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Recent OIG Advisory Opinion Provides Guidance for Structuring On-Call Coverage Compensation Arrangements

The United States Department of Health and Human Services Office of Inspector General ("OIG") recently issued Advisory Opinion 09-05 (the "Advisory Opinion"),¹ which analyzes a hospital's proposal to compensate physicians for on-call services provided to the hospital's uninsured emergency department patients (the "On-Call Arrangement") under the federal anti-kickback statute (the "Anti-kickback Law").² The Advisory Opinion reminds us of the potential risk associated with on-call coverage compensation arrangements and provides guidance to those structuring such relationships.

The hospital requesting the Advisory Opinion (the "Hospital") designed the On-Call Arrangement in response to its difficulty ensuring adequate on-call coverage for its emergency department. The lack of necessary coverage had resulted in the Hospital experiencing weeks each month without specialists being on-call and the Hospital being forced to outsource emergency care. The problem stemmed from the common view held amongst the Hospital's physicians that on-call emergency department coverage was an unwanted obligation. On-call physicians were disturbed at all hours of the day and night and were exposed to malpractice liability in connection with the services provided, yet were not compensated for on-call services provided to indigent and uninsured emergency department patients. The On-Call Arrangement aimed to improve this challenging situation by allowing eligible physicians to receive payment from the Hospital for on-call services rendered to certain uninsured emergency department patients.

Although the OIG recognizes that hospitals are increasingly compensating physicians for on-call coverage in order to provide necessary on-call physician services, the OIG also believes that there is a considerable risk that such arrangements may violate the Anti-kickback Law by being misused to generate additional business for hospitals or to impermissibly attract or retain physicians. Very broadly stated, the Anti-kickback Law prohibits purposefully receiving or paying compensation to induce or reward referrals for items or services payable by a federal health care program. In the Advisory Opinion, the OIG identifies certain compensation structures as particularly

¹ OIG Advisory Opinion 09-05 (May 14, 2009).

² 42 USC § 1320a-7b(b).

problematic:

- “lost opportunity” or similar designed payments that do not reflect *bona fide* lost income;
- payment structures that compensate physicians when no identifiable services are provided;
- aggregate on-call payments that are disproportionately high compared to the physician’s regular medical practice income; or
- payment structures that compensate the on-call physician for professional services for which he or she receives separate reimbursement from insurers or patients, resulting in the physician essentially being paid twice for the same service.

Whether a particular on-call compensation arrangement is permissible under the Anti-kickback Law can only be determined through a fact-specific analysis. A key inquiry used by the OIG to scrutinize on-call compensation arrangements to determine compliance with the Anti-kickback Law is whether the compensation paid under the arrangement is: (1) fair market value in an arms length transaction for actual and necessary items or services; and (2) not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties.³

The On-Call Arrangement included numerous requirements for physician participation and patient coverage. For example, patients could only be covered by the On-Call Arrangement if they had no sponsoring insurance plan and if they eventually qualified for a certain state program as determined by the state and verified by the Hospital. Furthermore, only active members of the Hospital's medical staff that entered certain written agreements with the Hospital and that provided on-call coverage as part of an organized on-call schedule would be able to participate. The written agreement entered between the physicians and the Hospital would require the physicians to respond to requests from the Hospital's Emergency Department in a timely manner and to evaluate the patient in person. Eligible physicians would be compensated under the On-Call Arrangement according to a predetermined flat fee schedule and only if the physician had submitted a completed claim request form reviewed and approved by the Hospital.

After examining the facts and circumstances surrounding the On-Call Arrangement, the OIG concluded that it would not impose administrative sanctions on the Hospital under the Anti-kickback Law

³ When possible, on-call coverage compensation arrangements should be structured to satisfy the personal services safe harbor set forth at 42 CFR 1001.952(d), which assures the parties involved that they will not be prosecuted or sanctioned under the Anti-kickback Law. The On-Call Arrangement at issue in the OIG Advisory Opinion 09-05 did not satisfy the personal services safe harbor.

in connection with the On-Call Arrangement. Those facts that the OIG viewed as significant to its determination regarding the On-Call Arrangement at issue in the Advisory Opinion include, amongst other considerations, the following:

- Amounts payable under the On-Call Arrangement were certified by the Hospital to be fair market value for identifiable services actually rendered. The compensation was tailored to the value of the services actually provided and was uniformly established without regard to referrals or other business generated between the parties. Safeguards would be in place to prevent physicians from being paid twice for the services.
- The underlying circumstances (weeks without needed specialists on-call, need to outsource emergency department obligations, physicians disliking on-call coverage and reducing on-call coverage commitment to the minimum allowed under the Hospital's Medical Staff Bylaws, etc.) indicate the Hospital had legitimate reasons for adopting the new On-Call Arrangement.
- The On-Call Arrangement would be offered to physicians uniformly and would impose tangible responsibilities on participating physicians uniformly. The On-Call Arrangement would not be used to selectively reward the highest referrers.
- The On-Call Arrangement was designed to be an equitable mechanism for the Hospital to compensate physicians who actually help the Hospital to fulfill its obligations in connection with certain state funding and to improve care at the Hospital, and thereby benefit the public.

Those structuring on-call coverage compensation arrangements can, to some extent, limit the potential risk associated with such relationships by including those elements identified in the Advisory Opinion as desirable and by avoiding those factors identified in the Advisory Opinion as problematic. However, because the legal considerations surrounding on-call coverage compensation arrangements are complex and such arrangements can present compliance risks, we recommend that those structuring such relationships do so with care and with the guidance of legal advisors experienced in these matters.

If you would like additional guidance with respect to on-call coverage compensation arrangements, please contact your regular Hall Render attorney, Michael Philbrick (248.457.7866 or mphilbrick@hallrender.com), or Kathryn Hickner-Cruz (248.457.7838 or khickner-cruz@hallrender.com).

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