

Will Your Emergency Department On-Call Arrangements Withstand OIG Scrutiny?

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In an Advisory Opinion posted on October 30, 2012, the U.S. Department of Health and Human Services Office of Inspector General (“OIG”) offers valuable insight as to how the OIG evaluates the legality of hospital call-coverage agreements with specialist physicians.

The Advisory Opinion involves an arrangement under which the requesting hospital pays *per diem* rates to specialist physicians for providing unrestricted call coverage for the hospital’s emergency department. In concluding that the arrangement does not violate the federal Antikickback statute, the Advisory Opinion points to the following factors:

- The hospital obtained an independent valuation that the *per diem* payment amounts were commercially reasonable and within the range of fair market value;
- The hospital allocates funds for call coverage for each participating specialty and calculates the per diem annually;
- The per diem payment for all participating physicians within a given specialty is administered uniformly, without regard to any physician’s referrals to the hospital;
- The participating physicians provide actual and necessary services for which they are not otherwise compensated; and
- The opportunity to participate in the on-call arrangement is offered to all specialists on the hospital’s medical staff required to take unrestricted call.

In contrast, the Advisory Opinion indicates that the following on-call compensation arrangements could be problematic (*i.e.* a disguised kickback):

- “Lost opportunity” or similarly 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.



The OIG opinion emphasizes the importance of evaluating more than just fair market value factors when considering a call coverage arrangement. Hospitals should document that a clear need for the coverage arrangement exists (*i.e.* there is a shortage of coverage in particular specialty). Hospitals should also be certain that the opportunity to participate in a call-coverage arrangement is not limited to those physicians who generate a high number of referrals to the hospital. Additionally, any on call coverage agreement must be written and meet an exception under the federal physician self-referral law (commonly referred to as the “Stark Law”).

Please contact your Lathrop Gage attorney or a member of our healthcare department with questions regarding this OIG Advisory Opinion.