

MEDICAL TOURISM AND GROUP HEALTH PLANS

By: Marcia S. Wagner, Esq.
The Wagner Law Group
A Professional Corporation
99 Summer Street, 13th Floor
Boston, MA 02110
Tel.: (617) 357-5200

Fax.: (617) 357-5250
www.erisa-lawyers.com

MEDICAL TOURISM AND GROUP HEALTH PLANS

Some employers who sponsor self-insured group health plans are interested in the concept of outsourcing certain medical procedures to foreign countries in order to control costs. Employers considering medical tourism as an option within their group health plans should understand the advantages and disadvantages of such an arrangement.

What is medical tourism?

Medical tourism is the act of traveling to other countries to obtain [medical](#), [dental](#), and [surgical](#) care. There has been increased interest in medical tourism due to (i) the high costs of [healthcare](#) in the United States, (ii) the low costs of healthcare in foreign countries, (iii) the ease and affordability of [international travel](#), and (iv) the improving technology and standards of health care in many foreign countries.

Medical tourism can reduce health care costs for individuals and companies, and the latter will likely offer cash incentives to their employees to prompt them to choose the medical tourism option.

Medical tourism, which is becoming more popular all over the world, is a growing industry in countries like [Mexico](#), [Brazil](#), [Argentina](#), [Costa Rica](#), [Dominican Republic](#), [Peru](#), [Singapore](#), [Hungary](#), [India](#), [Israel](#), [Jordan](#), [Lithuania](#), [Malaysia](#), [South Africa](#), [Thailand](#) and the [Philippines](#).

What are the advantages of medical tourism?

A number of self-insured group health plan sponsors are exploring the feasibility of medical tourism for non-urgent major surgeries. Large employers are pursuing this option for one reason: lower cost. The typical combined facility and physician charges per surgery is **60 – 85% lower than negotiated charges in U.S. hospitals**.¹

How are benefits outsourced within the context of a group health plan?

A self-insured group health plan may cover medical care in another country including travel and hotel expenses related to the visit. Such plans may also cover travel, meals and hotel expenses for a traveling companion.² Some plans may also offer incentives to employees to encourage them to elect the medical tourism option.

For example, Blue Ridge Paper Products, a North Carolina-based manufacturing company, is considering the medical tourism option for its 2,000 employees. Blue Ridge Paper Products plans to pay all the travel, lodging, meals, etc. for the patient and one family member, and also plans to give them up to 25% of the savings realized by the

¹ Arnold Milstein, MD, MPH, Testimony Before U.S. Senate Special Committee on Aging, June 27, 2006.

² Providing travel and hotel expenses for a companion may be necessary if the patient is either too young or too ill to travel alone.

plan. The savings will be based on the average cost of the procedure in the US compared to what it costs in the foreign country.

Are medical tourism benefits taxable to participants?

Any amounts paid by a group health plan for the hospital stay and expenses associated with the medical procedure (e.g., physicians' fees, nursing care, etc.) would not be taxable to the employee.³

All other costs, such as costs associated with transportation and lodging are unclear. Generally, costs associated with travel⁴ are treated as medical care. Also, costs associated with lodging⁵ (if there is no significant element of personal pleasure, recreation or vacation) are treated as medical care. If a group health plan pays these expenses, then the payments would not be taxable to the participant. This assumes, with respect to lodging, that there is no significant element of personal pleasure, recreation or vacation. However, in order to be exempt from taxation, lodging must be essential for medical care and the medical care must be provided by a physician who is licensed and providing services within the United States.⁶ Therefore, the cost of most lodging in a foreign country would likely be taxable to the participant.

Furthermore, if a doctor prescribes an operation or other medical care, and the taxpayer chooses for **purely personal reasons** to travel to another locality for the operation or other medical care, then medical care does not include the cost of the transportation or the cost of lodging (unless paid as part of the hospital bill).⁷ It seems likely, therefore, that the IRS would consider any decision to travel to a foreign country for medical care as a purely personal reason, particularly if the participant receives a financial incentive. Therefore, costs for travel and lodging would probably be taxable to the participant. However, without any guidance, the taxability of transportation and hotel expenses related to medical tourism is currently unclear.

Medical care does not include the cost of meals that are not part of inpatient care.⁸ Therefore, the cost of such meals would be taxable to the participant.

³ Code Section 105(b). Amounts paid by a group health plan for medical care provided to a participant or covered dependents are not taxable to the participant. Code Section 213(d)(1). Medical care includes amounts paid (i) for the diagnosis, cure, mitigation, treatment or prevention of disease, and the costs for treatments affecting any part or function of the body.

⁴ Code Section 213(d)(1). Medical care includes transportation primarily for and essential to the medical care. This includes, for example, transportation for a parent who must travel with a covered child who needs medical care.

⁵ Code Section 213(d)(2). Medical care may also include lodging not provided in a hospital or similar institution if (i) the lodging is primarily for and essential to the medical care; (ii) the medical care is provided by a **physician** in a licensed hospital (or in a medical care facility related to or the equivalent of a licensed hospital); (iii) the lodging is not lavish or extravagant under the circumstances; and (iv) there is no significant element of personal pleasure, recreation, or vacation in the travel away from home.

⁶ Code Sections 213(d)(2) and 213(d)(4).

⁷ IRS Reg. Section 1.213-1(e)(1)(iv).

⁸ IRS Publication 502, Medical and Dental Expenses, p. 10.

Any incentives that group health plans or plan sponsors pay to participants electing medical tourism would be taxable to the participants.

The cost for a prescription drug is not taxable to the participant if it is a drug or biological which requires a prescription issued in the United States by a physician who is licensed and performs the medical service in the United States.⁹ Therefore, the cost of any prescriptions issued and filled in a foreign country would be taxable to the participant.

How does the plan sponsor control quality of care?

In order to ensure quality of care, plan sponsors considering medical tourism should contract only with those health care facilities that are accredited. A substantial number of foreign hospitals have obtained quality of care accreditation from one of two trusted accreditation organizations: Accredited International Standards Organization (“ISO”) serves as an internationally respected designation of supplier excellence in quality control. The Joint Commission on Accreditation of Healthcare Organizations accredits U.S. hospitals, and in 1997 began to also accredit international hospitals that meet their quality standards. The [Joint Commission International](#), an affiliate of the [Joint Commission on Accreditation of Healthcare Organizations](#), has accredited 55 health care facilities in 14 nations. For additional information about the Joint Commission International and accredited hospitals, refer to their website at: <http://www.jointcommissioninternational.com/>

Furthermore, plans sponsors should ensure that available physicians are properly credentialed. Many hospitals and clinics that cater to medical tourism are staffed by physicians trained at major medical centers in the United States and Europe. For example, Bangkok’s Bumrundgrad hospital has more than 200 surgeons who are board-certified in the United States, and one of Singapore’s major hospitals is a branch of the prestigious Johns Hopkins University in Baltimore. In a field where experience is as important as technology, Escorts Heart Institute and Research Center in Delhi and Faridabad, India, performs nearly 15,000 heart operations every year, and the death rate among patients during surgery is only 0.8 percent--less than half that of most major hospitals in the United States.¹⁰

In some countries, clinics are backed by sophisticated research infrastructures. India is among the world’s leading countries for biotechnology research, while both India and South Korea are pushing ahead with stem cell research at a level approached only in Britain. In many foreign clinics, too, the doctors are supported by more registered nurses per patient than in any Western facility, and some clinics provide single-patient rooms that resemble guestrooms in four-star hotels, with a nurse dedicated to each patient 24 hours a day. Furthermore, some clinics assign patients a personal assistant for the post-hospital recovery period and throw in a vacation incentive as well.¹¹

⁹ Code Sections 213(d)(3) and 213(d)(4).

¹⁰ Medical Tourism Growing Worldwide, UDaily, University of Delaware, July 25, 2005.

¹¹ Medical Tourism Growing Worldwide, UDaily, University of Delaware, July 25, 2005.

What are the disadvantages of medical tourism?

There are a number of disadvantages related to medical tourism: lengthier absences, fewer legal protections for consumers, post-operative care in the U.S, and medical privacy issues.

1. Lengthier Absences. While a group health plan may experience significant savings, the employer will need to understand that an employee may be absent for a greater length of time. The employer should take into consideration the cost of such lengthier absences. Absences are longer because the employee will need to travel before entering the hospital for pre-operative tests and exams, and then stay longer in order to recuperate enough to travel safely.
2. Fewer Legal Protections. Most of the countries that offer medical tourism have weak malpractice laws, so the patient has little recourse to local courts or medical boards if something goes wrong.
3. Post-operative Care. In many cases post-operative care will be conducted by a doctor in the United States. The plan will need a mechanism to promote communications with the patient's doctor in the United States and the doctor in the foreign country.
4. Medical Privacy. Health plans in the United States must maintain a covered individual's medical privacy in accordance with HIPAA's Privacy, EDI and Security Rules. This requirement applies even if services are provided in another country. Therefore, any contracts with hospitals or health care providers in foreign countries should contain language that complies with HIPAA's Privacy Rule and Security Rule. Unfortunately, even though the group health plan is required to comply with HIPAA, hospitals and health care providers in foreign countries are not subject to HIPAA. As a result, ensuring compliance could be problematic.

What potential liabilities does the employer face?

In the event something goes wrong, a covered individual could sue the group health plan arguing that the group health plan encouraged the covered individual to seek medical care in a risky environment. If the plan provides a substantial financial incentive, the argument against the plan becomes even stronger. Therefore, plans offering financial incentives should, before they pay the incentive, require participants electing medical tourism, to sign a release. The release should include a statement that the participant is obligated to conduct his or her own due diligence. This release may or may not be valid in a court of law, depending on the facts and circumstances of a particular case, but could have a chilling effect on potential plaintiff litigation.

Are there any other issues that plan sponsors should consider?

1. Fiduciary Responsibility. Fiduciaries have a responsibility to administer the group health plan prudently and in the best interest of participants. Many employers may

feel obligated to pursue medical tourism as being in the best interests of plan participants and covered dependents.

2. Procedures not approved by the FDA. In some cases, doctors in a foreign country may recommend a procedure that has not been approved by the FDA. While it appears that payment for such a procedure would not be taxable to the participant currently, this could change in order to discourage procedures that the FDA believes are risky.

3. Prescription Drugs. It has been reported that [the FDA](#) has seized perfectly legal [prescription drugs](#) prescribed in a foreign country because it doesn't want those drugs to come into the United States. The FDA could also seize any drugs prescribed in a foreign country that are not legal in the United States.

4. Communications. It is very important that the patient be able to communicate with the physician and with the staff at the hospital. Therefore, the plan sponsor should contract with hospitals that have an appropriate number of staff members who speak English and healthcare providers who speak English.

5. Medical Tourism Companies. Employers considering offering medical tourism as an option in their group health plans should consider using the services of a medical tourism company (*e.g.*, IndUSHealth) to coordinate care in other countries. This is a new industry. Therefore, employers should use due diligence selecting a medical tourism company. The medical tourism company would be a business associate of the group health plan and a HIPAA compliant business associate agreement would be required.