



legal matters

Another Piece in Place The OIG has finally outlined some situations in which recruitment incentives may be offered to physicians—but the situations are limited and there's little word on which incentives may be offered.

BY JOHN ALLEVATO



A new safe harbor is born. The Office of the Inspector General of the Department of Health and Human Services (OIG), in November of 1999, issued final regulations relating to, among other things, parameters for practitioner recruitment incentives in the context of the federal fraud and abuse provisions of the Medicare and Medicaid program, also known as the anti-kickback rules.

This widely anticipated guidance sets forth, for the first time in final regulatory

form, a “safe harbor” for practitioner recruitment incentives under certain, albeit limited, circumstances. The bad news is that, although we now know with certainty under what circumstances certain incentives may be offered, we don't know for certain just what those incentives may be.

Juxtaposed with this guidance from the OIG are the Internal Revenue Service rules and pronouncements, relating primarily to recruitment incentives paid by tax-

exempt organizations. While the OIG guidance is separate from the IRS insight into this area, they must be read together in the context of recruiting by tax-exempt hospitals. (See “Fair or Foul” in the November/December, 1998 issue of *UO* for information about the IRS guidance.)

When an arrangement between a physician and a hospital falls within the safe harbor, there is some assurance that the arrangement does not violate the federal fraud

and abuse prohibitions of the Medicare and Medicaid laws. It is important to note that the converse is not true, however. Just because the physician/hospital arrangement does not fall within the safe harbor does not indicate that it would violate the fraud and abuse laws. Rather, it just means that you may be in an area of uncertainty with regard to the recruitment incentives provided.

A piece of the puzzle

The new safe harbor should be of interest to everyone involved in the physician recruitment process, whether the circumstances fit within the new safe harbor rules or

The new safe harbor applies to physicians moving to any health professional shortage area (HPSA), not only rural areas.

Continued

LEGAL MATTERS

Continued from previous page

not. That is because the guidance contained in these final regulations indicates the parameters of the OIG's accepted incentives. It also provides insight into how the agency charged with enforcing violations of the fraud and abuse prohibitions views certain types of physician recruitment incentives and under what circumstances certain incentives may be acceptable.

It is critical to keep in mind the context of this new guidance. In 1994 the OIG proposed a safe harbor for practitioner recruitment incentives under certain circumstances. Since that pronouncement, the Internal Revenue Service has published administrative guidance in this area at Revenue Ruling 97-21, with the Hermann Hospital closing agreement in between. The IRS inquiry into this area relates primarily to tax-exempt hospitals and the prohibition against private inurement—in this context, to physicians. Private inurement involves the use of charitable assets to personally benefit an individual who is an 'insider' with respect to that hospital.

Thus, the OIG guidance (applicable to tax-exempt and for-profit institutions as long as Medicare or Medicaid is involved) is focused on practitioner recruitment payments in the fraud and abuse arena—broadly speaking, investigations into payments to health professionals for referrals to a health provider. The OIG guidance suggests that the concern in this context relates to the recruitment of a physician to an area by a health-care organization that might have direct or indirect "strings attached," or quid pro quo requirements which require or appear to encourage the recruited physician to refer patients to the recruiting hospital. For example, it was common years ago for hospitals recruiting physicians

to require or encourage the physician to refer all of her patients to that hospital, as part of the recruitment arrangement. Under these new regulations of the fraud and abuse laws, that would be a clear and blatant violation.

So what are the parameters hospitals would be working within if they wish to fall under the fraud and abuse safe harbor after the adoption of the new regulations? Let's take a closer look.

Safe harbor requirements

One exciting change in the new guidelines from the proposed regulations is that the new safe harbor applies to physicians moving to any health professional shortage area (HPSA), not only rural areas. Under the safe harbor guidelines, any arrangement can be examined which involves the payment or exchange of anything of value by a hospital which can be construed as inducing, or attempting to induce, a physician who has been practicing within her current specialty for less than one year to locate, or to induce any other physician to relocate, from her primary place of practice into a health professional shortage area for her specialty practice.

An HPSA is an area designated by the Department of Health and Human Services as having a shortage of physicians in one or more specialty areas. This criteria is a major change from the proposed regulations surrounding the safe harbor, which required that a physician move into a rural area in order to qualify for safe harbor status. An HPSA may be a rural area, but it also may be an urban or semi-rural area. This change has increased the number of recruitment activities which may qualify for safe harbor status.

To fall within the safe harbor, a recruitment arrangement must include the following provisions, among the

other requirements:

- There must be a written agreement between the parties that specifies the benefits to be provided and under what terms they will be provided;
- The recruited physician leaving an established practice must generate at least 75 percent of his revenues for the new practice from new patients (the proposed regulations stated that most patients had to be from within a 75-mile radius of the new practice);
- The benefits may not be provided for more than three years, and no renegotiations can take place within that three-year period;
- The physician must not be required to make or influence referrals as a condition of receiving the benefits, though the hospital can require that staff privileges be maintained as a condition of the arrangement;
- The physician may not be restricted from establishing staff privileges at, or referring to, any other hospital;
- The value of the benefits to be provided to the physician may not, in any way, be tied to the amount or volume of referrals made to the hospital;
- The physician must agree to treat federal health-care program beneficiaries in a nondiscriminatory manner;
- At least 75 percent of the revenues of the new practice must be generated from patients residing in an HPSA or who are in a medically underserved area or who are part of a medically underserved population, designations also made by bureaus of the Department of Health and Human Services.

If these requirements are met, then the payments to the physician are protected under the safe harbor. But what does that mean?

LEGAL MATTERS

Continued from previous page

Incentive insights

It is interesting to note that nowhere does the OIG set out which payments, or in what form or amounts, can be made to the physician. Rather, limited guidance to those issues is provided by the IRS—although even here not many specifics are available.

A combination of Revenue Ruling 97-21 and an agreement between the IRS and Hermann Hospital, in Texas, provide insight into what might be acceptable. Possibly acceptable recruitment incentives covered in Revenue Ruling 97-21 include moving expenses, income guarantees, signing bonuses, start-up loans, payment of malpractice premiums for a limited period, below-market rent for a limited period, and a mortgage guarantee on a physician's personal residence. The Hermann Hospital closing agreement, although enforceable only against Hermann Hospital, provides insight into the IRS's thought process in a number of areas, particularly acceptable physician income guarantees. The new OIG regulations provide in what form and under what guidelines the incentives must be made available to fall within the protection of its provisions.

The specific recruitment incentives alluded to above first and foremost must be reasonable. Even the limited IRS guidance does not specify amounts, although there are indications of what might be acceptable under certain circumstances. For example, for a physician relocating to an HPSA, an income guarantee in writing for a two-year period, with a ceiling on the physician's income, provided the guaranteed amount is "reasonable," may pass muster with the IRS and the OIG. It is common for the physician to be required to repay the guaranteed income unless the physician meets certain requirements,

such as practicing in the community and providing community service or treating indigent patients for a minimum number of years. If the criteria are met, the income guarantee could be forgiven over a number of years.

Second, the amounts and types of assistance which are acceptable will vary depending on the location of the hospital, the patient population it serves, and the designation of its location, i.e., a medically underserved area or HPSA.

Finally, the recruitment package which is ultimately offered will be a product of negotiations between the physician and the hospital. While the leverage which may be brought to bear by the physician in such circumstances may be limited, tailoring a package of incentives which achieves goals of both the parties involved is possible because of the alternatives which may be available, such as varying the terms of the income guarantee payback or extending the years over which it could be paid back. These alternatives could still result in safe harbor status for the agreement as well as providing real and substantial economic benefits to the relocating physician. ■

John Allevato is a member in the Charleston, WV, law firm of Spilman Thomas & Battle, PLLC, where he practices business and tax law. He routinely advises and counsels health-care entities and physicians. He is a member of American Health Lawyers Association. E-mail him at jallevato@spilmanlaw.com