alert Health Practice

Saul Ewing LLP

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HHS OIG agrees to not challenge certain per diem coverage charge payments to specialist providers providing services to non-profit hospital emergency departments

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SUMMARY

On October 30, 2012, the Office of Inspector General, Department of Health and Human Services ("OIG") posted an Advisory Opinion (https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-15.pdf) stating it would not challenge an arrangement in which a non-profit hospital pays *per diem* coverage charges to certain specialists providing services to its Emergency Department ("ED").

Background

The key element in the HHS OIG's discussion was its reliance on a hospital's certification that it had obtained an independent valuation that the *per diem* payments "are commercially reasonable, within the range of fair market value for actual and necessary services provided without regard to referrals or other business generated between the parties."

The call coverage arrangement includes physician consultation by telephone, in-person consultation at the hospital, provision of necessary inpatient care and at least one follow up visit provided the patient makes an appointment. Under the call coverage arrangement, each year the hospital allocates an annual payment amount for each specialty for the on-call payments based on the likely number of days each month that the physician specialty would be called, the likely number of patients the physician would see each day and the likely number of patients requiring inpatient care and follow up visits. This amount is divided by 365 to arrive at a *per diem* amount.

The hospital's department chairs ensure the rotation of on-call coverage is spread as evenly as possible among the participating physicians in each specialty, and the hospital certified that the assignments and payments are made without regard to the participating physicians' referrals of patients or business. The same methodology is used for all specialties, and payments are made to participating physicians whether or not they are called by the ED during the on-call period. No amounts are charged to any federal health care program.

The OIG undertook a careful review of the personal service and management contract safe harbor provisions, and found requirements such as payments fixed in advance (as monthly payments can vary under the proposed arrangement) and a fixed schedule, were not met. However, for reasons given below, the OIG determined the arrangement would not be subject to sanctions.

In that review, the OIG noted various ways in which such an arrangement could violate the Anti-Kickback Statute. The OIG noted that while physicians could be paid twice for the same service, it appeared that the proportion of indigent care and other factors were persuasive that the physicians would be providing significant services for which they only received the *per diem* compensation. The OIG highlighted five reasons establishing the arrangement posed a low risk of fraud, and concluded it would not impose sanctions against the hospital or the physicians. These include:

- The *per diem* payments are within the range of fair market value;
- Funds are allocated based upon a specific methodology;
- Physicians are providing actual and necessary services;
- All specialists on staff are eligible to participate; and
- The hospital absorbs all costs of the program.

Call coverage is becoming an important and contentious issue for hospitals and physicians. This Advisory Opinion provides a useful approach to structuring a call coverage arrangement to be structured.

Members of Saul Ewing's Health Practice have significant experience in developing and implementing such arrangements. If you have any questions about this article, please contact John Reiss or Bruce Armon of our Health Practice, or the attorney in the firm with whom you are regularly in contact.

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