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OIG Issues Favorable Opinion on Payment For On-Call Coverage

Physicians who provide on-call coverage to emergency rooms may be heartened by a recent federal agency opinion that gave the go-ahead to a hospital's plan to pay on-call physicians for services provided to uninsured, indigent patients. However, the opinion, which was from the federal Office of Inspector General ("OIG"), was far from a blanket endorsement of the concept of on-call payments. In analyzing a proposed payment arrangement by a non-profit 400-bed general hospital, the OIG focused on the circumstances in that particular health care market and on the rigid structure of the plan itself. The proposed arrangement provided that the hospital itself would pay flat fees to on-call physicians for various services rendered to certain uninsured, indigent patients ("Eligible Patients").

The OIG determined that the proposed plan created a low risk of fraud and abuse because:

(1) Payments would be only for services rendered and would be fair market value;
(2) Physicians only would be able to seek payment for services rendered to Eligible Patients, which eliminated the risk that physicians could be paid twice, *i.e.,* once by the hospital and again by an insurer;
(3) Physicians participating in the proposed arrangement would be at risk for furnishing additional services without compensation because their obligations would extend to providing follow-up care in the hospital for Eligible Patients admitted through the Emergency Department;
(4) The circumstances giving rise to the proposed plan suggested that the hospital had a legitimate rationale for revising its on-call policy, which the OIG saw as reducing the risk that the arrangement would be used as a way to funnel unlawful remuneration to physicians for referrals to the hospital of insured patients; (the reasons for revising the policy included the hospital's lack of needed specialists for on-call coverage and the hospital having to outsource the coverage, and the medical staff's dislike of on-call coverage);
(5) The proposed arrangement would be offered uniformly to all physicians who are active members of the medical staff and would impose tangible responsibilities on them, such as responding to an ER call within 30 minutes, evaluating the patient in person, and providing additional evaluation and follow-up care as is clinically appropriate;
(6) The method of scheduling on-call coverage would be governed by the Medical Staff Bylaws, would be the same within each department or specialty, and appeared to be an equitable policy that would not selectively reward the highest referrers;
(7) An on-call physician's claim for payment must include details such as the date of service, the description of the service, and the dollar amount, and a claim will not be paid by the

hospital until after the hospital has reviewed it to determine that no other payor source, including Medicaid, is available to pay for the services;

(8) The flat fees that would be paid to physicians appeared "to be scrupulously tailored to reflect the value of services actually provided" in all four categories: ER consults, $100.00; in-patient care for patients admitted from ER, $300.00; surgical procedure, $350.00 for primary surgeon of record; endoscopy, $150.00 for physician performing the procedure.

The OIG found that even though the proposed arrangement did not fall within a "safe harbor" under the Anti-Kickback Statute, the arrangement did contain safeguards sufficient to reduce the risk that the payments were intended to generate referrals of federal health care program business. Therefore the OIG concluded it would not subject the hospital to administrative sanctions if the hospital proceeded with the proposed compensation arrangement.

In analyzing this proposed compensation plan, the OIG clearly set out elements of on-call payment structures that *would create a substantial risk* that the structure was being used to disguise unlawful payments:

(i) "Lost opportunity" or other amorphous payments that pay regardless of actual Emergency Department calls and that do not reflect bona fide lost income;

(ii) Payments that compensate physicians when no identifiable services are provided;

(iii) Aggregate on-call payments that are disproportionately high compared to the physician's regular medical practice income; or

(iv) Payments that compensate the on-call physician for professional services for which the physician receives separate reimbursement from insurers or patients, resulting in the physician being paid twice for the same service.

The OIG opinion emphasized that each on-call coverage arrangement must be analyzed under the Anti-Kickback Statute based on the totality of the particular facts and payment plan. It is important to understand that the OIG opinion is an "advisory" one that applies only to the hospital which submitted its proposed plan to the OIG for its legal review.

The OIG was careful to say that while the Anti-Kickback Statute does not compel hospitals to pay for otherwise uncompensated on-call services, it recognizes that hospitals increasingly are doing so and that legitimate reasons exist for such payments in many circumstances. Such reasons can include compliance with EMTALA, scarcity of certain physicians within a service area, or access to sufficient and proximate trauma services for local patients. OIG sounded a cautionary note by adding, that notwithstanding legitimate reasons, hospital payment for on-call coverage "potentially creates considerable risk that physicians may demand such compensation as a condition of doing business at a hospital, even when neither the services provided nor any external market factor (e.g. a physician shortage) supports such compensation. Similarly, [the payments] could be misused to entice physicians" to join or remain on staff or to generate additional business for the hospital.

Because the determination of compliance with the Anti-Kickback Statute is so fact-specific, if you and your hospital are considering entering into an arrangement for payments for on-call coverage, you should first consult your attorney for review of the proposed arrangement.