

Healthcare fraud enforcement in federal programs

an interview with
Amy Berne



by Paul P. Jesep, JD, MPS, MA

The ethics of taking and giving gifts

- » The code of conduct should be clear about if and when a gift can be given or accepted.
- » A broad policy that prohibits gift giving may be best, with limited exceptions carved out.
- » Apply common sense to all situations. As a courtesy, you may have to accept or give a gift.
- » Perception is reality. Even a token gift can cause a problem for a person's or organization's reputation.
- » State and federal laws don't cover every possibility where an individual can fall victim to improper influence. Go above and beyond what the law expects.

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Several years ago I learned of a lobbyist who often stopped by an office to chat with a receptionist. He'd sometimes bring a small box of chocolates of nominal value. Even though it wasn't Godiva, a cordial relationship was established. One day, the lobbyist casually asked when the organization's executive director went to lunch. Having received an answer, he waited in the lobby to pursue and corner his prey.



Jesep

The lesson is simple—even frontline staff, not just senior management, should have training in your gift policy. Just as important, a token gift can be as problematic as concert tickets, meals at a fancy restaurant, or use of a private plane. No organization is too small to fall victim to an ethical scandal because of gifts.

What this scenario also teaches is that an otherwise innocent recipient can be unaware they are being given a bribe. But there are also

out-of-touch senior executives receiving lavish gifts, believing it's more about friendship than business. Then again, they may think rules don't apply to them.

Keep in mind the industry or the size of an organization doesn't matter. Basic ethics and compliance principles should be universal. Of course, the world doesn't work that way. Doing business in Russia, for example, may test a Western company's values and mission.¹

Be sure you don't limit your definition of gifts. Gifts can include a business referral for a favor rendered, with nothing tangible exchanged.

Code of conduct

A code of conduct (Code) document is part of any good compliance program. Specific guidance should be made concerning behavior about gifts and the nature of gifts.² Consider a general rule to prohibit the giving or accepting of gifts. It's better to create a culture where individuals feel a need to clear it with an ethics and compliance officer before giving or accepting anything.

Giveaways (e.g., a few dozen vendor pens that can be left in a staff breakroom) are

something that comes with low risk. A large food platter from a pharmaceutical representative should go to the staff break room and not to feed a group of providers.

An invitation to a fancy luncheon at an upscale restaurant is in a different category. Unless your company is paying for it, it might not be a good idea to go. Are there exceptions? Of course. Suppose another non-profit is holding an event to celebrate a successful capital campaign. In this case, it may be permissible and impolite not to send a representative.

It is impossible for any Code to address what's acceptable or what's not in every situation. Here an individual's understanding of ethics will play an important role.

Always make it clear in the Code and during training that everyone should err on the side of caution and email the ethics and compliance officer regarding gifts. Board members and senior managers who fill out an annual compliance conflict-of-interest survey should be asked about any gifts. Although they may never consider taking one, it's a means to remind them about the policy. Remember, gifts should not be limited to tangible items, but can sometimes include business referrals.

Scenarios, common sense, and courtesy

Here are some things to think about:

- ▶ Should employees give supervisors holiday or birthday gifts? Should gifts only flow down? Can employees give gifts to one another if they don't supervisor the other?
- ▶ What do you do when a patient gives a piece of jewelry to a provider as a thank you for excellent care?
- ▶ Suppose the patient brings in a freshly baked pie?
- ▶ How is nominal value defined in the code of conduct?
- ▶ What about vendors who send gifts every holiday season? Should it be in a vendor's contract that no gifts are permitted?³
- ▶ Is being a guest at a private golf course acceptable?

The possibilities are almost endless.

In case you're wondering:

- ▶ Generally, gifts only flow down. I recall working at a place where staff felt obligated to give the CEO a holiday gift. Why? Fear.
- ▶ Staff can give one another gifts, because friendships often are forged in the workplace. Keep in mind that discretion must be shown if there is a supervisory nature to the relationship.
- ▶ A gift of jewelry should never be accepted, though you can suggest a person make a donation to a charity. If you're in a health-care setting, not accepting a thank you gift of cookies might be rude.
- ▶ Vendor gifts like food should go to the staff break room, and a contract provision banning gifts is a good idea, especially during the holiday season.
- ▶ Can an invitation to play golf be accepted? Possibly. It depends on the circumstances. Business is often discussed on the golf course.

Your industry will help guide you in establishing protocols and boundaries. Should the airline, financial, or healthcare industries approach things differently? Of course, each industry will have different needs.

Although someone at a small or mid-size organization isn't likely to be offered the use of a private plane, influence peddling isn't unique to any one industry or to the size of a business or nonprofit. Basic values and principles go across all industries, regardless of budget or the number of employees.

Perception is reality

Sometimes a gift may be offered as a way to say thanks. Or it can be a means to leverage good will for more business.⁴ Don't underestimate the impact of perception, no matter what the facts hold. You must be cognizant of how something may look. Sometimes transparency and disclosure may not be enough. Some situations just need to be avoided, even if it's legal and unfair. Always be mindful of how others, right or wrong, will perceive or react to certain behavior.

State and federal laws

The food, financial, and healthcare industries (to name just three) are regulated differently. It doesn't mean, however, ethics are different. Compliance is about law and regulation and will always be defined by specific industries. Professional and organizational ethics are universal. Everyone in healthcare is—or should be—aware of fraud and abuse laws, but these should be the minimum. Policies should go above and beyond the minimum.

Conclusion

It's extraordinarily important to have a clear Code and unambiguous policies in place. A policy on gifts need not be a novella, just clear and iron clad with commonsense allowances.

Fiorello H. La Guardia, as a private attorney fighting Tammany Hall's corrupt corporate interests (before he became one of the great mayors of New York), remarked during a trial, "If you have to think about it, you're a goner!" La Guardia was referring to bribes disguised as gifts or client referrals for favors.

La Guardia never had to think about it. Nor should you. If you spend too much time thinking about whether you can take a gift or give one, you answered your own question. Don't do it. And if you're not taking any time to assess the situation, then you don't have the right policies in place. 🍷

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