

**DISCOUNTING OR WAIVING PATIENT
CO-PAYMENTS AND DEDUCTIBLES -
AN OVERVIEW PRIMER**

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Whenever a health care provider is faced with the decision of whether to waive or discount a patient's co-payment or deductible, it must consider the various legal and business risks attendant to such practice. This primer provides a brief summary of those risks and recommends guidelines that a provider should consider to help reduce those risks.

As a general rule, a provider should not generally waive co-payments or deductibles. Moreover, in the case of Medicare and Medicaid patients, a provider should never waive or discount co-payments and deductibles unless the patient demonstrates financial hardship.

Where a provider is excluded from a managed care payor network, patients are often required to pay a much higher "out-of-network" co-payment if they choose to be treated at such provider. In such a case, it may be viewed as a potential kickback, insurance fraud or grounds for disciplinary action against a physician to waive the co-payment, co-insurance or deductible.¹ Further, a provider's waiver of co-payments or deductibles may also affect the provider's right to collect insurance from the payor. For example, courts in certain cases have held that by waiving a patient's co-payment or deductible, the provider also waives its rights to collect the insurance payment from the insurance company.

With regard to discounting co-payments or deductibles in the commercial payor context, a provider may choose to pursue the following options:

1. The safest course to take is not to waive or discount co-payments or deductible amounts.
2. The next safest course for a provider to take is to discount co-payments and deductibles to the same extent that it offers a discount to the insurer. Thus, if a provider discounts the co-payment by 25%, it should also offer to the insurer a 25% discount on the insurance payment amount. Alternatively (but a little less clear as to risk), a provider may

¹ For example, several states explicitly make it illegal to waive co-payments or deductibles. *See e.g.*, OHIO REV. CODE ANN. § 4731.22(B)(28)(a) and (b) (Anderson 2001). The State Medical Board may limit, revoke, or suspend an individual's certificate to practice medicine or otherwise discipline a physician if the physician waives "the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract or plan that covers the individual's services, otherwise would be required to pay if the waiver is used as an enticement to a patient or group of patients to receive health care services from that individual." OHIO REV. CODE ANN. § 4731.22(B)(28)(a) (Anderson 2001). A physician may also be disciplined for "advertising that [he or she] will waive the payment of all or any part of a deductible or copayment that a patient, pursuant to a health insurance or health care policy, contract, or plan that covers the individual's services, otherwise would be required to pay." OHIO REV. CODE ANN. § 4731.22(B)(28)(b) (Anderson 2001); *See also* TEX. INS. CODE art. 21.24-4(c), "The payment of benefits under an assignment does not relieve the covered person of any contractual responsibility for the payment of deductibles and copayments. A physician or other health care provider may not waive copayments or deductibles by acceptance of an assignment."

examine offering the insurer a discount equal to the patient discount. A letter to the payor should be provided outlining this policy. Alternatively, each claim should outline this policy.²

3. Another fairly safe course for a provider to take would be to reduce the co-payment or deductible amount so that it is based on the total payment that the provider expects to receive from the insurer as opposed to the usual and customary charge. For example, if the provider's usual and customary charge for a particular service is \$2,000, but it expects to receive \$1,200 from the insurer, and the patient is responsible for a co-payment amount equal to 20% of the fee for such service, the 20% co-payment amount may be based on the expected payment amount. Thus, the patient would only be responsible for 20% of the total expected amount (e.g. 20% of \$1,400 or so).

4. If a provider is going to furnish discounts on co-payments or deductibles, the provider should furnish the discount to an extremely small percentage of patients on an individual basis. In addition, it is preferred that these patients should demonstrate some financial need. The more that the practice is a regular business practice, the more risk that is likely to be involved.

5. A provider risks possible allegations of insurance fraud and of tortious interference with a contract by discounting co-payments and deductibles, particularly if it does not notify the insurer that a discount has been provided to a particular patient with respect to a particular claim. To help reduce the risk related to such allegations, the provider may notify the payor that a discount was provided to the patient by sending a letter to the payor and indicating on the claim form submitted to the payor that a discount was provided. Further, a provider also risks allegations of insurance fraud if it does not offer a similar discount to the payor. In essence, if the provider is charging a patient a reduced co-payment or deductible, but still charging the insurer the full usual and customary charge, the provider may be accused of illegal pricing schemes (i.e., charging different amounts to the patient and the insurer).

Further, many states specifically make it unlawful to waive co-payments or deductibles. While it is not clear that a discount to an in-network amount is a waiver, there exist a substantial risk that a court would not distinguish a waiver from a discount. Some states specifically indicate that one cannot waive any part of the co-payment. Further, certain states allow discounts or waivers if they are either authorized by the insurer or based on the individual patient and not a regular business practice of the provider.

² Certain states actually require the payor to consent to any discount provided. *See e.g.*, OHIO REV. CODE ANN. § 4731.22(N) (Anderson 2001). A physician will not be disciplined if he or she waives patient deductibles and co-payments “[i]n compliance with the health benefit plan that expressly allows such a practice. Waiver of the deductibles or copayments shall be made only with the full knowledge and consent of the plan purchaser, payer, and third-party administrator. Documentation of the consent shall be made available to the board upon request.” OHIO REV. CODE ANN. § 4731.22(N) (Anderson 2001); *See also*, GA. CODE ANN. §§43-1-19.1(a) and (c)(2001). A health care provider's license may be revoked, suspended, or otherwise sanctioned if the provider advertises “as an inducement to attract patients, the waiver of a deductible or copayment required to be made to such person under the patient's health insurance policy or plan.” GA. CODE ANN. §§43-1-19.1(a) (2001). A provider will not be sanctioned, however, “if the waiver is authorized by the insurer or if the waiver is based on an evaluation of the individual patient and is not a regular business practice of the person providing the health care services.” GA. CODE ANN. §43-1-19.1(c) (2001).

While some of these statutes regulate the conduct of physicians and other healthcare professionals, but not specifically healthcare facilities, a healthcare facility should be aware that these statutes may nonetheless be used to bring claims against them. Moreover, even in states that do not have statutes which specifically address the discount or waiver of co-payments or deductibles, providers may be held liable or alleged to be acting unlawfully for such practices under more general laws relating to insurance fraud, deceptive and unfair trade practices and kickbacks. Further, Health Insurance Portability and Accountability Act of 1996 contains certain provisions that implicate false claims issues in the non-governmental context.

6. A provider should consider determining an “in-network” charge. If the provider and the insurer are able to agree on an in-network charge, the provider greatly reduces its risks of allegations of insurance fraud, as well as claims asserted by the insurer for overpayments. Alternatively, a provider may charge the patient the in-network co-payment or deductible amount, inform the insurer of this practice and offer the insurer the in-network billing charge or the discount discussed in 2 or 3 indicated above. The provider should be aggressive about disclosing such practice to insurers. This option still involves some financial and legal risks.

7. To obtain further comfort and information on this issue, the provider must examine state laws related to co-payment and deductible waiver and discount practices. Further, we suggest that the provider or counsel approach the Department of Insurance and Board of Medicine or other physician regulating agency in the state in which the provider is located to obtain its feedback on these issues as well.

8. Other suggestions.

- a. When informing the payor that a discount has been provided to a patient’s co-payment or deductible, the provider may request the commercial payor to contact it if the payor objects to the discount. The provider may also contact the payor directly regarding this issue;
- b. The provider should carefully track receivables from any payors to whom a discount is applied to determine whether any sort of delay in payment is occurring;
- c. If any delay in payment does occur, the provider should follow up with the payor to assure that such delay is not due to the payor’s refusal to pay bills due to any discounts provided;
- d. The provider should understand that if it later brings claims against an insurer for refusal to pay or for some other reason and has discounted patient co-payments or deductibles, some risk exists that the payor will attempt to use the discount as an excuse to bring counterclaims against the provider, (e.g., for recoupment of claims paid);
- e. The provider should not advertise to patients that it will waive or discount co-payments or deductibles;

- f. The provider should keep abreast of legal developments related to discount and waiver of co-payments and deductibles; and
- g. The provider may consider meeting with payors to discuss its co-payment discount policy and attempt to become an in-network provider.

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