

# Center for Health and Wellness Law, LLC

Center for Health and Wellness Law, LLC  
November/December 2017 Newsletter

## When Responding to the Government, Don't Do It Alone!

I have many clients who find themselves being investigated by the government at both the state and federal levels. The investigation might be because a consumer complained against the health professional's license, or a complaint involving a HIPAA breach, or a Medicare or Medicaid issue. Whatever the reason, health and wellness providers should not respond without seeking help first. Here's a good example why.

A health professional had licenses in a number of states. One state's licensing board disciplined him because of a complaint that was brought by two other professionals who did not like him. Because he did not want to practice in that state anymore, he decided not to fight the allegations. However, as is often the case, when one state takes disciplinary action against a health professional, other states in which that professional holds a license follow. That is exactly what happened. It wasn't until these other states started to take disciplinary action against this professional that he contacted legal counsel. By then, it was too late to stop the landslide of disciplinary actions from not only all the states in which he held a license, but also the Medicare and Medicaid programs. Had this professional contacted legal counsel at the outset and fought the allegations in the first state, he could have very likely avoided the disciplinary action from the other states as well as Medicare and Medicaid. Instead, he waited. This cost him the ability to participate in Medicare for two years! This was not only bad for his finances, but also his reputation.

Lawyers and others who are familiar with the government investigation process know who the players are in the investigation and what they are looking for from the health professional. I have been asked to help too many clients too late in the process, after the client has informed the government of either needless or more damaging information than what was complained of in the first place. Experienced legal counsel knows what to tell the government and how much to tell the government. Giving the government unnecessary information can lead to further investigation and penalties. Penalties can include losing your state-issued license to practice your profession, a suspension of your license to practice, an order for more continuing education, financial penalties, loss of your ability to participate in the Medicare or Medicaid programs or other penalties.

So, if you find yourself facing a government investigation, call your legal counsel immediately. It may save you years of anxiety. Contact [www.wellnesslaw.com](http://www.wellnesslaw.com) to learn more.

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## Legal Risks to Offering Patient Discounts

Many providers, including chiropractors, like to offer patients "time of service" or "prompt-payment" discounts. According to an Office of Inspector General (OIG) Advisory Opinion from

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2008, prompt payment discounts are discounts for a patient's prompt payment of their cost-sharing amounts and amounts owed for services not covered by insurance.<sup>1</sup> Prompt pay discounts are designed to reduce a provider's accounts receivables and costs of debt collection, and to boost its cash flow. Often times, prompt pay discounts are equivalent to the amount of collection costs that would be avoided and are offered to patients regardless of their financial status or ability to pay.<sup>2</sup> In other words, time of service or prompt pay discounts save time for providers in collecting patient cost-sharing fees. They also may save money for patients, especially those who participate in "high deductible health plans" or HDHPs,<sup>3</sup> which are growing in popularity across the United States.<sup>4</sup> The average annual deductible in HDHPs is about \$2,500 for individuals choosing in-network providers and \$5,000 for families choosing in-network providers.<sup>5</sup>

Nevertheless, there are state and federal rules and guidelines that govern whether, when and how prompt pay or financial hardship discounts are permissible. As much as some dislike patient cost-sharing, insurers and regulators believe patient cost-sharing plays an important role in controlling overutilization of health care items and services.<sup>6</sup> "If beneficiaries are required to pay for a portion of their care, they will be better health care consumers, selecting items or services because they are medically needed."<sup>7</sup>

One risk in offering prompt pay discounts to patients is frequent or large discounts could affect a provider's "usual and customary" charge. For example, a provider who offers prompt pay discounts to self-pay patients for services otherwise covered by insurance for insured patients risks running afoul of possible "Most Favored Nation" (MFN) clauses in the provider's contract with an insurer. These MFN clauses require the provider to give the insurer the best available price for the service. If an insurer learns that a provider customarily charges less for the same service to uninsured self-pay patients as insured patients, the MFN clause in the insurance contract may entitle the insurer to pay the provider the lowest price charged by the provider. Furthermore, if a provider's HDHP and self-pay patients pay the prompt pay discount often, the Medicare or Medicaid program may exclude the provider from those programs because the provider's bills are "substantially in excess" of his or her "usual charge."<sup>8</sup> As a result, providers who contract with insurers and participate in the Medicare and Medicaid programs should

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<sup>1</sup> OIG Advisory Opinion No. 08-03, at 2 (Feb. 8, 2008).

<sup>2</sup> Id.

<sup>3</sup> According to [healthcare.gov](https://www.healthcare.gov/glossary/high-deductible-health-plan/), high deductible health plans (HDHP) are plans that feature higher deductibles than traditional insurance plans. They can be combined with a health savings account or a health reimbursement arrangement to allow patients to pay for qualified out-of-pocket medical expenses on a pre-tax basis. See <https://www.healthcare.gov/glossary/high-deductible-health-plan/>.

<sup>4</sup> The percent of employers offering HDHPs increased from 39% in 2013 to 48% in 2014. See <http://www.forbes.com/sites/brucejapsen/2014/11/19/half-of-employers-pushing-high-deductible-plans-onto-workers/>

<sup>5</sup> Id.

<sup>6</sup> Dept. of Health and Human Services, Office of Inspector General, *Hospital Discounts Offered to Patients who cannot Afford to Pay their Hospital Bills* (Feb. 2, 2004).

<sup>7</sup> Id.

<sup>8</sup> 42 USC § 1320a-7(b)(6)(a).

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avoid situations in which HDHP and self-pay patients receive frequent, substantial prompt pay discounts. A good rule of thumb is to limit the discount to the amount that the provider will save in collection costs by having the patient pay at the time of service.

Here is a helpful checklist. Please note that this checklist is not meant to be exhaustive. Please check with legal counsel before offering discounts to patients.

- ✓ Do not advertise any discounts.
- ✓ Offer prompt pay discounts only to HDHP patients who have not yet met their deductible or to self-pay patients (uninsured or insured patients receiving noncovered services).
- ✓ Do not discriminate in terms of which HDHP or self-pay patients receive the prompt pay discounts (i.e., offer the discount to all HDHP or self-pay patients unless a patient's insurance contract prohibits it).
- ✓ Inform the third-party payer of a HDHP or insured self-pay patient of any discount offered and applied.
- ✓ Match the amount of the prompt pay discounts to the amount of money saved from collection costs.
- ✓ Do not offer prompt pay discount to reduce or eliminate a patient's copayment or coinsurance amount.
- ✓ Check your insurance contracts to ensure there are no provisions that prohibit you from offering prompt pay discounts.
- ✓ Offer financial hardship discounts in accordance with objective guidelines.
- ✓ Apply financial hardship discounts uniformly to all patients who meet the objective guidelines.
- ✓ Be wary of offering frequent, large discounts that may adversely affect your "usual and customary" charge.
- ✓ When offering financial hardship discounts, reduce the amount owed by the insurer in proportion to the discount offered to the patient.

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## ***FAQ: Can an Employer Find Out Who is Participating in the Group Health Plan Wellness Program without the Employee's Prior Authorization?***

Yes. HIPAA permits group health plans to disclose to employers, without an employee's authorization, information about whether an individual is participating in the plan. See 45 CFR § 164.504(f)(iii). Thus, if an employer merely wants a list of wellness program participants with no other health information provided, a group health plan could disclose such a list to the employer without first obtaining the employee's authorization. Of course, other laws such as

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the Americans with Disabilities Act (ADA) would prohibit the employer from using that list to penalize employees who are not on that list (see next question).

Does this topic interest you? If so, check out the December WELCOA Webinar on Health Promotion Legal Updates on Wednesday, December 20<sup>th</sup>, 2017 at 9:30 am CST. The webinar will explore *“Who Can See What Health Information in Workplace Wellness Programs.”*

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## WELCOA Health Promotion Legal Updates to continue into 2018!!

The Center for Health and Wellness Law, LLC is happy to announce that its founder, Barbara J. Zabawa, JD, MPH, will continue her monthly webinar series for WELCOA in 2018. Topics to be covered in 2018 will include sexual harassment in the workplace, COBRA and workplace wellness, onsite clinics and workplace wellness, FTC Act, tiered incentives, use of genetic information, among others. The one-hour webinar will occur on the third Wednesday of each month, starting in January 2018. We hope you can join us! Visit <https://www.welcoa.org/training/webinars-current-events/> to learn more.

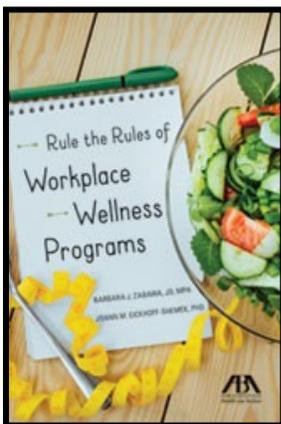
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Barbara Zabawa Featured in November 2017 Issue of National Association of Health Underwriters Magazine!

Read the article [“When it Comes to Workplace Wellness Programs, Compliance Equals Success.”](#)

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Have you ordered Rule the Rules of Workplace Wellness Programs yet?



The first comprehensive book regarding workplace wellness program compliance is now available for purchase. Order online at [www.wellnesslaw.com](http://www.wellnesslaw.com)!

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