

**WISCA's Members Only**  
**Frequently Asked Questions**  
(May, 2018)  
By Attny. Barbara Zabawa, JD, MPH

**1. Use of Titles**

**Acupuncturists in Wisconsin would like to use the title "Licensed Acupuncturist", with the initials "L.Ac.". Is that an appropriate interpretation of SPS 73.02, or are we legally required to use the title "Certified Acupuncturist" or "Acupuncturist"?**

**Is it appropriate for us to use other titles and initials that do not apply to every Acupuncturist in WI? Do they need to be used in conjunction with our primary title and initials, or can they be used independently? Here are some examples of additional titles/initials that Acupuncturists are currently using.**

**Dipl. Ac. refers to national board certification (not required in WI)**

**MSOM refers to a Master of Science in Oriental Medicine**

**M.Ac. refers to a Master of Science in Acupuncture**

**ABORM refers to certification by the American Board of Oriental Reproductive Medicine**

**Answer:** I believe a Wisconsin acupuncturist could use the additional titles/initials listed above as long as he or she indeed holds those credentials. See Wis. Stat. § 451.14(2)(d) (prohibiting acupuncturists from advertising in a false, deceptive or misleading manner).

I also believe acupuncturists could use the title "Licensed Acupuncturist," with the initials "L.Ac." because Wis. Admin. Code § SPS 73.02 allows acupuncturists to use "Wisconsin certified acupuncturist" or "*other similar title*" in advertisements of acupuncture services. Arguably, "Licensed Acupuncturist" is a "similar title" to "Wisconsin certified acupuncturist." As long as it is not misleading to use the word "licensed" or "L.Ac." instead of the word "certified," an acupuncturist should be able to include the word "licensed" in his or her title. Indeed, the Wisconsin Department of Safety and Professional Services (DSPPS) defines "credential" to include a license, permit, certificate or registration issued by DSPPS under chapters 440-480. Wis. Stat. § 440.01(2)(a).

Moreover, in the list of examples of false, deceptive or misleading advertising under Wis. Admin. Code § SPS 73.03, "Licensed Acupuncturist" is not among the listed titles. Instead, the regulation prohibits acupuncturists from using "medical doctor," "MD," "Doctor," "Dr.," or "PhD" unless the acupuncturist actually has one of those degrees. The word "licensed" does not appear in the list of prohibited titles.

## 2. Referral Incentives

***Scenario: A patient refers a friend for Acupuncture, and the referring patient receives a \$15 discount at the next appointment.***

**Are there any federal or state regulations that might prohibit Acupuncturists from offering referral incentives? Acupuncturists are not designated as Health Care Providers by the Social Security Act. At present, the services of an Acupuncturist cannot be reimbursed by any federal or state funded programs such as Medicare, Medicaid, or BadgerCare. Acupuncture is not presently an Essential Health Benefit in WI.**

**Answer:** As long as acupuncturists do not bill any publicly-funded health insurance programs, such as Medicare, Medicaid or Veteran’s Administration benefits, then the federal Anti-kickback statute would not apply. See 42 USC § 1320a-7b. To the extent that a patient is a cash-only patient, there does not appear to be any restriction on offering such a discount.

However, Wis. Stat. § 146.905 prohibits health care providers, including acupuncturists (see Wis. Stat. § 146.81(1)(g)), from reducing or eliminating or offering to reduce or eliminate coinsurance or a deductible required under a health insurance policy. Thus, if the patient’s acupuncture services are covered under a private insurance policy, an acupuncturist could violate this state law when offering a discount to a privately-insured patient. There is an exception if the total fee would impose an undue financial hardship on the patient receiving the service. Wis. Stat. § 146.905(2).

Moreover, offering a discount to a privately-insured patient may invoke a “Most Favored Nation” or “MFN” clause in a private insurance contract that the acupuncturist may have with the insurer. MFN clauses are generally used to describe an agreement between the insurer and provider that guarantees the insurer to best terms, including the lowest price for the service. So, an acupuncturist who has a provider agreement with an insurer that includes an MFN clause will want to review the MFN language to determine if a referral discount would violate the contract.

**In the scenario above, what measures need to be taken to ensure the referring patient’s confidential health information?**

**Answer:** If the referring patient instructed his or her friend to mention his or her name to the acupuncturist office for purposes of receiving the referral discount, then there is implied consent by the referring patient regarding the information disclosed to his or her friend. However, there is no need for the acupuncturist office to further disclose information about the

referring patient to the new patient. Under the Health Insurance Portability and Accountability Act (HIPAA), covered entities are required to disclose only the “minimum necessary” information when authorized to use or disclose Protected Health Information (“PHI”). See 45 CFR § 164.502(b).

### 3. Fee Splitting/Self Referral

**Are there any state or federal regulations that prohibit the following practices?**

***Scenario A: An Acupuncturist allows a Massage Therapist, Chiropractor, Acupuncturist, or other health care provider to use a room in an Acupuncture clinic on a part-time basis, and charges a monthly rent. The Acupuncturist refers patients to the renter.***

***Scenario B: An Acupuncturist allows a Massage Therapist, Chiropractor, Acupuncturist, or other health care provider to use a room in an Acupuncture clinic on a part-time basis, and charges commission on earnings from services. The Acupuncturist refers patients to the renter.***

***Scenario C: An Acupuncturist lists services on Groupon for a discounted price, and Groupon takes a portion of the earnings from services.***

**Answer:** It should be noted that the federal Stark law would not apply to acupuncturists for at least two reasons: 1) acupuncturists are not considered “physicians” under the federal Stark law (and the law applies only to “physicians”; see 42 CFR § 411.350-351); and 2) acupuncturists do not bill Medicare (see id.).

However, state fee-splitting statutes as well as private insurance contracts must be considered. Wisconsin prohibits the following health care providers from splitting their fees with most other practitioners or entities: Doctors of Medicine (see Wis. Stat. § 448.08); 2) Doctors of Chiropractic (see Wis. Stat. § 446.04(4)); Doctors of Optometry (see Wis. Admin. Code § Opt. 5.03(11)); Dentists and Dental Hygienists (see Wis. Admin. Code § DE 5.02(11)); Pharmacists (see Wis. Admin. Code § Phar. 10.03(14)); Nursing Home Administrators (see Wis. Admin. Code § NHA 5.02(12)); Physical Therapists (see Wis. Stat. § 448.56(2)); Podiatrists (see Wis. Stat. § 448.67)).

As a result, an acupuncturist could not have an arrangement described in Scenario B with a chiropractor as that would violate the fee splitting statute applicable to the chiropractor. An acupuncturist could have an arrangement as described in Scenario A, as long as the monthly rent was “fair market value” (that is, what others in the market are paying in similar arrangements and there are no kickbacks or incentives for patient referrals, for example). The lessee in Scenario A may bill federal health care programs and be subject to the federal Anti-kickback law. That law permits lease arrangements as long as the rent paid is fair market value and meets the other requirements set forth in 42 CFR § 1001.952(b). The acupuncturist should

be able to show that the rent being charged is similar to what others in the market are paying for similar space.

As for Scenario C, there are no Wisconsin laws that prohibit acupuncturists from splitting fees. However, as noted in the answer to Question #2, above, Wisconsin law does prohibit offering discounts to privately-insured patients if those discounts reduce the patient cost-sharing amount, such as a deductible or coinsurance. Plus, such discounts may invoke a MFN clause with a private insurer. Thus, an acupuncturist interested in offering discounts through Groupon will need to review their internal policies on whether discounts can be offered to cash-only patients and whether offering such discounts may invoke any applicable MFN clauses with privately-insured patients.

#### **4. Package Discounts**

***Scenario A: An Acupuncturist charges \$70 per appointment, but when a patient pays for 5 appointments in advance, the price is only \$300 (5 appointments for \$60 each).***

***Scenario B: An Acupuncturist offers a monthly "membership" to their facility.***

**Are there any state or federal regulations that prevent Wisconsin Acupuncturists from accepting payment in advance for services? Do the funds need to be held in a separate non-interest bearing escrow account? Does the Acupuncturist need to have a written refund policy? How should the Acupuncturist proceed if the patient has not returned to receive all of the appointments, and has not asked for a refund?**

***Scenario C: In a cash-only practice, can an acupuncturist offer a sliding fee scale uniformly to all patients?***

**Here is an exchange between an attorney and the OCI, on behalf of one of our members, regarding package discounts and the business of insurance:**

**"To Whom it May Concern,**

**I am writing to inquire about a question raised by a client of mine. She is a licensed Acupuncturist in Wisconsin. Recently, she raised with me the issue of the propriety of the sale of "packages" or "pre-paid sessions" arose in regards to acupuncturist practices, in general, in Wisconsin. Although I have done research in regards to this specific issue, unfortunately it appears that there is no consensus resolving the matter. As such, in an effort of caution and to insure all bases are covered, I believe it would be helpful to receive your input regarding the same.**

She does not accept any type of health insurance. She is contemplating offering the sale of 10 sessions to clients (only following an initial examination and determination of treatment needs). The 10 sessions "package" would represent a discount to the client of approximately 18.5 percent in overall cost of treatment. The 10 sessions "package" would not expire and any unused sessions would be subject to immediate refund upon request by the client.

Specifically, my question is: Does the sale of "packages" or "pre-paid sessions" in acupuncture practices generally, and specifically in the scenario set forth above, constitute the business of insurance? If so, how should acupuncture practices structure any "package" or "pre-paid" plans to insure they do not violate the insurance laws?

I appreciate your time and look forward to your response.

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REPLY:

“This appears to be a discount off a regular fee and would not appear to be considered a risk transfer that would fall under the definition of insurance. See s. 600.03(25), Wis. Stat. Examples where it might become insurance would be a provider offered an unlimited number of visits for a fixed fee.

Also, if a patient had insurance and wanted to submit a claim, most insurers would only reimburse based on the discounted amount. Let me know if you have further questions.

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**Answer:** As mentioned above, the federal Anti-kickback and Stark laws do not apply to acupuncturists if they do not bill federal health care programs. However, offering discounts of any kind could invoke a private insurer’s MFN clause (see answer to Question #2, above). MFN clauses may affect an acupuncturists ability to discount as described in Scenario A, above.

As for Scenario B, offering unlimited services for a monthly fee, the acupuncturists should be aware of the expectations set forth in Wis. Stat. § 451.14(2)(b), which requires acupuncturists to practice acupuncture with knowledge and skill and according to professional principles, as well

as Wis. Stat. § 451.13(2)(d), which prohibits acupuncturists from advertising in a false, deceptive or misleading manner. An acupuncturist who offers unlimited sessions for a monthly fee may fail to perform a proper assessment before each visit to determine what services may be needed by the patient, if any at all. Unlimited sessions for a flat fee may incentivize patients to use more services than they need, causing the acupuncturist to over treat and therefore possibly violate Wis. Stat. § 451.14(2)(b).

Alternatively, a patient who pays a monthly fee and does not use services in proportion to the monthly payment may feel deceived if that money is not refunded. Failing to refund prepaid package monies to a patient may violate Wis. Stat. § 451.14(d). As a result, an acupuncturist should keep any monies from a prepaid package plan in an escrow account and have a refund policy that returns any unused funds to the patient within a certain period of time, even if the patient does not request return of the money. Keeping money not earned is not only deceptive and unethical, but raises the risk of a lawsuit or complaint by the patient.

With regard to Scenario C, because this is a cash-only practice with no insurance contracts, this arrangement should be permissible. However, the acupuncturist should not discriminate against patients based on protected factors (age, sex, race, national origin, disability, etc.) when offering the sliding fee scale. Rather, it should be based on a written policy and applied consistently based on that policy.

As for the exchange with the Office of the Commissioner of Insurance (OCI), I trust their insight and recommend relying on it for the situation described.

## 5. HIPAA

**Are Wisconsin Acupuncturists considered HIPAA covered entities? What guidelines should we follow when using email, online scheduling software, newsletter services, and credit card processing? If an acupuncturist is not currently compliant, how could they be affected? What measures should be taken in order to become compliant? Are business associate agreements for HIPAA compliance easily available? If not, can you draft a template for us to provide to members?**

**Answer:** Whether a Wisconsin acupuncturist is a HIPAA “covered entity” depends on whether the acupuncturist conducts “covered transactions” as defined by the HIPAA privacy and security rule. “Covered transactions” include electronic claims billing and electronic encounter transmissions with insurers. See 45 CFR § 162.1101. Thus, if an acupuncturist has a cash-based practice only, the acupuncturist may not be a HIPAA covered entity and therefore not subject to the HIPAA privacy and security rule, including Business Associate Agreement (BAA) requirements. In those cases where an acupuncturist is not a HIPAA covered entity, the acupuncturist may want to implement some of the HIPAA privacy and security provisions to meet expectations of their patients (who most likely do not understand that some health care

providers are not subject to HIPAA). Also, Wisconsin acupuncturists who are not subject to HIPAA are still subject to Wis. Stat. § 146.82 with regard to the written records the acupuncturist keeps about each patient visit. This state law restricts disclosure of patient records except in the circumstances listed in the statute. Many of these circumstances mirror the uses and disclosures permitted under the HIPAA privacy rule. Acupuncturists not subject to HIPAA should adopt a best practice and implement policies and procedures that address the uses and disclosures permitted under Wis. Stat. §146.82.

To the extent an acupuncturist is subject to HIPAA privacy and security rules, the acupuncturist must have policies and procedures that address both rules. These policies and procedures include password protection, data security when at rest or in transit, risk analyses, notices of privacy practices, data access, email procedures, patient authorizations for release of records, breach procedures, BAAs among others. See 45 CFR §§ 164.302 *et seq.*, 164.400 *et seq.*, and 164.500 *et seq.* A BAA template can be made available to WISCA members. Failure to comply with HIPAA can lead to penalties of up to \$50,000 for each violation. See 45 CFR § 160.404.

In addition to HIPAA, entities that accept credit card transactions and/or collect other personal information about a person while conducting business in Wisconsin must comply with the Payment Card Industry Data Security Standard (PCI DSS) and Wis. Stat. § 134.98. The PCI DSS is not a law, but a standard for credit card transactions enforced by the credit card companies (American Express, Discover, JCB, MasterCard and Visa). The credit card companies can fine noncompliant merchants \$5,000 to \$100,000 per month for not meeting the PCI DSS standards. The standards include building and maintaining a secure network and systems, protecting cardholder data, maintaining a vulnerability management program; implementing strong access control measures, regularly monitoring and testing networks and maintaining an information security policy. More information about PCI DSS can be learned at the following two links:

- <https://www.pcicomplianceguide.org/faq/#1>
- [https://www.pcisecuritystandards.org/documents/PCI\\_DSS\\_v3-2.pdf?agreement=true&time=1525117423945](https://www.pcisecuritystandards.org/documents/PCI_DSS_v3-2.pdf?agreement=true&time=1525117423945)

Wis. Stat. §134.98 applies to all entities that conduct business in Wisconsin and maintain personal information in the ordinary course of business. The statute defines “personal information” as an individual’s last name and first name or first initial, in combination with any of the following if such information is not publicly available and is not encrypted, redacted, or altered in a manner that renders the element unreadable:

- an individual’s social security number;
- an individual’s driver’s license number or state identification number;
- the number of an individual’s financial account, including a credit or debit card account number, or any security code, access code, or password that would permit access to the individual’s financial account;
- an individual’s unique biometric data, including fingerprints, voice prints, retina or iris images, or any other unique physical representation.

Wis. Stat. § 134.98(1)(b).

Should any of the above personal information be breached, the statute requires the entity to notify the subject of the information unless the breach does not create a material risk of identity theft or fraud. Entities subject to the HIPAA breach rules may comply with those rules, but entities who are not subject to HIPAA must comply with the state law. Under Wis. Stat. § 939.61, a person convicted of an act or omission prohibited by statute and for which no penalty is expressed shall be subject to a forfeiture not to exceed \$200.

## **6. Good Manufacturing Practices**

**When do acupuncturists who prepare custom herbal formulas and topical products need to follow GMP? If an acupuncturist is not currently compliant, how could they be affected? What measures should be taken in order to become compliant?**

**“Am I subject to the DS CGMP rule if I am a practitioner (such as an herbalist, acupuncturist, naturopath, or other related health care provider)?**

- 1. Yes. Practitioners such as herbalists, acupuncturists, naturopaths, and other related health care providers are subject to the DS CGMP rule. However, we believe that it would be appropriate to consider the exercise of our enforcement discretion in certain circumstances (see example which follows in the next question).**
- 2. (72 FR 34752 at 34793)**
- 3. How does FDA expect to apply the DS CGMP rule to practitioners?**
- 4. FDA expects to exercise enforcement discretion, on a case-by-case basis, in determining whether to apply the DS CGMP rule to practitioners such as herbalists, acupuncturists, naturopaths, and other related health care providers. For example:**
  - We expect to exercise discretion in the case of a one-on-one consultation by a practitioner who is adequately trained in his or her profession. We believe such a case may not necessitate the same types of controls as we established in the DS CGMP rule for manufacturing activities on a larger scale. Such a practitioner may make some formulations in advance of the consultation and still make the formulations in very limited quantities for the individual client.**
  - We are not considering exercising our enforcement discretion with respect to practitioners who prepare batches of dietary supplements and sell them to individual consumers without determining whether the dietary supplement is appropriate for each consumer's needs in a one-on-one personal consultation.**
  - We are not considering exercising our enforcement discretion with respect to practitioners who prepare batches of a dietary supplement for which there is a known or suspected safety concern.**
- 5. We do not expect the number of practitioners subject to the consideration of our enforcement discretion to be very large. Many products manufactured by practitioners**



would not necessarily be considered to be dietary supplements (e.g., certain products used by traditional Asian medicine practitioners).

6. (72 FR 34752 at 34793)

<https://www.fda.gov/Food/GuidanceRegulation/GuidanceDocumentsRegulatoryInformation/DietarySupplements/ucm238182.htm>

**Answer:** As noted in the above excerpt from the Food and Drug Administration (FDA), most acupuncturists who prepare custom herbal formulas and topical products should be subject to the FDA's "enforcement discretion." This means that it is up to the FDA to decide on a case-by-case basis whether to apply the Current Good Manufacturing Practice regulations (CGMP) to an acupuncturist. It should be noted, however, that practitioners who prepare batches of herbs and sell them to individuals without determining whether the dietary supplement is appropriate for each consumer during a one-on-one personal consultation will be subject to the CGMP. Also, those practitioners who prepare batches of a dietary supplement for which there is a known or suspected safety concern will also be subject to the CGMP. For those practitioners, there is no enforcement discretion in those situations.

Because acupuncturists who prepare custom herbal formulas or herbal products will not know whether the FDA will decide whether to apply the CGMP regulations to them, it is advisable for such practitioners to have policies and procedures that demonstrate good quality management with regard to the products they use to make their formulas and products. Acupuncturists should have a system in place to ensure that they are obtaining appropriate quality raw materials, and a method to determine if there are product quality deviations. See e.g., [www.fda.gov/Drugs/DevelopmentApprovalProcess/Manufacturing/ucm169105.htm](http://www.fda.gov/Drugs/DevelopmentApprovalProcess/Manufacturing/ucm169105.htm).

Should the FDA decide to enforce the CGMP regulations against an acupuncturist, the FDA may take any of the following actions: 1) send a warning letter noting the specific violations and request a written response as to the steps which will be taken to correct the violation; 2) seize the adulterated product; 3) seek a court order to require the acupuncturist to stop distributing the formula or product. It is possible that the FDA could seek criminal prosecution as well, but it will depend upon the nature of the violation and the public health concern, agency policy, previous history of violations by the practitioner, and other factors. See *id.*; see also [www.fda.gov/AnimalVeterinary/ResourcesforYou/ucm268127.htm](http://www.fda.gov/AnimalVeterinary/ResourcesforYou/ucm268127.htm).

7. **Bloodwork/Labs**

**Can we request bloodwork or labs? The DSPS/Walker position statements on Acupuncture used to list this item, but I cannot find that document on the new DSPS website. If we cannot order bloodwork or labs, is there any law that prohibits us from directing patients to companies that offer bloodwork or labs directly to the consumer? Are we able to interpret the results?**

**Answer:** Wisconsin law is silent on direct access testing (DAT), which refers to a patient's ability to receive a laboratory test without a physician's order. Many states are silent on DAT, and the standard practice is to operate as though it is allowed in those states. A few states clearly prohibit DAT and require a physician's order for tests to be run and reported.

Because Wisconsin law is silent on DAT, acupuncturists should be able to request bloodwork or labs if such requests are within the acupuncturist's scope of practice. Wis. Stat. § 451.01 defines "acupuncture" as including "applying manual, thermal or electrical stimulation *or any other secondary therapeutic technique.*" One might argue that requesting or interpreting bloodwork or labs could fall within the "secondary therapeutic technique" provision of the acupuncture definition. However, the Wisconsin Department of Safety and Professional Services (DSPS) created a position statement on interpreting lab results. That position statement viewed lab testing as outside the scope of acupuncture practice. This position statement is no longer available on the DSPS website, but it still offers insight into how the licensing agency may view an acupuncturist's scope of practice when it comes to ordering and/or interpreting lab results. **Thus, given this historical perspective by DSPS and until more definitive guidance is available, the least risky course of action for Wisconsin acupuncturists is to avoid ordering and/or interpreting bloodwork or labs.**

It is important to note, however, that Wis. Admin. Code § SPS 72.06 requires acupuncturists to use disposable needles in patients who have has AIDS, hepatitis or any other blood-borne infection disease, or has tested positive for HIV. One could argue that this provision requires acupuncturists to request patients to obtain bloodwork or labs on a direct access basis or through the patient's primary care physician so that the acupuncturist can fulfill his or her duty to comply with Wis. Admin. Code § SPS 72.06.

## 8. Dry Needling

**Is Dry Needling performed by Physical Therapists illegal according to state statutes? Is it appropriate for Acupuncturists to say that Dry Needling is illegal? I have attached WISCA's position statement regarding Dry Needling.**

**Answer:** Assuming that "dry needling" is another term for acupuncture, Wisconsin's acupuncture statute, Wis. Stat. § 451.02, allows individuals holding a license, permit or certificate under chapters 441 (nursing), 446 (chiropractic), 447 (dentistry), 448 (medicine) or 449 (optometry) to practice acupuncture if acupuncture is included within that practitioner's scope of practice. Wisconsin physical therapists are licensed under subchapter three of Wisconsin statute chapter 448. Thus, physical therapists could practice acupuncture if it falls within their state-defined scope of practice.

Wisconsin law defines the practice of physical therapy to include, in relevant part:

- Alleviating impairments or functional limitations by...implementing therapeutic interventions.

The statute excludes from the definition of physical therapy using roentgen rays or radium, using electricity for surgical purposes, and prescribing drugs or devices. Wis. Stat. § 448.50(4)(b). Acupuncture is not excluded.

Thus, it is important to consider the meaning of “therapeutic interventions” to determine if dry needling is within a physical therapist’s scope of practice. The statute defines “therapeutic intervention,” in relevant part, as “using *physical therapy procedures or techniques* that are intended to produce changes in the patient’s condition and that are consistent with diagnosis and prognosis.” Wis. Stat. § 448.50(6) (emphasis added). The American Physical Therapy Association (APTA) has stated that “dry needling is not specifically included in entry-level education for physical therapists.” See <http://www.apta.org/StateIssues/DryNeedling/ResourcePaper/>, at 3. Thus, one could argue that dry needling is not a physical therapy procedure or technique as it is not part of the basic physical therapy education curriculum.

However, it should be noted that this is a very controversial issue, with some states excluding dry needling from the physical therapists’ scope, and others including it. See e.g., <http://myopainseminars.com/resourcesnews-rulings/>.

Indeed, the Wisconsin Physical Therapy Examining Board at one time concluded that dry needling was within a physical therapists’ scope. See <http://165.189.64.111/Documents/Board%20Services/Agenda%20Materials/Physical%20Therapy/2013/PTEB%2020130627%20Open%20Session%201-52.pdf>. This position statement is no longer available on the Department of Safety and Professional Services (DSPS) website.

Given the above information, one could argue that because Wisconsin law limits therapeutic interventions to “physical therapy” procedures and techniques and because most physical therapy schools do not teach dry needling, that dry needling is outside the scope of physical therapy practice in Wisconsin. The success of this argument may need to be tested in a court of law or through an attorney general opinion.

## 9. Participation in state and federally funded health programs

**If Acupuncture were covered by Medicare, Medicaid, or BadgerCare, how would this affect an acupuncturist? Would acupuncturists be required to participate in those programs, or would they be able to opt out? If an Acupuncturist is a medicaid provider could they bill medicaid for some seniors, but accept cash payment from others? Would Medicare, Medicaid, or BadgerCare patients be able to choose to see a provider who does not participate in those programs?**

**Answer:** Based on the experience of other providers with Medicare or Medicaid (the latter of which includes BadgerCare in Wisconsin), if either of those federally-funded programs reimburse for acupuncture services someday, acupuncturists will need to decide whether to participate in Medicare and/or Medicaid.

### Medicare

Those that decide to participate in Medicare would need to “opt-in” with the Centers for Medicare and Medicaid Services (CMS). Once participating in Medicare, acupuncturists can limit the number of beneficiaries they see (i.e., refuse to take new Medicare or Medicaid patients).

See e.g.,

<https://www.forwardhealth.wi.gov/WIPortal/Subsystem/KW/Display.aspx?ia=1&p=1&sa=50&s=1&c=5&nt=Limiting+the+Number+of+Members>. However, providers may not discriminate against patients based on protected characteristics, such as race, religion, sex, age or disability. Id.

Most providers in Medicare can choose to interact with Medicare in one of three ways: Participating, Non-Participating, or Opt-Out. Participating means the provider accepts Medicare reimbursement in full and does not balance bill the patient. Non-participating means the provider can charge the Medicare patient more than the Medicare-approved amount, up to a cap. See e.g., <https://www.medicare.gov/your-medicare-costs/part-a-costs/assignment/costs-and-assignment.html>; see also <https://www.dhs.wisconsin.gov/publications/p0/p00536-section1.pdf>, at 9.

Providers who opt-out of Medicare can still see Medicare patients, but only if they follow a certain procedure. Specifically, the rules for opting out of Medicare are found at 42 USC § 1395a(b) and 42 CFR §§ 405.400-.445. Those rules allow providers to opt-out of Medicare by signing an opt-out affidavit and having their patients sign opt-out contracts. The provider must agree not to submit any claims to or receive payment from Medicare for two years. The patient agrees not to seek reimbursement for the provider’s services from Medicare and to pay the provider directly for these services. The patient further acknowledges that the provider’s charges are not subject to Medicare payment limits, that Medigap will not pay for the services and that the patient has had the opportunity to use another provider who has not opted out, but freely chose this one.

It should be noted, however, that not all providers can opt-out of Medicare once they choose to opt-in. In particular, chiropractors, as well as physical and occupational therapists in independent practice cannot opt-out of Medicare. See <https://www.cms.gov/Regulations-and-Guidance/Guidance/Manuals/downloads/bp102c15.pdf>, at 25-26. Thus, if acupuncturist services would ever be reimbursed by Medicare, it would be beneficial to include them in the list of practitioners who are eligible to opt-out.

## Medicaid

Providers who wish to see Medicaid patients in Wisconsin must enroll in the Medicaid program through the Wisconsin Department of Health Services (DHS). Providers who wish to see Medicaid patients but are not interested in getting reimbursed for those services can enroll as a “Prescribing/Ordering/Referring Provider.” The application process for such providers is abbreviated compared to full Medicaid enrollment. See e.g., <https://www.forwardhealth.wi.gov/WIPortal/Subsystem/Certification/EnrollmentCriteria.aspx?topic=201>.

For providers interested in not only seeing Medicaid patients but also getting reimbursed for services rendered to Medicaid patients, such providers must complete a full application. Billing providers are grouped into three categories: Billing/Rendering providers; Rendering-only providers; and Billing-only providers (including group billing). Billing/Rendering providers can identify themselves as the rendering or billing provider on Medicaid claim forms; rendering-only providers are typically supervised by another provider and cannot submit claims directly to Medicaid (but rendering-only providers do have Medicaid reimbursement rates); and billing-only providers includes group practices where billing under the group number is allowed for convenience, as well as situations where a provider who bills is separate from the rendering provider. See <https://www.forwardhealth.wi.gov/WIPortal/Subsystem/Certification/EnrollmentCriteria.aspx?topic=6>.

### **10. Time of Service Discounts**

**Is it appropriate for a Wisconsin Acupuncturist who accepts insurance to offer a discount to a patient who pays their bill in full at the time of service? What is an acceptable discount? Is it acceptable to publish separate fee schedules for “usual and customary rates” versus “time of service rates” on a website or in written materials?**

Whether providers may offer time of service discounts to patients depends on the patient’s insurance coverage (or lack thereof). An acupuncturist could offer a time of service discount to self-pay patients, such as uninsured patients or patients who receive services not covered by insurance, unless the provider contract with the insurer prohibits such discounts even for noncovered services.

A time of service discount may also be permissible for High Deductible Health Plan (HDHP) patients. As long as the provider informs the insurer of the discounted amount, a time of service discount to a HDHP patient who has not yet met their deductible would not reduce the amount of the deductible owed by the patient. Rather, the discount would merely extend the time the deductible is in effect before the plan covers health care costs. Recall from the answer to Question #2 that Wis. Stat. § 146.905 prohibits health care providers, including acupuncturists (see Wis. Stat. § 146.81(1)(g)), from reducing or eliminating or offering to reduce

or eliminate coinsurance or a deductible required under a health insurance policy. Once a patient meets their deductible, a time of service discount could act to reduce the patient's cost-sharing amount.

Informing the insurer of the discount is important for complying with Wis. Stat. § 943.395, which makes it illegal to submit fraudulent insurance and employee benefit program claims. If an acupuncturist offers a insured patient a time of service discount (assuming such discounts are permitted in the provider agreement and the discount does not reduce the patient's cost-sharing amount, such as with a HDHP patient who has not yet met the deductible), the acupuncturist should inform the insurer of the discount before submitting a claim to the insurer.

The amount of a time of service discount should reflect the cost savings in collecting payment after the patient leaves the office.

The primary risk in offering time of service discounts, even to HDHP and self-pay patients, is the impact it might have on MFN clauses. See answer to Question #2 for further information.

Here is a helpful checklist for offering time of service discounts:

- ✓ Do not advertise any discounts.
- ✓ Offer time of service discounts only to HDHP patients who have not yet met their deductible or to self-pay patients (uninsured or insured patients receiving noncovered services).
- ✓ Do not discriminate in terms of which HDHP or self-pay patients receive the prompt pay discounts (i.e., offer the discount to all HDHP or self-pay patients unless a patient's insurance contract prohibits it).
- ✓ Inform the third-party payer of a HDHP or insured self-pay patient of any discount offered and applied.
- ✓ Match the amount of the time of service discounts to the amount of money saved from collection costs.
- ✓ Do not offer time of service discounts to reduce or eliminate a patient's copayment or coinsurance amount.
- ✓ Check your insurance contracts to ensure there are no provisions that prohibit you from offering time of service discounts.
- ✓ Be wary of offering frequent, large discounts that may adversely affect your "usual and customary" charge.

#### **11. Independent Contractors**

**Is it appropriate for a Wisconsin Acupuncturist to hire another Acupuncturist as an independent contractor, or to rent a room to another Acupuncturist? What are some guidelines that should be followed in order to secure their status with the IRS as an independent contractor versus an employee?**

**Answer:** Yes, it is appropriate as long as the acupuncturist employer meets the criteria for determining whether a worker is hired as an independent contractor or employee. See Wis. Stat. § 108.02(12); see also

[https://dwd.wisconsin.gov/worker\\_classification/ui/allothers/ee\\_ic.htm](https://dwd.wisconsin.gov/worker_classification/ui/allothers/ee_ic.htm). If worker performs services for pay for an employer, there is a presumption under the law that worker is an employee, not an independent contractor. That presumption can only be overcome by evidence, using the criteria found in the two-part test, that the worker is an independent contractor. Here is the two-part test:

- ▶ Part 1: Control or Direction
    - ▶ Worker must be free of employer's control or direction. If free from control or direction, then go to Part 2.
  - ▶ Part 2: Must meet 6 of 9 conditions
- ▶ **Nine Conditions:**
- ▶ [Condition One](#): The individual advertises or otherwise affirmatively holds himself or herself out as being in business.
  - ▶ [Condition Two](#): The individual maintains his or her own office or performs most of the services in a facility or location chosen by the individual and uses his or her own equipment or materials in performing the services.
  - ▶ [Condition Three](#): The individual operates under multiple contracts with one or more employing units to perform specific services.
  - ▶ [Condition Four](#): The individual incurs the main expenses related to the services he or she provides under contract.
  - ▶ [Condition Five](#): The individual is obligated to redo unsatisfactory work for no additional compensation or is subject to a monetary penalty for unsatisfactory work.
  - ▶ [Condition Six](#): The services performed by the individual do not directly relate to the employing unit retaining the services.
  - ▶ [Condition Seven](#): The individual may realize a profit or suffer a loss under contracts to perform such services.
  - ▶ [Condition Eight](#): The individual has recurring business liabilities or obligations.
  - ▶ [Condition Nine](#): The individual is not economically dependent upon a particular employing unit with respect to the services being performed.

## 12. CBD Oil

**Is it legal for Wisconsin Acupuncturists to sell CBD oil products?**

**Answer:** No. The Wisconsin Department of Justice recently released a statement about use and sale of CBD products in Wisconsin. The statement indicates that CBD products are illegal in Wisconsin. See [http://host.madison.com/wsj/news/local/govt-and-politics/doj-issues-warning-on-sale-and-possession-of-cbd-oil/article\\_ec2f60f3-9d50-5ee9-84cd-c1c550eaeac6.html#utm\\_source=host.madison.com&utm\\_campaign=%2Femail%2Fbreaking-news%2F&utm\\_medium=email&utm\\_content=F02D11D9629121FC1C765FC953127E0769C1BDE5](http://host.madison.com/wsj/news/local/govt-and-politics/doj-issues-warning-on-sale-and-possession-of-cbd-oil/article_ec2f60f3-9d50-5ee9-84cd-c1c550eaeac6.html#utm_source=host.madison.com&utm_campaign=%2Femail%2Fbreaking-news%2F&utm_medium=email&utm_content=F02D11D9629121FC1C765FC953127E0769C1BDE5).

This statement aligns with guidance from the Wisconsin Statewide Intelligence Center, which states: "CBD oil and other CBD products, with or without THC, are illegal to possess or distribute within the state of Wisconsin except for patients with a doctor's certification in very limited circumstances." See <https://datcp.wi.gov/Documents/IHGuidanceCBD.pdf>. Those limited circumstances are very unlikely to apply to situations in which an acupuncturist would use or sell CBD oil products in their practice.

Also, I believe it is risky for Wisconsin acupuncturists to sell or use CBD oil products under the current federal government view of these products. It appears that the federal Food and Drug Administration (FDA) views Hemp Oil and CBD products as "drugs," not dietary supplements. See e.g., <https://www.fda.gov/ICECI/EnforcementActions/WarningLetters/2016/ucm484989.htm>. The FDA has issued warning letters to many manufacturers of CBD products for misrepresentations of their products. Moreover, the FDA has said in reference to any CBD products: "It is important to note that these products are not approved by FDA for the diagnosis, cure, mitigation, treatment, or prevention of any disease. Consumers should beware purchasing and using any such products."

Even assuming CBD oil could be classified as herbal medicine, administration of which is within a Wisconsin acupuncturist's scope of practice under Wis. Stat. § 451.01(1) and Wis. Admin. Code § SPS 73.01(11)(a), the acupuncturist still faces the issue of selling or using products that are not approved by the FDA for the purposes for which the acupuncturist would likely use them.

Selling or using such products could cause the acupuncturist to violate Wis. Stat. § 451.14(2)(d), which prohibits false, deceptive or misleading advertising. With the FDA stating that CBD oil products are not approved by the FDA for the diagnosis, cure, mitigation, treatment or prevention of any disease, any claim to the contrary could be viewed as false, deceptive or misleading advertising.

Here is a link to the various warning letters issued by the FDA against the manufacturers of these products: <https://www.fda.gov/newsevents/publichealthfocus/ucm484109.htm>.