OIG Turns Thumbs Down on Gainsharing

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Practice Area: Health Law & Healthcare Billing and Collection

In a move that caught some industry observers by surprise, the Office of the Inspector General of the Department of Health & Human Services ("OIG") issued a Special Advisory Bulletin on July 8, 1999, asserting that most so-called "gainsharing" arrangements are prohibited by federal law. OIG concludes that such arrangements violate provisions of the Civil Monetary Penalties (or CMP) statute. This statute imposes fines on a hospital that knowingly makes a payment to a physician as an inducement to reduce or limit services to Medicare or Medicaid beneficiaries, and against any physician who accepts such a payment. The key concern under the statute is whether gainsharing arrangements, which share hospital cost savings with physicians, provide an improper incentive to reduce or limit necessary services.

Gainsharing "Flatly Prohibited"

The fact that gainsharing arrangements raise concerns under the CMP law is nothing new, and we have advised our clients for some time to exercise caution on gainsharing for this and other reasons. What is surprising, though, is that all gainsharing arrangements are questioned, regardless of the level of care exercised in crafting the agreement to eliminate any incentive to reduce or limit services. While recognizing that gainsharing plans typically include features to reduce these incentives, OIG concluded that "no combination of features could guarantee that such plans would not be subject to abuse." OIG's lack of faith in hospitals and physicians is evident throughout the Bulletin, as it cites the "high risk of abuse" and the likelihood that affected parties will "manipulate the hospital accounts to generate phantom savings" or otherwise "game the arrangement to generate income for referring physicians." As a result, OIG concluded that "such plans are flatly prohibited."

OIG's Attack on All Clinical Joint Ventures

OIG expanded the Bulletin beyond gainsharing arrangements to include all clinical joint venture relationships involving physicians and hospitals. OIG suggested that these arrangements could violate the CMP law since investor-physicians may have an incentive to reduce services to patients in order to decrease costs, and therefore, increase profits. Taken to its logical conclusion, OIG's rationale broadly characterizes any profit motive in hospital-physician arrangements as suspect under the CMP law. Clouding the issue further, OIG provides no clear guidance for determining when physician ownership in a hospital or other clinical joint venture is appropriate or inappropriate.

OIG Cuts Off Further Review: No Advisory Opinions

Gainsharing proponents have attempted to address CMP concerns by structuring the agreements to eliminate improper incentives, such as by denying bonus payments where quality of care is adversely affected. These approaches reflected an industry expectation that OIG would review gainsharing arrangements on a case-by-case basis, using the advisory opinion process. Indeed, a number of advisory opinion requests were pending with OIG at the time of issuance of the Bulletin. OIG has now stated that it will not provide guidance on gainsharing arrangements through the advisory opinion process, concluding that gainsharing arrangements "contain common elements that preclude our issuance of any favorable opinion." Instead, OIG directs the industry to seek legislative relief on this issue.

OIG Effectively Voids IRS Private Letter Rulings

The IRS recently issued several private letter rulings approving gainsharing programs. Gainsharing is just a new name and a health care industry twist for something the IRS has accepted for years: incentive compensation based on exempt organization cost reduction. The IRS has long approved such programs, when properly structured with safeguards to limit compensation to fair market value and linked to accomplishment of exempt purposes.

The IRS regularly conditions its health care industry rulings on compliance with other legal and regulatory requirements. Now that the OIG has concluded that gainsharing is unlawful, the IRS rulings are effectively voided. Watch for an IRS release revoking the recent rulings.

Now What?

While the OIG Bulletin does not have the force of law, it clearly indicates how OIG will exercise its enforcement discretion on gainsharing agreements. Indeed, the Bulletin states that OIG will consider whether a suspect agreement was "terminated expeditiously" following release of the Bulletin when exercising OIG enforcement discretion. As a result, hospitals and physicians who have entered into such arrangements should review the agreements with legal counsel to determine compliance.

The Bulletin does not necessarily sound the death knell for all incentive compensation arrangements. OIG acknowledges that arrangements based upon fixed-fee compensation (rather than a percentage of cost savings) may pass muster. In addition, programs that exclude Medicare and Medicaid beneficiaries, or apply only to physicians who do not have responsibility for direct patient care, may still be permissible so long as they adequately address other regulatory issues such as Stark, anti-kickback and private inurement rules. Incentive programs that compensate physicians based upon quality of care, patient satisfaction, or other factors unrelated to the quantity or cost of services may also be acceptable.

On the other hand, given the breadth of the OIG Bulletin, it may implicate incentive plans that are not typically viewed as "gainsharing" arrangements. For example, medical director agreements that provide for incentive payments based upon ability to control department costs might be impacted by this Bulletin. Hospitals and physicians would be well-advised to review all incentive compensation arrangements in light of this recent OIG pronouncement.

The OIG Bulletin is unlikely to be the last word on gainsharing. We recommend that our clients and friends stay tuned, and provide input, as this issue is resolved.

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