



**THE STATE OF NEW HAMPSHIRE
INSURANCE DEPARTMENT**

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**BULLETIN
No.: INS No. 12-005-AB**

TO: All New Hampshire Licensed Producers

FROM: Roger A. Sevigny
Insurance Commissioner 

DATE: January 18, 2012

SUBJECT: Producer Involvement in Health Care Provider Prompt Pay Discount Arrangements

The New Hampshire Insurance Department has been asked to consider the legality of programs offered by certain insurance producers in conjunction with hospitals. These programs waive or reduce copays and/or deductibles due a provider by an employee enrolled in a group health insurance plan in which eligible out-of-pocket expenses may be reimbursed through a Health Reimbursement Arrangement (HRA) funded by that person's employer for the benefit of its employees. Depending on the particular program, the producer may act as an HRA administrator by processing payments from the HRA. Alternatively, the producer may contract with an HRA administrator to perform these services, or the employer itself may process the payment. The hospital applies a discount, which it may call a "prompt pay" discount, to the amount due from the employee.

The arrangements in question are designed to encourage employers to purchase health insurance through a producer that offers such a program rather than from a producer that does not. The Department does not regulate prompt pay discounts when they are offered directly by a health care provider to a patient as a way to encourage immediate payment of

charges not covered by insurance.¹ However, when producers offer these programs as an inducement to buy insurance they do fall under the Department's jurisdiction. If as an inducement to buy insurance a producer offers a "prompt pay" discount program that is not specified in the insurance policy, the arrangement may violate anti-rebating laws.

RSA 402:39 bars an insurance producer from offering anything of value not specified within the policy itself, including any reduction in premium or commission or "any other thing of value whatever" as an inducement to purchase insurance through that producer:

No insurance company, by itself or another, and **no insurance agent, solicitor or broker, personally or by another, shall offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to insurance, on any risk in this state, any rebate of or part of the premium payable on any policy or of the agent's commission thereon;** nor offer, promise, allow, give, set off or pay, directly or indirectly, as inducement to such insurance, any earnings, profits, dividends or other benefit, founded, arising, accruing, or to accrue on such insurance or therefrom, **or any other valuable consideration, which is not specified, promised or provided for in the policy contract of insurance,** nor offer, promise, give, sell or purchase, as inducement to insurance or in connection therewith, any stocks, bonds, securities, or property, nor, except as promised or provided for in the policy contract, offer, promise **or give any other thing of value whatever, as an inducement to insurance.**

(emphasis added). RSA 417:4, IX makes the offering of a rebate an unfair insurance trade practice.

In 2003, the New Hampshire legislature amended RSA 402:41 to allow producers to offer certain "value added" services or products as incentives to consumers. A free or reduced cost service or product that falls under the exemption at RSA 402:41, I(d) is not an

¹ These arrangements may under some circumstances be regulated by federal law, a detailed discussion of which is beyond the scope of this bulletin. However, in brief, the federal anti-kickback statute makes it a criminal offense knowingly to solicit or receive remuneration to induce or reward referrals of items or services reimbursable by a federal health care program. See U.S. Department of Health and Human Services OIG Advisory Opinion No. 08-03, discussing Section 1128B(b) of the Social Security Act. Federal regulations create a safe harbor for arrangements that precisely meet certain criteria, including a hospital's waiver of beneficiary co-pay or deductible associated with inpatient services, where the amount waived (a) is not written off as bad debt; (b) does not vary by medical procedure or service provided; and (c) is not part of an agreement between the hospital and a third-party payer. 42 C.F.R. section 1001.952(k). Under federal law, it is particularly important that the discount offered under a prompt payment policy bear a reasonable relationship to the amount of avoided collection costs. OIG Advisory Opinion No. 08-03 at 5-6.

unlawful rebate. However, to qualify under this exemption, a value added service or product must meet the following standards:

(d) Value added service, activity, or product offered or provided without a fee, or at a reduced fee, that is **related to the coverage provided** by the insurance contract, if the provision of such value added service, activity, or product **does not violate any other applicable statute or rule, and is:**

(1) Clearly identified and **included within the insurance policy**, annuity contract, or brokerage agreement; **or**

(2) **Directly related to the firm's servicing of the insurance policy**, annuity contract, or brokerage agreement, or offered or undertaken to provide risk control for the benefit of the client.

RSA 402:41, I(d) (emphasis added). The statute gives examples of value added services, including risk assessment, risk control tools, claims assistance, legislative updates and administrative consulting. RSA 402:41, II. If a prompt pay discount program falls under the value added services/product exception it will not be a rebate under state insurance law; if it does not, it will be an unlawful rebate.

Only arrangements that do not violate other applicable laws will be exempt as value added services or products. See RSA 402:41, I(d). Thus, producers should seek legal advice to make sure any prompt pay discount programs they wish to offer do not violate other state insurance laws. For example, programs where the producer or contract HRA administrator *by exclusive arrangement* with a health care provider offers access to reductions or waivers of copays or deductibles which are not available to all patients, for all services and regardless of the patient's carrier may violate the unreasonable restraint of trade or unfair discrimination provisions of the unfair insurance trade practices law, RSA 417:4, V and VIII. If there is a fee for the service or if the discount is applied in a way that cannot reasonably be described as a true prompt pay discount, then the program may need to be licensed as a Discount Medical Plan under RSA 415-I and comply with the requirements of that chapter. Finally, producers acting as HRA administrators as part of a prompt pay arrangement must be mindful that if they adjust or settle claims of New Hampshire residents they must be licensed as Third Party Administrators (TPAs) under RSA chapter 402-H, and must comply with the requirements of that chapter.

In addition, the producer must make sure the prompt pay discount program does not violate federal law. For example, if the prompt pay discount does not bear a reasonable relationship to the amount of avoided collection costs, the discount may violate federal anti-kickback laws. If the waiver of the deductible is required to be reported as a taxable benefit but is not reported, there may be a violation of federal tax law. Any program offered by a producer that violates federal anti-kickback laws applicable to health care

providers or federal tax laws governing the handling of employee benefits would not fall under the exemption as a value added service.

A producer choosing to offer a prompt payment discount program administered through an HRA can minimize the likelihood of running afoul of the law by structuring the program in the following way:

- The program is one in which the producer or contract HRA administrator has a non-exclusive arrangement with the health care provider. That is, the reductions or waivers of copays or deductibles that are offered by the health care provider are available to all patients and employers, and can be provided through programs offered by other producers licensed in this state.
- The discount is a true prompt pay discount. That is, the discount bears a reasonable relationship to cost savings resulting from prompt payment and the avoidance of collection costs.
- The HRA administrator is either a licensed TPA under RSA 402-H or does not “adjust or settle claims” or otherwise act as a TPA within the meaning of RSA 402-H.

Producers offering or contemplating prompt pay arrangements or similar programs should review their programs carefully and seek advice of legal counsel regarding the issues raised above. Producers who do not follow this guidance may be subject to enforcement action by the Department.

If you have questions about this bulletin, please contact the Department’s Life, Accident and Health Legal Counsel Jennifer Patterson at (603) 271-2261 or Jennifer.patterson@ins.nh.gov.