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HHS Says Physician-Employee Bonuses Aren't Kickbacks

By **Ken Downey Jr.**

Law360 (October 13, 2023, 7:31 PM EDT) -- Paying physician employees bonuses based on profits from certain procedures does not breach federal kickback law, the U.S. Department of Health and Human Services said in an advisory opinion Friday.

In addition, the department's Office of Inspector General stated it would not impose administrative sanctions on the unnamed "requestor" who submitted the bonus proposal.

According to the opinion, when procedures are reimbursable by a federal health care program, the anti-kickback statute would be implicated in this scenario. However, the agency stated the requestor would be protected because the physicians are employees. Thus, bonus compensation would be for a service.

The requestor operates a multi-specialty practice that has 11 physician employees, according to the advisory. When a physician performs an outpatient surgical procedure at one of the two ambulatory surgical centers the requestor operates, they would receive a bonus equal to 30% of net profits from facility fees.

Similar arrangements with bonuses to independent contractor physicians or other non-employees could raise fraud or abuse concerns under the federal anti-kickback statute, the agency noted. But because this proposed agreement satisfies the statutory exception and regulatory safe harbor for employees, these remunerations would not be in violation.

Amy H. Kearbey, a partner at [Winston & Strawn LLP](#) who specializes in health care fraud, told Law360 the opinion "reaffirms OIG's view that the employment safe harbor is in fact very broad."

While some courts have attempted to narrow the interpretation of employment safe harbor, the OIG isn't following suit.

"This opinion reflects OIG continuing to interpret that safe harbor — which is also a statutory exception directed by Congress — as being very broad," Kearbey said.

Kearbey, who previously worked for OIG, also noted it made no mention of the size of such bonuses.

"I think [this] reflects that OIG's view is that fair market value is not a factor in assessing the applicability or the availability of the employment exception," she said.

Michael C. Foster, who specializes in health care law at Greenbaum Rowe Smith & Davis LLP, said the opinion didn't break new ground.

"What [the agency says], however, is if it had been an owner or an independent contractor and bonuses were paid, it raises fraud or abuse not only under the anti-kickback statute, but also potential physician self-referral laws at the federal and state level as well," Foster said.

Although the department noted the opinion is limited to the requestor, the decision to allow physician employees to receive bonuses does leave a path open for other practices to request similar opinions for their business, Foster said.

"I know having dealt with transactions [similar to this], it is not entirely uncommon," he said.
"Usually [bonuses] are based, not necessarily on the overall profits, but more towards the individuals' net collections."

An HHS OIG representative declined to comment.

--Editing by Caitlin Wolper.

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