, and best practices, but may be ‘cold comfort,’ given the warning of the risk.

According to the OCG opinion, New York Education Law also contains various prohibitions, although the Department of Education in this case referred the matter to OCG.

Participating provider concerns, kickback issues

There are additional legal risks beyond those of insurance fraud as outlined by OGC above.

One online article raises another issue: the contractual relationship of the participating practitioner, with the insurer: “the terms of that contract may limit the Practice’s discretion to charge lower fees to different categories of patients.”

Another article, Cash Discounts for Patients: Navigating the Legal Minefield, suggests that legal challenges include: “Medicare reimbursement limitations, state anti-kickback laws, the anti-beneficiary inducement provision of the Health Insurance Portability and Accountability Act (“HIPAA”), the Medicare exclusion provision that relates to Medicare and non-Medicare charges, and state insurance anti-discrimination provisions.”

Of course, the article includes under “cash discounts,” waivers of out of network penalties.

Even so, the article suggests that particularly with a Medicare-covered service, “the effect of this discount typically will be to take the actual charge below the Medicare fee allowable.”

The article further cites prohibitions in state anti-kickback laws against inducing patient referrals; anti-discrimination laws; and clauses in participating provider insurance contracts that require a provider to give the lowest price it has offered to anyone else automatically to the private insurance company, regardless of what the insurer would otherwise pay.

Some Best Practices

If a healthcare provider does make a business judgment to charge non-insureds a lesser charge, the healthcare provider should at the least be sure to disclose this to your insurer(s); that the usual and customary charge is clear; and that any cash discount has a logical basis or can readily be explained in way that creates an argument against potential kickback concerns.