OIG Issues New Advisory Opinion Identifying Acceptable and Risky On-Call Physician Payment Arrangements

May.22.2009

On May 21, 2009 the Department of Health and Human Services' Office of Inspector General ("HHS-OIG") issued Advisory Opinion ("AO") No. 09-05, which addressed an inquiry relating to a Hospital's proposal to compensate its medical staff physicians for Emergency Room on-call services to indigent patients. In this AO, the OIG concluded that a proposed compensation plan, which would compensate on-call physicians at fair market value on the basis of services actually provided to indigent patients, while potentially violative of the civil monetary penalty anti-kickback prohibitions (42 USC § 1320a-7a(7)), would not be pursued by the OIG based on the facts as set forth in the AO.

As important as this conclusion is, however, the OIG also identified in the AO several on-call compensation approaches which it would view as potentially "problematic," several of which are commonly employed by hospitals compensating their on-call physicians. They include:

- compensation structures which compensate "lost opportunity" cost or for merely "being available" but that do not reflect bona fide services provided.
- aggregate on-call payments that are disproportionately high compared to the physician's regular medical practice revenues.
- payment structures that compensate physicians for professional services for which he or she also receives separate reimbursement from third party payers, resulting in the physician potentially being paid twice for the same services.

The OIG observes that all of these compensation structures "might disguise kickback payments," noting that covert kickbacks "might take the form of payments that exceed fair market value for services rendered or payments for on-call coverage not actually provided."

Hospitals have struggled for some time now with the issue of whether and how to compensate physicians for on-call services. Because market conditions vary so widely, the economic bargaining power between parties negotiating on-call arrangements varies significantly on a region-by-region basis and even by physician specialty within regions, or at the same hospital.

Hospitals sometimes struggle to secure the on-call coverage required of them by licensure law, third party payer requirements, and/or accreditation standards. Where physician supply does not meet this demand, it is not uncommon for physicians or physician groups to require, for example, payment for simply "being on-call" - whether or not their services are actually required. In other instances, the "lost opportunity cost" strategy is brought into negotiations. In still other cases, physicians may simply refuse to provide on-call coverage to Medicaid or indigent patients because they will not be paid fair value for their services. In these cases, hospitals are often required to "make up the difference" to entice these physicians to provide the coverage the hospital is obligated to provide.
While it is heartening that the OIG recognizes in this Advisory Opinion that "each on-call coverage arrangement must be evaluated under the anti-kickback statute based on the totality of its facts and circumstances," there can be no question but that the OIG has at the same time explicitly identified several kinds of arrangements which on their face will at least raise concern as potentially "problematic."

**Evaluating Risk**

Hospitals with on-call arrangements should reassess all of these compensation relationships in light of this Advisory opinion, to determine whether or not they would now pass muster with the OIG.

At the "safe end" of the spectrum would be "on-call" compensation arrangements styled similarly to the proposed relationship in the Advisory Opinion. That relationship included the following elements, of all which led to the OIG being satisfied that the relationship passed anti-kickback muster:

- the payments to the physicians were for services actually provided to indigent patients.
- the payment levels were established on a flat fee basis ($100 for emergency consultations, $300 for the care of an admitted patient).
- the payment levels were calculated based on a series of factors, including acuity levels of patients seen in the Emergency Department, a blend of fees paid by other payers, average length of stay, payer mix, and likely time requirements.
- the physicians are required to sign a written agreement affirming his/her being bound to the relationship, and agreeing to participate in the hospital's on-call scheduling plan, including providing timely responses to requests for coverage.

This combination of specific compensation and performance elements, combined with the OIG being generally comfortable that the hospital's circumstance warranted payments to physicians to obtain the coverage necessary, and that the arrangement was "equitable," lead the OIG to conclude that the AO requester presented an on-call arrangement which involved little or no anti-kickback risk.

On the "riskier" end of the scale are those relationships described by the OIG in the Advisory Opinion as "problematic." More generally, the OIG sees concerns with arrangements where:

- there is little or no support for the "value" of compensation being paid to the physician. The "value" of "being available" or the "value" of "lost opportunity" are particularly elusive concepts, thus providing fertile ground for inappropriate remuneration.
- on-call compensation differs between physicians or physician groups in a single region or at a single hospital for reasons not attributed to true "fair market value" calculations.
- hospitals subsidize "too low" third party fees where a clear showing cannot be made that failing to do so would lead to an on-call coverage shortage.
- favorable on-call scheduling is offered based on a physician's affinity to the hospital. (e.g. his or her referrals).

With this Opinion, the OIG has now finally crossed the threshold and acknowledged that, in fact, on occasion, it may be quite reasonable - indeed essential to compensate physicians to provide on-call coverage. However, the OIG has chosen to tread lightly in approving only the single, tightly calibrated, on-call compensation proposal submitted to it for its review. The OIG has
used the golden opportunity offered by this clearly thoughtful, circumspect arrangement to warn of other on-call arrangements with which it may indeed take issue. In doing so, the OIG has in effect required that hospitals go back to their on-call files to review existing relationships in light of the new "risk" hierarchy established by the OIG in this important Advisory Opinion.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.