

# Just What the Doctor Ordered: OIG Approves Pay for Call

Oct 04 2007

Practice Area: Health Law

---

On September 27, 2007, the Office of Inspector General (the "OIG") issued Advisory Opinion No. 07-10, approving a financial arrangement between a medical center and physicians on the hospital's medical staff for on-call coverage and uncompensated care (the "Arrangement"). The hospital requesting the advisory opinion is a tax-exempt, not-for-profit hospital with an emergency department (the "ED"). The ED operates 24/7 and accepts all persons regardless of their ability to pay. Several factors contributed to the shortage of physicians in various specialties willing to treat patients in the ED including uncompensated care and high malpractice insurance costs. The lack of physician availability impeded the hospital's ability to provide services to patients in the ED and caused the hospital to transfer patients to other facilities, sacrificing patient convenience and efficiency. While this Advisory Opinion is only applicable to the requesting hospital, the OIG's guidance will help other hospitals in reviewing similar and other compensation arrangements.

## **Key Elements to the Approved Pay for Call Arrangement**

To address the shortage of physician specialists in the ED, the hospital created a committee comprised of members of the hospital's Board, medical staff and administration. The committee studied the problem and developed the Arrangement. The key elements of the Arrangement are that all physicians in 18 specialties who are on the hospital's medical staff may participate and each physician commits to a two-year contract in which the physician is required to satisfy the following five criteria:

1. Each month, physicians in each specialty will equally provide on-call coverage to the ED.
2. Physicians are obligated to provide follow-up care until discharge to any patient whom the physician treats in the ED regardless of the patient's ability to pay.
3. When on call, physicians are required to respond timely to the ED.
4. Physicians are required to adhere to and participate in the hospital's various initiatives related to risk management, utilization, discharge planning and patient observation.
5. Physicians are required to timely complete medical records for patients treated in the ED.

The criteria are designed to prevent deterioration of physician performance. If a physician fails to satisfy any of the five criteria, the hospital may suspend payment until the physician reaches full compliance or the physician is terminated from participation in the Arrangement.

### **Development of the Per Diem Rate**

Under the Agreement, the hospital pays physicians that participate a per diem rate developed for each specialty except for the one and one-half days per month that the physicians are required to provide call coverage for no charge. The per diem rate, which the hospital certified is fair market value and does not consider the volume or value of the referrals or other business generated between the parties, varies based on specialty and whether the coverage is provided on a weekday or weekend (in recognition that weekend coverage is a greater burden for physicians). With the assistance of a consultant, the hospital determined the per diem rate, based on the severity of illness encountered by that specialty; the likelihood of that specialty having to respond to on-call requests in the ED; the likelihood of having to provide consultative services for uninsured inpatients; and the degree of inpatient care typically required by ED patients. The hospital provided a copy of the consultant's analysis and opinion to the OIG.

After implementing the Arrangement, the hospital reported that its ED functions more efficiently; specialty physicians' responses to on-call requests improved; cooperation between the on-call specialty physicians and the ED physicians improved; and patient satisfaction with the ED increased.

### **Pay for Call Coverage: Concerns and Possible Abuses**

The OIG determined that although the Arrangement could potentially generate prohibited remuneration under the anti-kickback statute, the Arrangement has sufficient safeguards and the OIG will not impose administrative sanctions in connection with the Arrangement. Its approval notwithstanding, the OIG expressed reservations regarding hospitals paying for call coverage. Those reservations include the risk that physicians will demand pay for call coverage even when circumstances do not support the payment, and the potential for hospitals to use payments as enticement for physicians to join or remain on a hospital's medical staff and/or to generate additional business. Citing the Supplemental Compliance Program Guidance for hospitals, the OIG stated that the key elements in a legitimate on-call arrangement are that the compensation be fair market value for actual and necessary services and that the compensation not be determined in a manner which takes into account the volume or value of referrals or other business generated between the parties. This is the standard that the OIG expects each call coverage compensation arrangement to satisfy.

The OIG believes that improperly structured arrangements could be used to disguise unlawful payments. Problematic arrangements include:

1. those where pay exceeds fair market value for the services rendered;
2. "lost opportunity" payments that do not represent *bona fide* lost income;
3. payment to physicians for call coverage *not* actually provided (no identifiable services rendered);
4. payments that are disproportionately high compared to the physician's regular medical practice income; and
5. payment for on-call services that are also separately reimbursed by insurers or patients (being paid twice for the same service).

### **Helpful Guidance**

Ultimately, the OIG deemed that the Arrangement evidenced a low risk of fraud and abuse. It was persuaded by the fair market value per diem rate, the evidenced burden on each physician to provide call coverage and follow-up care services for no additional payment, the physicians' obligation to annually provide 18 days of call coverage without compensation, the medical record responsibilities and the physicians' obligation to participate in the hospital's initiatives and committees. Other factors included the uniform per diem payments per specialty (not per physician) and the opportunity for all physicians in a specialty on the medical staff to participate in the Arrangement. Finally, the OIG was persuaded by the hospital's demonstration that the Arrangement allowed it to satisfy an unmet need in its ED.

This Advisory Opinion may only be relied upon by the hospital that requested approval. However, this Advisory Opinion provides guidance that all hospitals may use in developing compensation arrangements with physicians not only for on-call coverage (which is becoming a common practice in many hospitals) but for other services as well. The facts and circumstances with each relationship will and should impact the terms of each arrangement. This Advisory Opinion highlights that an assessment of fair market value will always be critical to creating legitimate arrangements and that other safeguards may support otherwise suspect arrangements.

---

von Briesen & Roper Legal Update is a periodic publication of von Briesen & Roper, s.c. It is intended for general information purposes for the community and highlights recent changes and developments in the legal area. This publication does not constitute legal advice, and the reader should consult legal counsel to determine how this information applies to any specific situation.