

CLIENT ADVISORY

**OIG APPROVES HOSPITAL COMPENSATION PROGRAM FOR
ON-CALL PHYSICIANS**

On September 27, 2007, the U.S. Department of Health and Human Services, Office of Inspector General (OIG) posted Advisory Opinion 07-10, the first advisory opinion addressing a hospital's payment to physicians for providing on-call and indigent care services. In the Advisory Opinion, the OIG declined to impose sanctions on the hospital under the Anti-Kickback Statute ("Medicare and Medicaid Patient Protection Act of 1987", as amended, 42 U.S.C. §1320a-7b) for paying most physician specialists on the hospital's medical staff in return for their on-call and indigent care services.

Description of the Program

The hospital in the Advisory Opinion established a program – which covers nearly all surgical and medical specialties – pursuant to which the hospital pays physicians on the medical staff in return for their agreement to provide the following services:

- (1) take part in a rotational on-call schedule for the emergency department (ED);
- (2) respond to calls from the ED within established time frames;
- (3) provide inpatient follow-up care (until discharged) to any patient seen in the ED while on-call if the patient is admitted to the hospital, regardless of the patient's ability to pay;
- (4) provide consultative services to patients of other physicians while on-call; and
- (5) complete medical records in a timely manner for all patients seen under the program.

In return for furnishing these services, each physician who participates in the program receives a per diem payment for each day he/she is on-call. The per diem amounts for each specialty vary based upon a host of factors (e.g., severity of illness typically encountered, likelihood of having to respond when on-call at the ED, likelihood of having to respond to a request for inpatient consultative services for an uninsured patient when on-call, and degree of follow-up care typically required of the specialty) and all such amounts were valued by a nationally recognized consulting firm. In addition, each physician is obligated to provide 1.5 days per month of uncompensated on-call coverage.

To ensure that service and quality do not decline post-implementation, the hospital designed the program to include several safeguards, such as monitoring of on-call response times, assessing the quality of care delivered (through a committee of administration and physician leadership), and terminating physicians who fail to adhere to program requirements.

In addition, the program includes several safeguards to further reduce the risk of fraud and abuse. Specifically, the program:

- (1) is open to all physicians;
- (2) provides equal distribution of responsibilities for all physicians;
- (3) obligates physicians to provide follow-up care to all patients, regardless of ability to pay;
- (4) requires documentation of the actual services provided; and
- (5) is structured so that all costs are absorbed by the hospital and none accrue to federal healthcare programs.

OIG's Response

In its Advisory Opinion, the OIG stated that, as a general matter, on-call compensation programs must be “scrutinized closely” and on a case-by-case basis. Such compensation programs can be subject to scrutiny under the Anti-Kickback Statute. The Anti-Kickback Statute generally provides for criminal penalties for directly or indirectly knowingly and willfully offering, paying for, soliciting or receiving remuneration of any kind in order to induce business (i.e. referrals) reimbursable under federal or state health care programs, including Medicare and Medicaid. The Anti-Kickback Statute defines remuneration as anything of value. Remuneration could include valuable gifts, waivers of deductibles or copays, or anything else that possesses monetary value.

As noted in the Advisory Opinion, a particular concern of the OIG is the potential for an on-call compensation program to pay for indiscernible services, especially given the fact that most medical staff bylaws require physicians to participate in on-call coverage. Thus, the OIG looked to whether the program was designed to:

- (1) address a verifiable need;
- (2) obligate the physicians to provide meaningful and needed services; and
- (3) compensate the physicians in a reasonable manner in light of the services provided and likely compensation from third party sources.

In ruling favorably on the program, the OIG took specific note of the hospital's historical difficulty obtaining on-call coverage from physicians. The OIG specifically referenced the fact that the lack of on-call coverage in the past had resulted in the hospital having to transfer patients to other providers who had appropriate specialists on-call. The OIG stated that these circumstances “lower the risk that the arrangement was instituted as a way to funnel unlawful remuneration to physicians for their referrals.”

Of particular importance to the OIG was the fact that the program requires physicians to provide services beyond participating in an on-call rotation. Critical to the OIG's analysis was the program's requirement that physicians provide inpatient follow-up care to any patient seen in the ED while on-call if the patient is admitted as an inpatient. Furthermore, the obligation to provide care continues through discharge and regardless of the patient's ability to pay for the care. In light of this, the OIG stated that the program covers “substantial, quantifiable services, a large portion of which are furnished to uninsured patients in the ED and afterwards.” In addition, the OIG noted that a physician provides meaningful services in return for the payment from the hospital, given that the physician “remains at risk

of having to furnish additional services for no additional payment,” an obligation which begins when a patient presents at the ED and does not end until the patient is discharged. The OIG also noted that these services help the hospital satisfy its mission and charitable purpose. The OIG stated that the program “promotes an obvious public benefit in facilitating better emergency on-call and related uncompensated care physician services.”

Although the OIG did not rule on the fair market value of on-call coverage payments in the Advisory Opinion, it noted that the payments to the physicians were based upon “the burden on a physician and the likelihood that a physician in a particular specialty will actually be required to respond while on-call, as well as the likelihood that he or she will have to provide uncompensated treatment, and the likely extent of that treatment.”

Finally, the OIG noted that the hospital’s on-call coverage compensation program was developed by an ad hoc committee comprised of some of the hospital’s community board members, medical staff members and hospital administration. Accordingly, the program was the result of a balanced process to study the problem and recommend a solution.

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Although the OIG declined to impose sanctions against the hospital in the Advisory Opinion, any hospital-based program that provides compensation to physicians for on-call coverage needs to be reviewed from a legal perspective to ensure compliance with applicable fraud and abuse statutes and regulations, as well as the regulations of the Internal Revenue Service. If you have any questions or concerns regarding the Advisory Opinion or on-call coverage compensation arrangements, please do not hesitate to contact any of the attorneys at The Rogers Law Firm.

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