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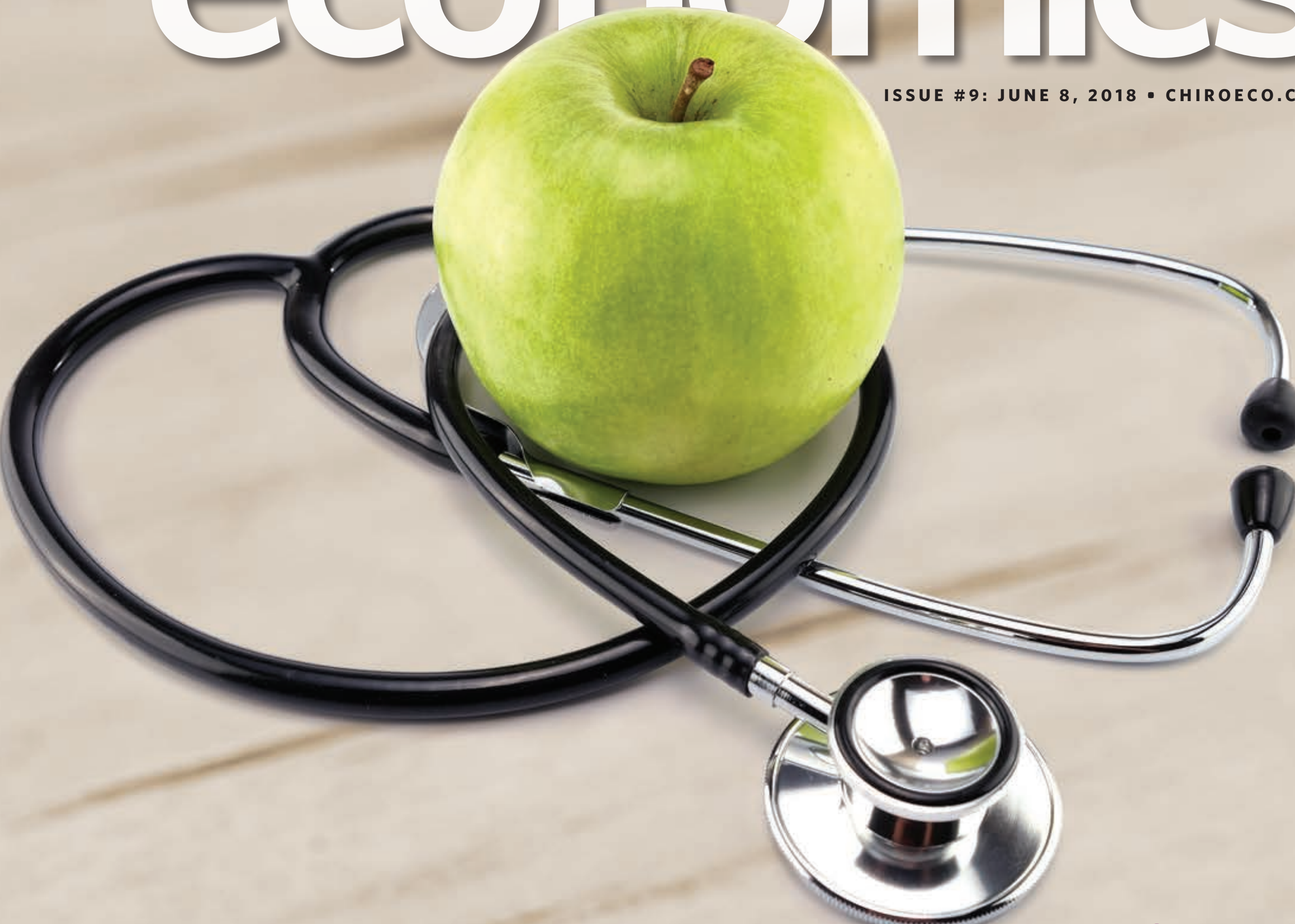

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How to navigate the legal minefield of prepaid gift card programs.

BY MICHAEL "AKIVA" NEWBORN

WHILE HEALTH CARE CONTINUES TO BE AN in-demand commodity, the days of setting up shop and passively waiting for patients to walk through the door are rapidly fading from view. As insurance premiums and co-pays rise, health care consumers are looking for the most cost-effective way to obtain the care they need. As a result, the traditional "if you build it, they will come" ethos has given way to a new era of competition in health care, one that has made the health care industry look more like other businesses.

Indeed, this competitive environment has led to aggressive efforts by health care professionals to vie for more market share, leading many to look to traditional marketing techniques for an edge. But unlike other industries, health care marketing and business development can be a legal minefield.

Red flags

One health care marketing practice in particular has gained increased scrutiny from state legislatures; namely, the use of prepaid gift card programs. Marketing studies have shown that prepaid gift card programs can achieve a significant return on investment by attracting new clientele and procuring more business from existing clients.

But this practice has raised red flags among state legislatures that, over the past several years, have enacted legislation to protect patients from exploitation. In turn, these legislative initiatives have made the business of health care more complex.

One sector of the health care industry that has felt the brunt of recent legislation is chiropractic. While chiropractic began as a discipline outside traditional medical practice, it has gained significant ground in recent decades as an established medical field. Accompanying this upgrade in status, however, has been the promulgation of strict professional laws, regulations and ethical standards similar to those applied to other state-recognized health care professions. In a number of states, these laws include promotional and marketing restrictions.

Indeed, certain states have enacted particularly burdensome legal regimes governing marketing tools such as prepaid gift cards for chiropractic services. New Mexico, for example, requires that chiropractic offices hold each customer's prepayment funds in an escrow account.[1] This can be cost-prohibitive, because banks typically charge a fee to hold funds in escrow.

Chiropractors subject to the escrow requirement have found that it eats away at their profit margin and, in some cases, eliminates profitability altogether. In addition to its financial cost, the escrow requirement adds paperwork and complexity to each prepayment transaction (which chiropractors and patients typically wish to avoid).

Insurance-like products

Other states, such as New York, Texas and Oregon, caution against certain prepaid gift card arrangements that resemble insurance.[2-4] Providers who offer prepaid gift card programs in these states run the risk of accidentally engaging in the unlicensed practice of insurance if the prepaid services are undefined.

For example, a 1993 New York General Counsel Opinion advised that if prepaid service charges are based on "fortuitous events," i.e., any occurrence which lies beyond the control of either party, the plan would run afoul of the New York Insurance Code.[5]

In such states, chiropractors must be careful not to offer vague and ill-defined treatment plans that hedge against the future need for chiropractic services. The best practice in these states would be to limit the services provided in the prepaid treatment plan and to tailor those services based on the patient's foreseeable chiropractic needs. Chiropractors in these states are advised to discuss with the patient additional costs for services that fall outside the contemplated prepaid services arrangement.

A mixed bag

Another common legal pitfall in a number of states is the requirement that prospective patients undergo thorough evaluation prior to their purchase of prepaid services.[6] These states typically mandate a diagnosis, prognosis and formation of a treatment plan prior to the establishment of a prepaid services arrangement.

Some states require that a contract for services and consent for treatment form be included in the patient file prior to consummating the prepaid gift card transaction. These laws are a mixed bag. On the one hand, they serve as guardrails for chiropractors who are bound, in virtually every state, to decline payment for services that are contraindicated or otherwise unjustified.[7]

By thoroughly examining patients before accepting prepayment for services, chiropractors can safely and reasonably determine whether the prepaid services are medically warranted. On the other hand, these laws can reduce the efficacy of prepaid gift cards as a marketing tool. Requiring such a thorough analysis of a patient's condition before accepting payment significantly decreases the likelihood of impulse buys and limits the ability of current patients to buy gift cards for friends and family.

Marketing matters

Beyond the regulations governing prepaid gift cards, chiropractors in most states must also exercise caution in promoting their prepaid gift card programs. Chiropractors, like most health care professionals, are usually bound by strict advertising rules governing their services.

State laws almost universally proscribe chiropractors and other health care professionals from engaging in misleading and deceptive advertising.[8] To avoid running afoul of such laws, it is advisable to include a disclaimer in advertisements for prepaid gift card promotions, making it clear that the prepaid services offered may not be appropriate for every patient. Moreover, in the event the recipient of prepaid services no longer needs chiropractic services or the full number of visits pre-purchased, chiropractors should be prepared to offer a refund.

Similarly, a number of states have legislated against the use of overly aggressive tactics to solicit patients. Pennsylvania, for instance, cautions against soliciting "any engagement to perform professional services by any direct, in-person or uninvited soliciting through the use of coercion, duress, compulsion, intimidation, threats, overreaching or harassing conduct."[9]

Ohio prohibits chiropractors from offering "cash equivalents" to potential patients or current patients as an inducement to begin or continue care.[10] These regulations make the practice of offering a discount in exchange for the purchase of a certain number of visits a riskier proposition. In these states, chiropractors have to walk a fine line between publicizing their prepaid gift card promotion and not exerting too much sales pressure on potential or existing customers.

Notwithstanding the increased legislative scrutiny and the legislative trend toward patient safety, health care providers will undoubtedly continue to evolve and adapt as they have done in the past. While certain states are more regulation-heavy than others, it is still possible to navigate the complex state laws and regulations to create a compliant prepaid gift card program, one that increases the profits of the providers' business, all the while safeguarding their patients' health and well-being. CE


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