

WEISS



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Surprising Advisory Opinion On ASC Profit Sharing by Non-Owner Employed Physicians

On October 10, 2023, the Office of Inspector General (“OIG”) of the U.S. Department of Health and Human Services issued what can only be described as a surprising advisory opinion (Adv. Op. 23-07) supporting a medical group’s plan to pay bonuses to its employed physicians based directly on the ASC facility fee net profits of the procedures performed by those physicians.

In other words, the OIG took a position approving payments to non-ASC owners directly related to their performance of procedures at the ASC.

Factual Background

The “Requestor” is a medical group that operates a multi-specialty physician practice with approximately eleven physician employees (the “Physician Employees”). Requestor furnishes services for which payment is made by Federal health care programs. The Physician Employees receive certain employment compensation from Requestor in exchange for the services they provide on behalf of Requestor, which include services for which payment may be made under Federal health care programs.

Under the arrangement submitted to the OIG for review (“Proposed Arrangement”), Requestor proposed to implement an employment compensation bonus methodology for each of the Physician Employees, in addition to their base employment compensation, which would be in exchange for the services they provide on behalf of Requestor (including services for which payment may be made under Federal health care programs).

Specifically, when a Physician Employee performs outpatient surgical procedures at either of two ambulatory surgical centers (“ASCs”) operated by Requestor in a given calendar quarter, the Physician Employee would receive a bonus in the form of 30 percent of Requestor’s net profits from the ASC facility fee collections attributable to that physician’s procedures performed at the ASC for that quarter.

Requestor certified that all Physician Employees would be bona fide employees of Requestor in accordance with the definition of the term “employee”, i.e., an individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee.

The AKS

The Federal anti-kickback statute (“AKS”) makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program.

The AKS has been interpreted to cover any arrangement where *even one purpose* of the remuneration is to induce referrals for items or services reimbursable by a Federal health care program.

Violation of the statute constitutes a felony punishable by a maximum fine of \$100,000, imprisonment up to 10 years, or both. Other consequences include exclusion from Federal health care programs, including Medicare and Medicaid, and possible civil monetary penalties

There are, however, statutory exceptions to the AKS as well as regulatory “safe harbors” that specify certain arrangements as not being illegal.

Safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the particular safe harbor. Compliance with a safe harbor is voluntary. Arrangements that do not comply with a safe harbor are evaluated on a case-by-case basis.

There are both a statutory exception and a regulatory safe harbor for employees.

The statutory exception protects “any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.”

The regulatory safe harbor provides that the AKS’s term “remuneration” does not include “any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.”

The OIG’s Analysis

The AKS is clearly implicated by the Proposed Arrangement: Requestor would offer and pay each Physician Employee remuneration in the form of a quarterly bonus equal to 30 percent of Requestor’s net profits from Requestor’s ASC facility fee collections attributable to that physician’s procedures performed at either of Requestor’s ASCs for the preceding quarter (in addition to base employment compensation).

Nonetheless, the OIG concluded that the bonus compensation under the Proposed Arrangement would be protected by the statutory exception and the regulatory safe harbor for employees because:

1. Requestor certified that the Physician Employees would be bona fide employees of Requestor in accordance with the applicable definition of that term; and
2. The bonus compensation would constitute an amount paid by an employer to an employee for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs.

The OIG took effort to state that a similar arrangement involving bonus payments to *independent contractor physicians* or other nonemployees or under a different corporate structure (in which, for example, the physicians were owners of the ASCs and paid themselves the bonuses contemplated by the Proposed Arrangement as ownership distributions) may raise fraud and abuse concerns under the Federal anti-kickback statute.

However, because the Proposed Arrangement would satisfy the statutory exception and regulatory safe harbor for employees, the remuneration exchanged under the Proposed Proposed would satisfy the statutory exception and regulatory safe harbor for employees, the remuneration exchanged under the Proposed Arrangement would not constitute prohibited remuneration under the AKS.

Important Takeaways for You

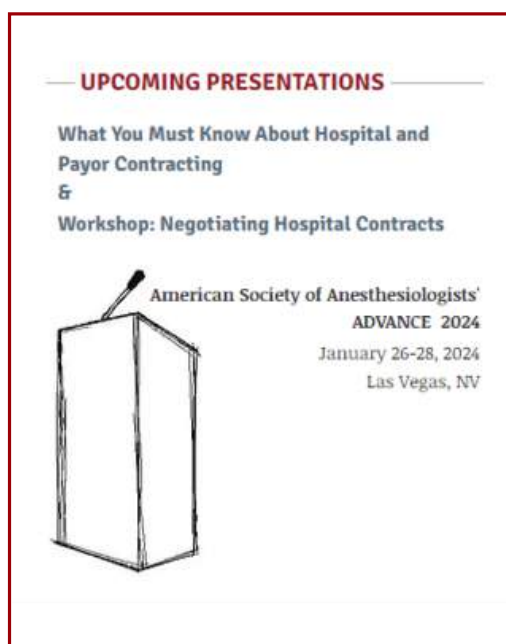
The arrangement described in the Proposed Arrangement varies greatly from the usual manner in which physicians invest, i.e., as individuals, in an ASC. Additionally, it varies greatly from the smaller subset in which an ASC is owned by a medical group via a subsidiary entity in order to segment liability.

Here, the Requestor medical group directly owns the two ASCs “inside” of the medical group entity itself.

The OIG specifically stated that a similar arrangement involving bonus payments to independent contractor physicians or other nonemployees or under a different corporate structure (in which, for example, the physicians were owners of the ASCs and paid themselves the bonuses contemplated by the Proposed Arrangement as ownership distributions) may raise fraud and abuse concerns under the Federal anti-kickback statute.

An advisory opinion is limited in scope to the specific Proposed Arrangement and is issued only to the specific Requestor. Although it provides insight into the OIG’s thinking, the opinion cannot be relied upon by any other person, nor may anyone other than the Requestor introduce it into evidence to prove that the person did not violate the AKS or any other law.

Compliance with the AKS is highly fact specific. As I always advise, vet any proposed arrangement for compliance before embarking on it.





Wisdom. Applied. - 179: The Strategy of Power in Negotiations

You're probably familiar, if not personally, then at least conceptually, with the notion of "F.U. money" – having enough money that you can simply walk away. That concept, whether you have the money or not, applies directly to your negotiation strategy.

All Things Personal

"Neither snow nor rain nor heat nor gloom of night stays these couriers from the swift completion of their appointed rounds."

Popularly thought to be the United States Postal Service motto, the USPS goes well out of its way to say that it doesn't have a motto; that those words of dedication, service, and efficiency are merely what's chiseled in gray granite over the entrance to the New York City Post Office on 8th Avenue.

And, I know why.

Last week, late October 2024, a check mailed by a client in August, nearly 100 days prior, finally arrived. Well, sort of. The envelope, apparently semi shredded by some piece of post office sorting machine, was stuffed inside a plastic post office pouch, the equivalent of a Postal Service coffin.

Several instructive lessons:

1. When someone tells you that "the check's in the mail" it might actually be. But the fact that it's in the mail doesn't mean that it's going to be delivered anytime soon.
2. It's not hard to understand why someone will spend close to \$20 to use an overnight courier service like FedEx to get a quarter ounce letter somewhere within a day or two as opposed to 66 cents to get it there in maybe 3 days or maybe 100 days. For that same reason, it's not hard to understand why it's illegal for a private company to offer the same scheduled, door-to-door delivery service as the post office; the post office would go out of business.
3. And a more direct lesson for you: Don't overpromise and under deliver.

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- [What You Must Know About Hospital Vicarious Liability for Non-Employees' Actions](#), published in the [Fall 2022](#) issue of [MiraMed Focus](#).

Books and Publications



We all hear, and most of us say, that the pace of change in healthcare is quickening. That means that the pace of required decision-making is increasing, too. Unless, that is, you want to take the “default” route. That’s the one in which you let someone else make the decisions that impact you; you’re just along for the ride. Of course, playing a bit part in scripting your own future isn’t the smart route to stardom. But despite your own best intentions, perhaps it’s your medical group’s governance structure that’s holding you back. In fact, it’s very likely that the problem is systemic. The Medical Group Governance Matrix introduces a simple four-



Whenever you're ready, here are 4 ways I can help you and your business:

1. Download a copy of The Success Prescription. My book, The Success Prescription provides you with a framework for thinking about your success. Download a copy of The Success Prescription [here](#).

2. Be a guest on "Wisdom. Applied. Podcast." Although most of my podcasts involve me addressing an important point for your success, I'm always looking for guests who'd like to be interviewed about their personal and professional achievements and the lessons learned. [Email me](#) if you're interested in participating.

3. Book me to speak to your group or organization. I've spoken at dozens of medical group, healthcare organization, university-sponsored, and private events on many topics such as The Impending Death of Hospitals, the strategic use of OIG Advisory Opinions, medical group governance, and succeeding at negotiations. For more information about a custom presentation for you, [drop us a line](#).

4. If You're Not Yet a Client, Engage Me to Represent You. If you're interested in increasing your profit and managing your risk of loss, [email me](#) to connect directly.