Employment Tips for the Pharmaceutical, Biotech, and Life Science Industries

Tip #2: Thorny Issues with Commissions Part 1: What Happens When a Salesperson Is Selling a Drug To Herself or Her Family Member?

A key component of compensation for pharmaceutical salespeople is the sales commission, and some pharmaceutical products are so expensive that even one additional sale can significantly affect a salesperson's overall annual compensation. As a result, one particularly thorny question arises when the salesperson is seeking a substantial commission because she, or her family member, is the patient using the Company's product. How can a Company determine, and later address, the inherent conflict of interest when the salesperson is selling to his/her family or friends?

A threshold issue arises in that the Company cannot easily determine whether a salesperson or her family member is the actual patient using the Company's product. There is no simple method for an employer to collect this information. For example, asking an employee about her medical conditions, or her family member's medical conditions, raises potential legal issues under the Family Medical Leave Act ("FMLA"), Americans with Disabilities Act ("ADA") and the Genetic Information Nondiscrimination Act ("GINA"), as well as other state privacy and leave laws. We suggest establishing a clear policy that a salesperson is obligated to self-disclose to her manager, or an ombudsman, any commission-generating sale she makes to herself, her family or a friend.

Once such disclosure is made, the Company must address whether the sale violates any sales and marketing compliance obligations it may have under state and federal regulations. There is obviously less of a risk of abuse, or commission manipulation, when the drug therapy is not common, in other words, when someone would not use the product unless it was necessary to treat a specific rare disease. In contrast, however, it is easy to see the potential for abuse, and commercial compliance issues, if a salesperson is selling painkillers and other common drugs to himself or his friends and family members. When the Company's product is one which might be subject to abuse [opiates are a clear example], it is even more important to have a neutral third party, who would receive no compensation for the sale, review the transaction for appropriateness and commercial compliance.

If the transaction to a friend or family member is ultimately determined to create an inappropriate conflict, the Company should be careful how it communicates its decision not to pay the salesperson's incentive compensation relating to the transaction. Such a decision could lead the salesperson to allege that the Company took an adverse employment action in direct response to learning of the salesperson, or her family member's, illness. Knowledge of the condition alone, could create liability for discrimination.

To avoid these issues, companies should promulgate clear guidelines, establishing checks and balances for those instances when salespeople or their families become customers.

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