



OIG Releases Advisory Opinion Regarding Per Diem Fees Paid to Physicians for On-Call Coverage to Emergency Departments

November 8, 2012

In [Advisory Opinion 12-15](#), issued on October 30, 2012, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) reiterated that in certain circumstances hospitals may enter into written arrangements to pay for on-call coverage in the emergency department. The OIG indicated that payment for on-call emergency services could potentially generate prohibited remuneration under the Anti-Kickback Statute, if the requisite intent to induce or reward referrals to federal health care programs business was present. But it recognized that there are situations in which a hospital must compensate physicians for on-call coverage for emergency services in order to sustain necessary on-call physician coverage.

In reaching this conclusion, the OIG considered the following factors:

1. The applicable hospital certified, based on an independent valuation, that the per diem payment amounts were 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.
2. The per diem amount was calculated in advance in a manner uniformly administered for all participating physicians in a given specialty, without regard to the individual physician's referrals to, or other business generated from, that physician.
3. Each participating physician provided actual and necessary services. This required each physician to respond within 30 minutes of request from the emergency department and, in some cases, provide follow-up care. In the event that the patient was admitted, the participating physician was required to provide inpatient care through the patient's discharge and, where applicable, an initial follow-up visit.
4. All specialists on staff in the involved categories were given the opportunity to participate in the arrangement. Thus, there was no offer to only the big admitters or the individuals who utilized the most ancillary services. All physicians in the particular specialty had the opportunity to participate.

The OIG indicated that the applicable arrangement structured as described above contained sufficient safeguards to reduce the risk that the reimbursements are intended to generate referrals under federal health care program business.



The analysis provided in the Advisory Opinion relied heavily on the safe harbor for personal services in management contracts found at 42 CFR § 1001.952(d). Under it, protection for personal service contracts exist if the following standards are met:

- The agreement is set out in writing and signed by the parties;
- The agreement covers and specifies all of the services to be provided;
- If the services are to be performed on a periodic, sporadic or part-time basis, the agreement exactly specifies the schedule, length and charge for the performance intervals;
- The agreement is for at least one year;
- The aggregate amount of compensation is set in advance, is consistent with fair market value in an arm's length transaction, and is not determined in any manner that takes into account the volume or value of any referral or business otherwise generated between the parties, which payment may be made by a federal program;
- The services performed under the arrangement do not involve the counseling and protection of a business arrangement or other activities that violate federal or state law;
- The services contracted for do not exceed those which are reasonable and necessary to accomplish the commercially reasonable purpose for these services.

With the exception of the exact specification of the schedule of services, and the exact amount paid set in advance, the safe harbor requirements in the subject on-call arrangement were met. However, if the entire category of participating physicians is included, the schedule of services for all the periodic services for the whole category is detailed, as well as the per diem for the category as a whole.

This Advisory Opinion is the third in the line of opinions discussing on-call coverage. It should be reviewed by hospitals that are paying for on-call coverage. Many hospitals currently have programs in place for such payments. Hospitals should consider reviewing those programs in light of this Advisory Opinion, bearing in mind that it is only precedent for the specific requester involved.

For further information, please contact [Roy M. Bossen](#) or your regular [Hinshaw attorney](#).

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