

Part B Insider (Multispecialty) Coding Alert

COMPLIANCE: OIG: Part-Time Docs Can Perform Services at Clinic -- If They're 'Bona Fide Employees'

Know where arrangement could cross the line before you participate.

Your physicians may be fielding requests from outside entities to perform services at their locations -- but before you say "yes," make sure you know what the OIG may be scrutinizing.

On Dec. 15, the OIG issued its latest advisory opinion, which strove to decipher when an arrangement with an outside physician becomes a problem.

At issue: A non-profit corporation proposed hiring two part-time physicians to perform endoscopies at its location. Both physicians operate their own private practices, where they would continue to work in addition to their working at the facility.

The corporation planned to pay both physicians a salary based on fair market value of their services.

The outcome: The OIG determined that the proposed arrangement "would not generate prohibited remuneration under the antikickback statute" and that the OIG would therefore not impose administrative sanctions on the entity in connection with the arrangement.

Why this arrangement is OK:

The fact that the part-time physicians are considered "bona fide employees" of the clinic means that the OIG sees it through a different light.

Analysis: This opinion finds no problem for anti-kickback purposes where the compensation is based on the employee physician's personally performed services, says **Howard L. Sollins, Esq.**, with Ober Kaler in Baltimore. "The advisory opinion deals with the anti-kickback law, which is appropriate since that is the focus of the inquiry."

Bona fide employees: Under the federal anti-kickback law, "the analysis of employment arrangements is a bit different since not only is there an employment safe harbor regulation, but there is also an overlapping statutory provision concerning bona fide employment arrangements," Sollins says.

Other issues: The advisory opinion also reveals other issues that the practice should consider.

For instance: From a compensation perspective, "it is interesting that the OIG, in a footnote, noted it was not relying on a certification of fair market value from the requestor but, rather, relied on the fact that the compensation was for professional services personally rendered by the physician employees," Sollins says.

Not only does the OIG consider potential violations to the antikickback statute when reviewing such arrangements, but it may attempt to measure the legality from other perspectives as well.

"The OIG does state that a fair market value analysis still has to be done under the federal Stark law, which is outside the scope of the opinion," Sollins says.

Plus: The arrangement in question "needs to pass another hurdle -- it must also come within a parallel Stark exception for employment arrangements," says **David C. Harlow, Esq.**, with The Harlow Group LLC in Newton, Mass.

The Stark exception "includes a requirement that pay not vary with volume or value of referrals from the physician's

'home practice," Harlow says. Fixed part-time salary arrangements would likely satisfy that and the other elements of the Stark exception, he opines.

To read the OIG opinion, visit www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-22.pdf.