

Jan 10 2013

Practice Area: Health Law

---

As hospitals deal with the increasing infrastructure costs and declining reimbursement imposed by healthcare reform, the need to align hospital and physician goals and incentives has become more critical than ever. One alignment strategy that has received increasing attention is the establishment of co-management arrangements by which hospitals outsource the day-to-day management of a clinical service line to physicians. On January 7, 2012, the Office of Inspector General (OIG) issued Advisory Opinion No. 12-22, in which it approved such an arrangement.

The opinion involves a large, rural acute Hospital that operates four cardiac catheterization laboratories on its main hospital campus. The Hospital entered into a three-year co-management agreement for the cardiac catheterization service line with an 18-physician group practice. The Group includes general cardiologists, interventional cardiologists and electrophysiologists. The Group is the only cardiology group on the Hospital's medical staff, and the only physician group in town that provides cardiac catheterization services. The Group does not provide cardiac catheterization services at any location other than the Hospital's labs.

The Group committed to provide the following services under the agreement: operational oversight of the Hospital labs; strategic planning; medical direction; development of the Hospital's cardiology program; staff development, training and credentialing; consultation on lab equipment, devices, supplies and information systems; and assistance with financial and payor issues.

In exchange, the Hospital proposed to pay a co-management fee that would consist of both a fixed annual component, paid in quarterly installments; and a variable performance component tied to the Group's achievement of targets in employee satisfaction, patient satisfaction, improved quality of care, and cost reductions attributable to lab procedures.

OIG analyzed the arrangement under federal law that prohibits reductions or limitations of services provided to Medicare and Medicaid beneficiaries (the civil monetary penalty provisions of the Social Security Act, commonly referred to as the "CMP"), and under the Anti-Kickback Statute ("AKS"). OIG's concerns included the potential for stinting on care, "cherry picking" healthy clients while steering sicker clients to other hospitals, payments to induce referrals, and unfair competition.

Ultimately, OIG concluded that the arrangement provided sufficient safeguards against these risks, such that the OIG would not seek sanctions against the Hospital under the CMP or AKS. While the cost reduction element of the performance component implicated the CMP, OIG concluded that the Hospital had adequate safeguards in place to monitor and prevent any inappropriate reductions or limitations in patient care or the medically inappropriate use of items and supplies. In addition, the financial incentives tied to cost savings were deemed to be reasonably limited in duration and amount, and the receipt of those incentives was conditioned on the physicians not taking actions that would lead to stinting, cherry-picking, or improper referrals.

The CMP didn't apply to other elements of the co-management fee involving the fixed annual component or the variable satisfaction and quality aspects, but those elements still required analysis under the AKS. The Hospital provided an independent opinion that the compensation was fair market value for the services provided. In addition, the compensation would not vary based on the number of referrals, and it was unlikely that the Hospital was offering compensation to the Group as an incentive for referrals since the Hospital operated the only cardiac catheterization laboratories within a fifty-mile radius.

Co-management agreements may provide an effective alternative to other alignment strategies involving physician employment and clinical joint ventures. The OIG has addressed laboratory management agreements and gainsharing arrangements in the past, but A.O. 12-22 is one of the first opinions to specifically address a co-management agreement between a hospital and a physician group.

While A.O. 12-22 provides helpful guidance in analyzing such arrangements, it does have limitations. For example, the Hospital in A.O. 12-22 contracted directly with the physician group; the opinion does not address arrangements where hospitals contract with a co-management company that is jointly owned by the hospital and its referring physicians, which can raise numerous additional compliance considerations. The OIG also limited its analysis to the initial three-year term of the agreement, and expressed no opinion with respect to future extensions of the agreement other than to note its expectation that quality improvement and cost-saving measures would be adjusted over time to avoid paying for improvements achieved in prior years. Also note that the advisory opinion does not address potential application of the "Stark" physician self-referral law, or potential issues facing nonprofit 501(c)(3) hospitals under IRS private inurement and private benefit regulations. Finally, the OIG opinion is premised on a major assumption regarding the fair market value of the compensation paid for the services provided under the agreement. OIG states that if the fees are not fair market value, the opinion is without force and effect, such that the opinion is only as good as the underlying fair market value opinion on which the request was based.

#### **Key Safeguards**

- Adherence to nationally recognized standards
- Specificity of measures, tied to quality
- Flexibility to depart from standards when medically appropriate
- No reduction or limitation of care
- Ongoing monitoring to detect and prevent stinting, cherry-picking
- Independent FMV opinion

---

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.

