

Legal Implications of Chiropractic “Groupons”

Introduction

As Groupon and other “deal of the day” websites proliferate and simultaneously inundate our email inboxes, more and more businesses are utilizing these sites to market themselves. Chiropractors are no exception. Each day, numerous chiropractors contract with Groupon and its competitors to sell certificates for adjustments, examinations, x-rays and massages. More often than not, the certificate is for some combination of the aforementioned services. The following are examples of actual deals we have seen in the last few months:

- Consultation, exam, digital x-rays, three chiropractic adjustments, and a 30-minute massage for \$99 (\$325 value)
- \$28 for a chiropractic exam and treatment plus a 60-minute massage or a 2nd treatment (\$175 value)
- \$49 for three chiropractic visits (\$610 value)

Despite the variety of services offered, these programs all have two things in common: (1) the chiropractor is offering a significant discount –92% in the third example, and (2) the chiropractor is sharing the income from each certificate sale – usually around 50% – with the website. While we are unaware of any state board taking action against a licensee for a Groupon-style offering, we believe these programs could create significant civil and criminal liability for California chiropractors.

Groupons as Illegal Referral Fees

California Business & Professions Code Section 650 prohibits the offer, or acceptance by a chiropractor, of any commission, discount, or other consideration as compensation or inducement for referring patients, clients, or customers to any person, irrespective of the practitioner’s membership, proprietary interest or co-ownership in or with that person. Section 650 is the law typically used to prosecute chiropractors who form relationships with marketers, attorneys, and other referral sources and who have structured the compensation in such a way as to “pay for referrals.” The following all constitute “fee for referrals” that violate Section 650:

- A chiropractor hires a marketer, and pays that person \$100 per person for each new patient referred to the office.
- A chiropractor hires a marketer, and pays that person 10% of the revenue generated from treatment provided to patients referred by the marketer to the chiropractor.
- A lawyer seeks to be paid \$500 for each new patient the lawyer refers to the chiropractor’s office.

Groupon-style deals for chiropractic services could violate Section 650 since money is paid by the chiropractor to the website in connection with a patient’s referral. The chiropractor essentially, albeit indirectly, pays the website per patient that purchases the certificate. At their base, these agreements require the chiropractor to pay the website for soliciting, referring and/or procuring clients on the chiropractor’s behalf, a practice that the prohibition of Business and Professions Code Section 650 is directed at.

Medicare Inducement

Medicare’s Anti-Kickback Statute criminalized the payment of kickbacks for patient referrals. Subsequent laws expanded it to all federal pay programs. Kickbacks include “any remuneration,” a very broad definition, which includes coupons. The Office of the Inspector General issued a “Special Fraud Alert” regarding advertisements offering “discounts” given to Medicare beneficiaries. Then a “Special Advisory Bulletin” appeared on offering inducements to Medicare beneficiaries. Essentially, it said a provider could not offer a patient anything worth more than \$10, and combined \$50 in a year for multiple gifts. The discounts discussed here could implicate the Alert and the Bulletin.

There is, however, a “Safe Harbor” for discounts—but they must comply with the federal regulations. Moreover, both buyers and sellers have compliance responsibilities under the Safe Harbor. In short, the regulatory scheme is so complex that as instance, the \$10 limit, and since the Safe Harbor likely cannot be used, “Groupon” type discounts are not advised, absent careful consultation with an attorney familiar with Medicare law.

Groupons May Create Dual Fee Schedules

Separate and apart from Section 650, Groupon-style deals are unadvisable as they may pose problems with insurance companies. Most insurance policies will not pay for any charges that would not have been made in the absence of insurance. Groupon offerings, which almost always charge a lower fee to the purchaser versus insured patients, could be viewed as creating a “dual fee schedule.” Insurers believe dual fee schedules constitute fraud and over billing. Some argue that Groupons are merely a version of a prompt-payment discount. While California law expressly permits prompt-payment discounts, such discounts must be reasonable. Given the extreme nature of the discounts typically offered by Groupon and its competitors, such certificates likely would not fall under the prompt-pay exception.

Conclusion

Given their widespread use, it seems unlikely that the Board of Chiropractic Examiners would discipline each and every licensee who engages or has engaged in Groupon-style offerings. That said, there may be a rash of “test case” or “example” disciplinary actions that follow. Eventually, we would expect the Board to adopt a regulation, or the Legislature to pass legislation, that explicitly either proscribes or prohibits the use of these deals. In the meantime, we recommend that chiropractors abstain from these types of marketing campaigns as they could violate Section 650 and could constitute insurance fraud.

By Keith W. Carlson and Jehan Jayakumar