

No Sanctions For Hospital and Cardiology Group Co-Management Arrangement

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A rural hospital's contractual arrangement to pay a performance bonus with a significant "gainsharing" feature to a cardiology group for assistance with implementation of certain cost-savings and quality measures (the "Arrangement") will not result in sanctions, according to a recent advisory opinion posted January 7, 2013 (the "Opinion") by the Department of Health and Human Services Office of Inspector General ("OIG").

What Was the Arrangement?

The rural hospital ("Hospital") that requested the Opinion from the OIG entered into the Arrangement with a cardiology group ("Group") for provision of various co-management and other services with regard to four cardiac catheterization laboratories owned and operated by the Hospital (each a "Lab" and collectively, the "Labs"). These services included, but were not limited to, providing strategic planning and medical direction services, developing the Hospital's cardiology program, providing staff development and training, providing credentialing for Lab personnel, recommending Lab equipment, medical devices and supplies, and consulting with Hospital about information systems.

Compensation by the Hospital to the Group for the services provided consisted of two main parts - 1) a fixed fee and 2) a performance fee. The performance fee was at the center of the Opinion and was earned and paid in specified components relating to 1) Hospital employee satisfaction, 2) Hospital patient satisfaction, 3) improved quality of care within the Labs, and 4) successful implementation of Lab cost saving measures, the cost saving measures being the most significant component of the performance fee. In sum, the Group would be paid a performance fee if they were successful in helping the Hospital and Labs to improve patient service and quality while decreasing related costs.

Why Was the Arrangement Subject to Scrutiny by the OIG?

The OIG noted in its Opinion that, "like any payment arrangement between a hospital and physicians who refer business to the hospital, payments purportedly intended to encourage quality improvements and costs savings might be misused by unscrupulous parties to induce limitations or reductions in care or to disguise kickbacks for Federal health care program referrals."

In addition to the above, the OIG indicated that some of its primary concerns about these kinds of arrangements include, 1) stinting on patient care, 2) "cherry picking" healthy patients and steering sicker ones to hospitals that do not offer such arrangements, 3) payments to induce patient referrals,

and 4) unfair competition among hospitals offering incentive compensation programs to foster physician loyalty and attract more patient referrals.

Why the OIG Got Comfortable with this Arrangement.

Although the OIG determined in its Opinion that the federal Civil Monetary Penalty law applied to the cost-savings component of the performance fee in the Arrangement and determined that the federal Anti-kickback Statute could apply as well (OIG determined that no “safe harbor” was available), it also determined that it would not impose sanctions in this case.

In making the determination above, the OIG noted that the following factors provided sufficient safe guards and comfort that made sanctions unwarranted.

- Hospital certified that the compensation paid to the Group is fair market value for the serviced rendered under the Arrangement
- Compensation paid does not vary depending upon the number of patient referrals
- There were no competitors for cardiac catheter laboratory services within a 50 mile radius and the Group physicians did not work at any other such laboratories – meaning it was less likely that compensation would serve as an inducement to the Group to refer patients to the Labs as opposed to a competing cardiac catheterization laboratory
- The variety of substantive services to be performed by the Group and the specificity of those services helped to ensure that the purpose of the Arrangement was to improve quality, rather than reward referrals
- The contract was for a limited duration of three years and the performance fee was subject to a maximum annual cap
- Arrangement involved numerous patient quality safeguards (e.g, use of internal auditors and independent third party reviewers to ensure quality, physicians were not prevented from using higher-cost medical devices where necessary and appropriate, parties adhered to recognized national quality health standards)
- Payment of the performance fee was conditioned upon the Group not (i) stinting on patient care, (ii) increasing referrals to Hospital, (iii) “cherry-picking” and (iv) accelerating patient discharges

Take Away

The Opinion appears to give a generally favorable signal with respect to co-management and gainsharing arrangements in certain situations. Notwithstanding, open questions remain about whether the Opinion might have been different had the Hospital not been in a rural area with no apparent competitors, as was the case here. However, past advisory opinions relating to “gainsharing” arrangements have not depended upon involvement of a rural provider or the absence of competition. Another open question remains about whether the Opinion might have been different had the Arrangement not included the seemingly unusual provision that apparently conditioned payment of the performance fee upon not increasing referrals to the Hospital. Also noteworthy is that the OIG indicated that it expects that similar arrangements would provide for appropriate periodic adjustments to quality improvement and cost savings measures over time because compensation paid for meeting

standards that have already been achieved and accepted as the standard of care could potentially implicate the federal Anti-Kickback Statute.

Nevertheless, the Opinion, on the whole, should offer encouragement to healthcare providers who are assessing co-management arrangements and other clinical integration strategies as they pursue improved patient care and adapt to evolving healthcare payment methodologies.



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