



DECEMBER 2012

## OIG Issues Advisory Opinion: Per Diem Call Coverage Payment Not Subject To Sanctions

On October 23, 2012, the Office of the Inspector General (OIG) issued [Advisory Opinion 12-15](#) (Advisory Opinion) regarding payment by a not-for-profit hospital (Requestor) to specialist physicians (Physicians) of a per diem fee for on-call services provided to the Requestor's emergency department (the Arrangement). The OIG ultimately concluded that, while the Arrangement has the potential to generate prohibited remuneration under the anti-kickback statute (AKS), sufficient safeguards prevent a violation of the AKS from occurring.

### THE ARRANGEMENT

The Requestor developed the Arrangement because many Physicians no longer desire to provide call coverage, and the Requestor was having difficulty obtaining adequate coverage. Under the Arrangement, the Requestor pays Physicians a per diem fee for unrestricted call coverage. Unrestricted call coverage permits covering Physicians to be off-site during the on-call period, provided they are able to respond to a call, in person, within thirty minutes. Physicians who admit patients while providing call coverage must provide care for them during the patients' inpatient stay and must provide follow-up care in their office, regardless of such patients' ability to pay.

The Requestor determines the per diem payment annually. To calculate the payment, the Requestor adds the estimated number of days per month each specialty will be called, the estimated number of patients an on-call Physician would see per day, and the estimated number of patients that will require inpatient and post-discharge follow-up care at the Physician's office. The Requestor divides this sum by 365 days to derive a daily per diem payment. The Requestor obtained an independent valuation of the per diem payment. Physicians receive the per diem payment for each day that they provide call coverage, regardless of whether they are actually contacted during the coverage period. Each Physician's on-call arrangement with the Requestor is documented in a written agreement with a one-year term that automatically renews from year to year. The Requestor strives to distribute call coverage evenly among the Physicians. The chief of the applicable Requestor department establishes the on-call schedule.

## OIG FINDINGS

The AKS makes it a crime to knowingly and willfully offer or receive remuneration to induce or reward referrals of services reimbursable by a federal health care program. Both sides of an impermissible "kickback" transaction can be held criminally liable for the violation. The OIG has, under statutory authority, promulgated "safe harbors" identifying certain payment and business practices not subject to criminal and civil prosecution under the AKS due to their low risk for fraud or abuse. An arrangement must meet all of the requirements of a safe harbor to be protected. In this case, the applicable safe harbor is the personal services and management contracts safe harbor. In pertinent part, this safe harbor requires that aggregate compensation is set in advance and that, if the services are performed on a part-time or sporadic basis, the exact schedule must be set forth in the Arrangement.

While acknowledging that many hospitals are having difficulty obtaining adequate call coverage, the OIG expressed its concern that physicians may demand on-call payments regardless of actual need and that hospitals may make such payments to encourage physicians to join or remain on their medical staff. The OIG identified four on-call compensation structures that it believes could be used to disguise prohibited remuneration: payments based on "lost opportunity" costs, which do not reflect actual lost income; compensation paid to physicians without evidence that actual services were provided; on-call payments that are disproportionately high when compared to the physician's medical practice income; and compensation arrangements in which a physician receives an on-call fee in addition to payment from an insurer or a patient for the same professional service. The OIG noted that the key inquiry under the AKS is whether there is an impermissible kickback payment. The OIG referenced two previous call-coverage Advisory Opinions in which it stated that it would not impose sanctions: [Advisory Opinion 7-10](#) and [Advisory Opinion 09-05](#).

The OIG stated that the Arrangement does not meet the personal services and management contract safe harbor for two reasons. First, the aggregate compensation paid to each Physician is not set in advance. Although the per diem payments are calculated annually, payments to a Physician can vary depending on the actual call coverage schedule. Second, the Arrangement does not meet the safe harbor because the written agreement between the Requestor and each Physician does not include the actual intervals in which call coverage services will be provided. Although the Arrangement does not meet the applicable safe harbor, the OIG determined that the Arrangement presents a low risk of fraud and abuse because of the following five factors:

- The Requestor obtained an independent valuation of the per diem payments and, based on that valuation, certified to the OIG that the per diem payments are of fair market value for the services provided and do not reflect the volume or value of referrals or other business between the Requestor and the Physicians. The OIG noted certain elements of the Arrangement that appear to support the Requestor's certification, including the Requestor's per diem formula accounting for the varying degrees of burden to the Physicians, the likelihood that the Physicians will provide uncompensated care, and the likely extent of any uncompensated care provided.
- The per diem payments are calculated annually, in advance, and paid to Physicians without regard to the volume or value of referrals or other business generated by a Physician for the Requestor.
- Physicians perform actual and necessary services, risk not receiving additional compensation for required follow-up care, and must document the services that they provide. While for some patients a Physician may collect both a per diem fee and a separate reimbursement from the patient or the patient's insurer, the Arrangement is

- not intended to have this effect.
- Any Physician on the Requestor's medical staff who is required to take unrestricted call may participate in the Arrangement.
  - No burden is placed on any federal health care program because the Requestor absorbs all costs of the Arrangement.

Although the OIG stressed that this Advisory Opinion is limited to the Requestor, it provides guidance to other hospitals contemplating or already using per diem payments for on-call physicians.

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Please contact any member of [Robinson & Cole's Health Law Group](#) with respect to any portion of this Advisory Opinion.

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