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OIG Announces Closer Anti-Kickback Scrutiny of Physician Deals

Federal prosecutorial scrutiny of physician compensation arrangements has come full circle.

Earlier this month, the Office of Inspector General of the U.S. Department of Health & Human Services (“OIG”), the agency charged with enforcing the federal Anti-Kickback Statute (“AKS”), issued a new Fraud Alert aimed directly at physician compensation arrangements such as medical directorships and physician employment relationships.

The federal Anti-Kickback Statute (the “AKS”) makes it a crime to pay remuneration to induce a referral of a federal health care program patient.

There are safe harbors, exceptions, in place for certain arrangements, including the two underlying the new Fraud Alert: the safe harbors for physician employment agreements and for personal services contracts.

In significant part, the genesis of the AKS was a result of what the government saw as abusive relationships whereby hospitals (such as in the medical director sphere) and other federal health care program participants (from skilled nursing facilities to ASCs to referral-receiving medical practices) entered into compensation arrangements with physicians in a position to refer.

The employment and personal services safe harbors developed "checklists," so to speak, of the requirements for a protected arrangement.

Over the course of the ensuing decades, there's been a significant public focus on what the OIG describes as "suspect joint ventures." A prime example is the focus on so-called Company Model deals in which facilities or other providers in a position to refer enter into profit making ventures with the physicians or other providers in a position to receive those referrals.

One of the central issues in analyzing the availability of the employment and personal services safe harbors in respect of Company Model deals involves understanding what the employment and personal services safe harbors were designed to protect.

The historical abusive relationships that gave rise to those safe harbors concerned remuneration from the principal **to** an agent (for example, from a hospital to a physician who was in a position to refer to the hospital) but not *from an agent **to** the principal* (for example, the discount, or profit transfer, inherent in a Company Model venture). Both the employment and personal services safe harbors protect remuneration flowing **to** the agent.

But now, by way of its June 2015 Fraud Alert on physician compensation arrangements, the OIG is publicly announcing a widening of its web of inquiry back inside of the facts underlying facial compliance with the employment and personal services safe harbors.

The central issue for physicians (as well as for facilities) is that many mistakenly believe that simply following the “recipe” set out in those safe harbors is sufficient. It’s not.

The OIG reminded in the Fraud Alert that compensation must be at **fair market value** for **bona fide services** the physician **actually provides**. The arrangement **can’t take into**

account the volume or value of referrals.

The new Fraud Alert grew out of a recent spate of OIG settlements with physicians concerning alleged illegal compensation arrangements, including medical directorships. In the allegations underlying those settlements, physicians (and their family members) were receiving remuneration tied to the volume or value of referrals, were receiving sums that didn't reflect what the OIG alleged was actual FMV, were being paid but not actually providing the contracted services, and were receiving disguised remuneration such as free office staff.

Additionally and extremely importantly, the OIG also restated its long held position that an otherwise legitimate compensation arrangement may violate the AKS if even one purpose is to violate the AKS, that is to compensate for past or future referrals.

*In other words, fitting **completely** into the safe harbor might not be sufficient to protect you if just one reason for entering into the otherwise lawful arrangement is to provide a reward for referrals*.

The Take Aways For You:

Be extremely careful when entering into any physician compensation arrangement, whether you are the payor or the recipient. What passes as common knowledge in this area does not come close to comprehending the complexity of AKS compliance.

Many arrangements between facilities and physicians, between physicians and physicians, and between physicians and other persons or entities providing items or services under federal health care programs fall within danger zones under the AKS.

The OIG has clearly signaled that it will come after physicians as well as facilities in connection with physician compensation deals gone bad.

Penalties for violation of the AKS include jail time, criminal fines, civil monetary penalties and debarment from participation in federally funded health care programs.

Wisdom. Applied. 78 - Compounding The Kickback Problem

Compounding pharmaceuticals, specific drugs for specific patients, offers tremendous benefit. The problems arise when the benefit is for the prescribing physician.

All Things Personal

You walk into a store at the mall and find exactly what you're looking for. Maybe a great shirt. And it's 70% off! You take it to the register, where you come upon a sales clerk who looks like someone just ran over her dog and her grandma and maybe her best friend, too. She "greets" you with "next." The rest of the conversation consists of her saying "fifty-three ninety-seven."

Selling a great product or service is no longer enough. Customers, and that includes you and I, value the item or service within the context of the experience or transformation in which it's wrapped.

Think, for example, of Starbucks which took a $.50 cup of coffee and turned into a close to $5 beverage by wrapping it within the experience that its founder describes as the "third place," neither work nor home, but welcoming.

When people obtain service from you, they're measuring the experience they receive.

help clarify your thinking?

Directions is a collection of thoughts as thinking tools, each intended to instruct, inform, and even more so, cause you to give pause to instruct and inform yourself.

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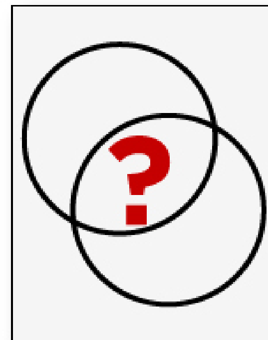

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But the measuring stick is not necessarily against the experience received from your competitors within your specialty or business category. Instead, it's against the patient's or customer's catalog of experiences, both good and bad: A patient who had a wonderful experience at a hotel wonders why her doctor can't provide the same level of service.

Start cataloging the experiences you encounter, both the good and the bad. Think how you can leverage off of them to create the best experience possible for your patients or customers. That's what they'll remember. That's what they'll measure you by.

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