

## OIG Advisory Opinion Approves Physician On-Call Coverage Payment Arrangement

The Office of Inspector General (“OIG”) of the Department of Health and Human Services issued an Advisory Opinion on September 27, 2007 announcing its approval of an arrangement in which a nonprofit hospital compensated physicians for emergency department on-call coverage (“Arrangement”).

The hospital that requested the Advisory Opinion is a tax-exempt, not-for-profit medical center with a charitable mission of assisting the poor. The hospital’s emergency department is always open and treats all patients independent of their ability to pay. About 10% of the hospital’s uninsured emergency room patients are subsequently admitted for inpatient treatment.

The hospital experienced difficulty securing physicians to provide on-call emergency room coverage and subsequent inpatient treatment of uninsured emergency department patients because of the increasing financial difficulties associated with uncompensated patient care. The hospital was unable to find physicians in some specialties who were willing to provide any emergency department on-call coverage without compensation. The hospital was unable to fulfill its charitable mission because its inability to provide adequate emergency room coverage in some specialties required it to transfer some uninsured and underinsured emergency department patients to other facilities.

The hospital proposed an Arrangement through which its staff physicians in particular medical specialties would provide emergency department on-call coverage, respond to emergency cases in the emergency room, and provide inpatient treatment for uninsured patients. All physicians on the hospital staff in the particular specialties were offered two-year contracts under the Arrangement.

These contracts would obligate the physicians to participate in call rotation with an equitable distribution of on-call hours among participating physicians in a given specialty. Independent of patients’ ability to pay, the physicians must provide inpatient treatment to patients admitted while they were on-call in the emergency room until discharge. The physicians must also respond to calls from the emergency department in a reasonable time, cooperate with hospital care management and quality initiatives, and provide prompt documentation of their services.



Under the Arrangement, the hospital would pay the physicians a per diem rate for each day spent on-call for the emergency department; however, each physician must provide one and one-half days for free per month. The per diem rate is based on physician specialty and whether the call coverage is on a weekend or weekday. The different payment rates among the different specialties take into account such factors as the severity of illnesses the physicians typically encounter in the emergency room, the likelihood of responding to calls when providing emergency room coverage, the probability of responding to requests for inpatient consults for uninsured patients when on-call, and the degree of inpatient treatment usually required of the specialty for patients that originally come to the ER.

The hospital certified that the per diem rates are fair market value for the services provided and do not and will not take into account the volume or value of referrals in any way. The results of the on-call Arrangement included a more efficient emergency department, improved physician response time, enhanced cooperation among the ER physicians and on-call specialists, and improved patient satisfaction survey results.

The hospital sought the OIG's opinion as to whether the Arrangement would violate the anti-kickback statute, which prohibits knowingly and willfully offering, paying, soliciting, or receiving anything of value to induce or reward referrals of items or services reimbursable by a federal health care program. The OIG noted that the personal services and management contracts safe harbor, which often applies to service arrangements between physicians and hospitals, did not apply to the Arrangement because the amount of compensation could not be established in advance, as the monthly payments could vary from month to month.

The OIG noted that an improperly on-call payment arrangement could conceal kickback payments. For example, on-call payment arrangements could purport to compensate physicians for "lost opportunities" but in reality fail to reimburse any actual lost income. Moreover, an on-call payment arrangement could pay physicians when no service is actually provided or could result in disproportionately high payments relative to the physician's regular medical practice income. Finally, an on-call payment structure could provide payment for services for which the physician already receives reimbursement from other sources, effectively providing double payments for the same services.

However, the OIG concluded the Arrangement proposed here presented a low risk of fraud and abuse for several reasons. The hospital certified the payments were fair market value for actual services needed and provided with no relationship to referrals. The hospital also applies the per diem rate uniformly within a given specialty independent of independent physicians' referrals. The Arrangement's terms supported the hospital's certification in several ways. For example, the hospital customized the per diem payment to meet the on-call physicians' potential burdens. Further, the Arrangement requires that the physicians potentially treat some uninsured patients in the inpatient setting following their emergency treatment, so the physicians risk providing further treatment without additional compensation. Moreover, the physicians must provide eighteen (18) days of

uncompensated on-call coverage annually, and they have recordkeeping and management responsibilities. Thus, the per diem payments compensate the physicians for significant, quantifiable services that they principally provide to uninsured patients. The OIG contrasted this payment with compensation that could lack the nexus to identifiable physician responsibilities and may disguise kickbacks.

Additionally, the OIG determined that the hospital's legitimate and unmet need for on-call coverage demonstrated that the Arrangement was not a means to conceal unlawful remuneration for referrals. Furthermore, the Arrangement prevents "cherry picking" of patients because on-call physicians must provide inpatient care following admission from the emergency department independent of the patients' ability to pay.

The OIG therefore concluded that the Arrangement provided sufficient safeguards to prevent the use of on-call compensation to pay kickbacks for referrals. The Arrangement also promoted the hospital's charitable mission, and the hospital, not federal health care programs, absorbed all of the costs of the on-call compensation program.

The OIG warned that hospitals should scrutinize on-call coverage compensation arrangements to be certain they are not used to clandestinely reward referrals in violation of the anti-kickback statute. Although OIG Advisory Opinions are limited to the requester of the opinion and the specific facts addressed, hospitals should look closely at this Advisory Opinion when structuring on-call coverage compensation programs so as to minimize the risk that such an arrangement would violate the anti-kickback statute. A copy of the Advisory Opinion is available by clicking [here](#).

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