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Some Hospitals Give COVID-19 Patients Oxygen Free to Speed Discharge; 'We Will Take That Risk'

By Nina Youngstrom

Some COVID-19 inpatients are ready for discharge but stuck in beds because hospitals can't always get their hands on home oxygen from durable medical equipment (DME) suppliers. To solve the problem, a handful of California hospitals have entered into leases with DME companies in which the hospitals commit to leasing a certain number of oxygen concentrators and other supplies to guarantee their availability. In turn, the hospitals give home oxygen free to Medicare beneficiaries without checking the boxes of Medicare coverage requirements, a hospital executive told RMC.

"You walk on eggshells when you try to provide something to a beneficiary," said Paul Arias, assistant vice president of care coordination at Loma Linda University Health in California. "Some of us said we will take that risk. I don't want to run the risk of having patients stay in the hospital while I am waiting for the supplier to get supplies and we have run out of oxygen in the state and they would otherwise take up a bed."

The risk here is a civil monetary penalty (CMP). As the HHS Office of Inspector General (OIG) explained in a 2002 special advisory bulletin,^[1] it has the statutory authority to levy CMPs on "a person who offers or transfers to a Medicare or Medicaid beneficiary any remuneration that the person knows or should know is likely to influence the beneficiary's selection of a particular provider, practitioner, or supplier of Medicare or Medicaid payable items or services." That includes copay waivers and free items or services. Items of nominal value are allowed (no more than \$15 each, not to exceed \$75 annually), and there are exceptions, although they don't appear to apply to the free oxygen, attorneys said. The same goes for answers to frequently asked questions^[2] that OIG has posted about the application of its administrative enforcement authorities to arrangements directly connected to the COVID-19 public health emergency.

But it's hard to imagine the government coming after a hospital in the throes of an oxygen shortage, said attorney William Maruca, with Fox Rothschild in Pittsburgh, Pennsylvania. "It's probably low risk" under the CMP law because Loma Linda isn't giving patients free home oxygen to try to steal them from competing hospitals, and it's a short-term fix.

The hospitals found themselves with a "dearth of home oxygen in the area," Arias explained. Inpatients with COVID-19 were stable for discharge except that they required home oxygen, occupying beds at a time when many hospitals are at or near capacity. Medicare requirements make it harder to get hold of the low-flow oxygen one concentrator at a time. "Medicare has hoops you have to jump through to give a beneficiary durable medical equipment," he noted. "It has caused a lot of delays."

Hospital Signed a Three-Month Lease

To arrange home oxygen for COVID-19 inpatients ready to leave the hospital, Loma Linda and other hospitals signed leases with DME vendors that ensure a supply of home oxygen, Arias said. They buy the oxygen directly and provide it to patients free, without billing Medicare. The hospitals are doing this independently of each

other, he emphasized. Loma Linda has a three-month lease with its vendor, with the possibility of a three-month renewal, depending on supply and demand in the area.

Loma Linda's respiratory vendor has a long relationship with the hospital and was willing to enter into the lease, Arias said. "They're still getting supplies, but slowly, and instead of providing limited resources here and there, they took what they had and gave it to us and another facility that did the same," he said. If there are leftover supplies, they're given to other facilities, which also are now hunting down home oxygen in Reno, Nevada.

In a desperate situation, with the COVID-19 pandemic raging and a more-contagious variant exacerbating the surge, the hospital is focused on getting recovering patients out the door. The urgency may grow, now that another COVID-19 variant has shown up about 100 miles away from Loma Linda, in Los Angeles, according to a June 19 article in *The New York Times*.^[3]

Loma Linda also is sending COVID-19 patients home from the emergency department (ED) with home oxygen, but Medicare doesn't pay for it at all under those circumstances. "The reason that Medicare doesn't allow coverage, it comes down to them being in a chronic stable state, which is not considered possible in the ED," Arias said. "You must have been monitored in an inpatient setting to achieve those results."

Free Oxygen Is Not 'Distorting' Decision-Making

Maruca said the hospital is "probably taking a calculated risk. It could be a technical violation because they are providing free services." But "I would think this is a low priority for" the government. The hospitals are giving home oxygen to patients free as a temporary solution and not to promote their services. "Beneficiary inducements are all about inducing a patient or distorting the patient decision-making: 'I could go to Hospital A or Hospital B, but Hospital A will give me free oxygen.' These patients are already in Hospital A. The oxygen is not distorting the patient's decision-making about where to seek care, and that's what beneficiary inducement is about," Maruca explained. "The underlying rationale is not there for anyone."

His reasoning is not a guarantee, however. "Whether it would be an effective defense is a toss-up," Maruca said. But "it's even less likely the government would go after the hospitals, especially if [the free oxygen] is short term."

However, whenever there's a CMP risk, "you may have an Anti-Kickback Statute risk," said former OIG Senior Counsel Stewart Kameen, with Bass, Berry & Sims in Washington, D.C.

Generally, hospitals and other providers may have more latitude to provide certain free items and services to patients when they form or join "value-based enterprises" to enter into "value-based arrangements" under new OIG regulations^[4] that took effect Jan. 19, Kameen said. The regulations create safe harbors and revise the CMP for beneficiary inducements. They're a companion to revised Stark Law regulations with exceptions for value-based enterprises and were advanced as part of the Regulatory Sprint to Coordinated Care.

"Fitting within the requirements of this value-based framework is just the starting point," he said. "Parties then must look to the individual value-based safe harbors, each with its own set of conditions, to protect certain remuneration. The new patient engagement and support safe harbor may protect in-kind remuneration provided by value-based enterprise participants to certain patients, but there are a few things to remember." For example, OIG's rule doesn't allow patients to be value-based enterprise participants, Kameen said. Also, "tools and supports funded or contributed by certain entities, including companies that sell or rent durable medical equipment, prosthetics and orthotics, are not eligible for protection under the patient engagement and support safe harbor. Compliance with safe harbors is voluntary, but careful and deliberate structuring of these enterprises and arrangements is a must for parties seeking the protection of a value-based safe harbor."

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1 HHS, Office of Inspector General, “Offering Gifts and Other Inducements to Beneficiaries,” Special Advisory Bulletin, August 2002, <https://bit.ly/3sLqtnD>.

2 “FAQs–Application of OIG's Administrative Enforcement Authorities to Arrangements Directly Connected to the Coronavirus Disease 2019 (COVID-19) Public Health Emergency,” HHS, Office of Inspector General, last updated December 14, 2020, <http://bit.ly/2zKhA6Q>.

3 Carl Zimmer, “New California Variant May Be Driving Virus Surge There, Study Suggests,” *The New York Times*, January 19, 2021, <http://nyti.ms/2KzvAWD>.

4 Nina Youngstrom, “Final Stark Rule Makes Room for ‘Imperfect Performance,’ Has VBC Exceptions Like OIG’s,” *Report on Medicare Compliance* 29, no. 43 (December 7, 2020), <http://bit.ly/3sLfudL>.

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