

OIG ISSUES SECOND OPINION ON ARRANGEMENTS TO COMPENSATE PHYSICIANS FOR ON-CALL COVERAGE FOR HOSPITAL EMERGENCY DEPARTMENTS

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JUNE 17, 2009

The U.S. Department of Health and Human Services, Office of Inspector General (OIG) recently issued a second advisory opinion addressing whether a hospital may compensate physicians who provide on-call coverage for the hospital's emergency department (ED) ([OIG Advisory Opinion No. 09-05](#), (May 14, 2009)). There are significant similarities between the compensation arrangement described in this advisory opinion and the arrangement described in the advisory opinion previously released by the OIG two years ago ([see Advisory Opinion No. 07-10](#) (September 27, 2007)).

Need for the On-Call Arrangement.

In each opinion, the hospitals presented legitimate justifications for the need to compensate physicians for ED on-call coverage. The hospitals reported that the growing financial burdens of uncompensated care, malpractice insurance costs, and the disruption of on-call coverage to the physicians' personal lives affected the hospitals' abilities to adequately arrange for ED on-call coverage. In both situations, the hospitals had to transfer patients to a different hospital for both emergency treatment and inpatient care that might have been handled more conveniently by the hospitals if appropriate physicians were on-call.

OIG recognized that hospitals are increasingly compensating physicians for on-call coverage and their justifications are legitimate reasons to compensate physicians such coverage. A legitimate, unmet need for on-call coverage and uncompensated physician services are both likely necessary in order to lower the risk that the on-call arrangement will be viewed by OIG as a funnel for unlawful remuneration to physicians for referrals.

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The Compensation Arrangements.

The compensation methodology described by the hospital in the first advisory opinion was simply a per diem rate for each day spent on-call at the ED with a higher per diem rate for weekend coverage. Additionally, physicians were required to contribute gratis one and one-half days per month of on-call coverage.

Under the proposed arrangement in Advisory Opinion No. 09-05, the hospital will allow physicians to submit claims to the hospital for services rendered to certain indigent and uninsured patients who present to the hospital's ED. Claims may be submitted for only those patients deemed "eligible," that is, the patient must have no insurance coverage and eventually qualify for the state's insurance program as determined independently by the state agency and verified by the hospital's patient accounting department.

Additionally, physicians would be compensated a flat fee for each of the following:

- in person, face-to-face emergency consultations on the presenting eligible patient;
- care of the eligible patients admitted as inpatients from the emergency department (per admission);
- surgical procedure(s) performed on an eligible patient admitted from the emergency department (flat fee for the primary surgeon of record);
- endoscopy procedure(s) performed on eligible patients admitted from the emergency department (flat fee for the physician performing the procedure).

In order to participate in the new on-call coverage program, a participating physician must be an active member of the hospital's medical staff. The physician must also sign an agreement with the hospital that provides, among other things, that the physician agrees to follow all policies with respect to this new program, including, most notably, that the physician will (i) respond within thirty minutes from the hospital emergency department's request for consultation; (ii) evaluate the patient in person; (iii) provide such additional evaluation and care as are clinically deemed appropriate by the physician; and (iv) abide by the hospital's claims request process, including waiving all billing or collection rights, or claims against third party payers.

Standard for Evaluating On-Call Coverage Arrangements, Generally.

OIG believes that on-call coverage compensation potentially creates considerable risks that physicians may demand such compensation as

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a condition of doing business with a hospital, even when neither the services provided nor any external market factor (e.g., physician shortage) support such compensation. Similarly, payments by hospitals for on-call coverage could be misused to entice physicians to join or remain on the hospital's staff, or to generate additional business for the hospital. OIG specifically identified the following as potentially improper aspects of on-call coverage arrangements:

- payments for "lost opportunity" that do not reflect bona fide lost income;
- payments to physicians when no identifiable services are provided;
- disproportionately higher aggregate on-call payments compared to the physician's regular medical practice income; and,
- structures that pay for services for which the physician is paid twice, i.e., that allow the physician to receive separate reimbursement from insurers and/or patients for the same services.

The OIG's Analysis of On-Call Coverage Arrangements.

In both opinions, OIG relied on the hospital's certification that (i) the payment rates would be fair market value for services provided and would not account for either the party's referrals or other business generated; and (ii) the services were actually needed and provided.

In the most recent advisory opinion, OIG noted that several features of the hospital's program support this certification. Foremost, physicians will only be paid for tangible services they rendered during their on-call arrangements, such as surgical or endoscopic procedures. There are no "lost opportunity" or other amorphous payments. Moreover, physicians will be permitted to seek payment for services rendered to uninsured patients, a limitation which eliminates the risk that a physician could be paid twice for the same service. Other features that OIG viewed as safeguards include patient eligibility determined by an independent standard and a detailed claims request policy. Physicians will also be at risk for furnishing additional services without compensation because their obligation will extend to providing follow-up care for patients admitted to the hospital (this was also the case in the first advisory opinion).

Other features that OIG viewed favorably include that all physicians in the relevant specialty were offered the opportunity to participate, monthly call obligations in each specialty are divided as equally as possible, and call scheduling is not used to reward the highest referrers. OIG also noted in each opinion that the physicians must respond to the call from the ED in a timely manner. Finally, OIG said that each hospital hired an independent consultant to determine the compensation rates to be paid to the physicians.



Conclusion.

These advisory opinions provide insight into OIG's views on on-call coverage arrangements. However, providers must bear in mind that advisory opinions are legally binding only on the requesting entity, and further that the advisory opinions do not speak to compliance with the Stark Law. Therefore, any ED on-call compensation arrangement between a hospital and a physician must satisfy an applicable exception under the Stark Law. Nevertheless, these advisory opinions provide a roadmap by which an ED on-call coverage arrangement may be structured with minimal risk of liability under the anti-kickback statute.

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