

“What keeps you up at night?”

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OIG provides guidance regarding paying physicians to take hospital call

By Bruce D. Armon and George W. Bodenger

Physicians are asking hospitals to be compensated for providing emergency department (“ED”) call coverage at an increasing rate. Many hospitals are responding to such requests, and offering on-call compensation arrangements to ensure that patient needs are being met. Recently, the U.S. Department of Health and Human Services posted **Advisory Opinion 09-05** (<http://oig.hhs.gov/fraud/docs/advisoryopinions/2009/AdvOpn09-05.pdf>), which squarely addresses this topic of ED on-call compensation arrangements. AO 09-05 concluded that a non-profit hospital (the “Hospital”) could compensate physicians for on-call services provided in the ED to the Hospital’s indigent and uninsured patients. The OIG stated that the proposed arrangement (the “Program”) would, as described by the requesting party, result in a low risk of fraud and abuse, and therefore OIG would not impose sanctions. This AO 09-05 may generate additional requests from physicians to be compensated by hospitals for taking ED call and provides hospitals with additional guidance regarding structuring of permissible pay-for-call arrangements.

RELEVANT FACTS

The Hospital’s bylaws require the active medical staff to provide call coverage. A particular group of specialists reduced its weeks of ED call to the minimum required under the bylaws, citing no payment for on-call services as the basis for this action. As a result, there were weeks during each month when the Hospital did not have needed specialists on-call, and the Hospital was forced to outsource emergency care pursuant to transfer agreements and other similar arrangements with neighboring hospitals.

Under the Program, the Hospital’s bylaws will be revised to allow participating physicians to submit claims for services rendered to certain indigent and uninsured patients presenting at the

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Hospital's ED. Key elements of the Hospital's Program include the following:

- The Program applies only to patients without any insurance coverage.
- Physicians who participate in the Program must be members of the Hospital's medical staff.
- Physicians interested in participating in the Program must sign a letter agreement containing certain conditions, including (i) participating in an organized call schedule, (ii) giving up all billing or collection rights with respect to services furnished to eligible patients, and (iii) arriving on-site at the ED within 30 minutes of receiving a request for a consultation.

Under the Program, after a participating physician treats an eligible patient, the physician submits a completed claim form to the Hospital's Patient Financial Services office. The Hospital then verifies that no payer source (including Medicaid) is available for the patient. Upon verifying that no other payer source is available, the Hospital compensates the treating physician based on a fee schedule comprised of four (4) distinct service categories: (i) on-site consultation; (ii) consultation, admission to Hospital, and care of patient during Hospital inpatient stay; (iii) consultation, admission to Hospital, performance of surgical procedure(s); and (iv) consultation and performance of endoscopic procedure(s).

ANALYSIS

In AO 09-05, the OIG notes that even though, “hospitals are increasingly compensating physicians for on-call coverage for hospital emergency rooms ... [o]n call-coverage compensation 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) support such compensation.”

The OIG initially analyzes the Program under the Anti-Kickback Statute's (“AKS”) “personal services” safe harbor, which the Program fails to satisfy because aggregate annual compensation is not fixed in advance. The OIG acknowledges, however, that failure to satisfy all of the requirements of a safe harbor under the AKS does not, in and of itself, make the Program illegal. The OIG then focuses its analysis on the methods used by the Hospital to

determine fair market value compensation. A central theme of AO-05-09 is that Program compensation must be consistent with fair market value in an arm's length transaction that is not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties. The OIG expressed concern that, “there is a substantial risk that improperly structured payments for on-call coverage could be used to disguise unlawful remuneration.”

The OIG concluded that the Program, as described in the facts provided by the requesting party, presents a low risk of fraud and abuse. The OIG noted that the Hospital certified that the payments are within a range of fair market value for tangible services provided; the Hospital had a legitimate need for revising its on-call coverage policy; there are material requirements imposed upon participating physicians under the letter agreement(s); and, the Program appears to be “an equitable mechanism” for the Hospital to compensate physicians who actually provide care that the Hospital must furnish to remain eligible for state funding.

NEXT STEPS

Physicians and hospital administrators should review AO 09-05. Physicians who receive or seek compensation for call coverage should discuss the payment arrangement and requirements with hospital administration. Hospital administrators who are having a difficult time ensuring adequate call coverage should consider what type of payment arrangement should be offered to physicians to ensure that necessary patient coverage is available and remains available.

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