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OIG Finds Hospital-Physician Call Coverage Arrangement Poses Little Risk Under Anti-Kickback Statute

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The Office of Inspector General (OIG) of the Department of Health and Human Services has concluded that a *per diem* payment structure between a not-for-profit hospital and specialist physicians would not result in administrative sanctions under OIG's civil monetary penalties law that relates to prohibited remuneration by the anti-kickback statute. According to an OIG Advisory Opinion that was posted this week:

Each year, [the hospital] allocates an aggregate annual payment amount per specialty for on-call coverage payments to participating physicians based on: (1) the likely number of days per month the specialty would be called; (2) the likely number of patients a participating physician would see per call day; and (3) the likely number of patients requiring inpatient care and post-discharge follow-up care in a participating physician's office (OIG Advisory Opinion 12-15)

Once the aggregate amount per specialty is determined, the hospital divides this amount by 365 days to create the on-call coverage *per diem* fee to be paid to the specialty physicians. Notably, these physicians receive the *per diem* fee for each day of coverage under the arrangement even if they are not contacted by the emergency department to treat a patient.

Numerous elements of the particular arrangement at issue were highlighted by OIG as minimizing the risk of fraud and abuse. First, the *per diem* payment was certified by an independent consultant as commercially reasonable and within the range of fair market value for actual and necessary services. It was also calculated without regard to referrals or other business generated by the participating physicians. The OIG highlighted that the *per diem* amount was

calculated annually in advance and was uniformly administered without regard to the individual physician's referrals.

The OIG also recognized that the specialist physicians were providing actual and necessary services for which they did not otherwise receive payment. Per the agreements, the physicians who admitted patients to the emergency department must provide care during the patients' inpatient stays and necessary follow-up care in office practices even if the patients were uninsured. Although in some instances the participating physicians may receive separate payment for providing follow-up care, the percentage of uncompensated care at this particular hospital (19 percent) made it apparent that the physicians were providing a significant amount of care for which they received no compensation other than the *per diem* amount.

The OIG considered other key factors in making its determination, including that the opportunity to participate was provided to all specialists required to take unrestricted call, and the scheduling was uniform. This demonstrated that the not-for-profit hospital was not selecting physicians based on their respective ability to refer or generate business. Finally, and perhaps most important, the hospital certified that it absorbed all the costs of the arrangement. In other words, the costs were not being passed on to federal healthcare programs.

In reaching its favorable conclusion, the OIG recognized the obstacles hospitals face in sustaining necessary call coverage without providing some sort of compensation. However, as with all Advisory Opinions issued by the OIG, it placed a few caveats in reaching its favorable determination. Namely, the OIG stated that there can be instances where *per diem* payments to on-call physicians may run afoul of the law, especially if there is evidence that the arrangement is done with the purpose of inducing or rewarding referrals. Some of the examples pointed to by the OIG as potentially problematic compensation structures include:

1. lost opportunity payments not reflecting actual lost income;
2. compensation where no identifiable services are provided;
3. on-call payments disproportionately high compared with regular practice income; or
4. compensating the on-call physician for professional services for which he/she already received reimbursement from insurers or patients.

What This Means to You

Compensating on-call physicians may be the only way for a hospital to sustain necessary call coverage services in the emergency department. However, hospitals must structure these compensation arrangements within the confines of the anti-kickback statute and the Stark Law. Consequences of

noncompliance can be severe, including heavy monetary penalties and damages, imprisonment (only for a violation of the anti-kickback statute) and exclusion from participating in Medicare and Medicaid. If your institution is interested in analyzing its current payment structures for compliance with the OIG opinion, or implementing a new payment structure, we would be glad to assist you.

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