Recent OIG Fraud Alert Puts Physician Medical Director Agreements in Focus

By James F. Owens & Josh R. Hill

Earlier this month, the US Department of Health and Human Services Office of Inspector General (OIG) issued a fraud alert (Fraud Alert) which pointed out that physician compensation arrangements may result in significant liability when they are structured in a way that does not comply with federal fraud and abuse laws. Of course, that has long been understood by those in the health care industry, but what distinguishes this alert is that it focuses specifically on the fact that physicians, and not just the health care institutions with which they contract, may be held liable for entering into suspect arrangements.

The Fraud Alert reveals that the OIG recently reached settlements with twelve physicians who had entered into separate medical directorship agreements, which, according to the alert, were each deficient in some way. The deficiencies highlighted in the Fraud Alert include payments taking into account the physicians’ volume or value of referrals, payments being inconsistent with fair market value for the services to be performed, and physicians not actually performing the services called for in the agreements. The OIG also claimed that certain arrangements involved an affiliated health care entity improperly paying for the salaries of the physicians’ front office staff, which relieved the physicians of a financial burden which would otherwise have been their responsibility.

While some of the questionable features highlighted in the Fraud Alert would be problematic in almost any arrangement between a physician and an affiliated health care entity, such as paying a physician for services that he or she never actually performs, other features discussed, such as employing a physician’s non-professional staff, are not so straightforward. In California, medical foundation clinics that are exempt from licensure pursuant to Section 1206(l) of the California Health and Safety Code often acquire a physician medical practice and enter into a professional services agreement with the acquired practice pursuant to which the physicians provide medical services on behalf of the foundation in exchange for the foundation providing compensation and various management and administrative services on behalf of the physician practice. Provision of non-physician personnel by a medical foundation to support a physician’s practice is a common element of these arrangements. Likewise, hospital outpatient clinics operating pursuant to Section 1206(d) of the California Health and Safety Code commonly employ all non-physician staff located in the clinics, and the staff members’ duties often includes supporting the practice of a physician providing services in the space. While these examples typically involve the clinic directly employing the non-physician staff, sometimes the staff remain as employees of the physician and the clinic provides reimbursement for the staff’s salary. Despite the Fraud Alert highlighting the fact that an affiliated health care entity paying for a physician’s office staff was cause for concern, California clinics and physicians alike should take
comfort in knowing that these arrangements, when properly structured, will not result in fraud and abuse violations simply as a result of the foundation employing all or a portion of the medical practice’s non-professional staff, or reimbursing the practice for their salary.

As noted above, while it serves as yet another reminder that compensation arrangements with physicians must be properly structured to avoid risk of liability for violating fraud and abuse laws, there is nothing particularly groundbreaking in the latest Fraud Alert. What makes it noteworthy is that it focuses specifically on physicians’ liability for entering into suspect medical directorship arrangements, whereas in the past, more often than not, the OIG has focused on the health care entity when evaluating such arrangements, rather than the physicians themselves. In this case, the Fraud Alert specifically points out that physicians are equally responsible in these situations, and thus are subject to penalties in the same way that health care institutions are.

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