PUBLICATION

OIG Issues Favorable Advisory Opinion Regarding Employee Lease Arrangement Between Related Entities [Ober|Kaler]

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Reviewing an arrangement involving the lease of employees and other operational and management services between a health system and its related psychiatric hospital, the OIG issued a favorable advisory opinion, Advisory Opinion 15-10 [PDF], on July 28, 2015. The proposed arrangement, described more fully below, involves an employee lease agreement and other services that were offered at fully loaded costs without an administrative fee or mark-up. The OIG concluded that while the arrangement could potentially generate prohibited remuneration under the antikickback statute if the requisite intent were present, the proposal presents a low risk of fraud and abuse and the OIG will not impose any sanctions.

The requestor is a nonprofit, multi-hospital system (System) that owns a related nonprofit psychiatric hospital (Center). Under an existing arrangement, the Center leases non-clinician employees and obtains operational and management services from the System pursuant to an agreement under which the Center pays the System's fully loaded costs (i.e., salary, benefits and overhead), plus a two percent administrative fee. The System asked the OIG to opine whether eliminating the administrative fee would cause the arrangement to run afoul of the antikickback statute since the resulting fee (fully loaded costs) may be below fair market value. The OIG noted that, under cost reporting principles, since the parties are related organizations, the Center could include only the actual costs of the services provided by the System on its cost report as an "allowable cost," not any administrative fee.

Finding that the Center is a potential source of referrals to the System, the OIG concluded that the arrangement would implicate the antikickback statute because the compensation paid by the Center may be less than fair market value, and may be remuneration in exchange for referrals to the System. The OIG noted that the personal services and management contracts safe harbor was inapplicable because the compensation (1) may be less than fair market value; and (2) will not be set in advance as the System's costs and the Center's personnel, operational and management needs may change over the term of the agreement. Nevertheless, the OIG concluded that the proposal presents a low risk of fraud and abuse, and it would not impose any sanctions for the following reasons:

1. The parties structured the arrangement to be consistent with the Medicare cost reporting and related party principles that prohibit the Center from reflecting as its "allowable costs" any amounts in excess of the System's costs from employees and services as a related party. Accordingly, the administrative fee would not be an allowable cost.
2. The arrangement would reduce the Center's labor and operational costs, as well as achieve efficiencies for the related parties within the integrated health system. While the cost savings achieved by the arrangement are not directly passed through to the federal health care programs, the OIG recognized that the cost efficiencies are reflected on the cost reports, which are used as data points when CMS adjusts reimbursement under the inpatient psychiatric facility prospective payment system.
3. Lastly, the OIG recognized that, as related parties, the Center and System may have incentive to refer to one another; however, the OIG found no evidence suggesting that the proposal was designed to induce referrals.

Ober|Kaler's Comments

This Advisory Opinion provides some helpful guidance regarding services agreements between a health system and its related entities. We caution, however, that the facts presented are narrowly tailored, and the OIG typically looks for services contracts between unrelated parties that are in a position to refer to one another to be consistent with fair market value.