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Paid On-Call Arrangements

In its Advisory Opinion (No. 09-05) issued May 14, 2009 (the "2009 Opinion"), the Department of Health and Human Services' Office of Inspector General (the "OIG") revisited the issue of paid on-call arrangements. While approving the arrangement that is the subject of the 2009 Opinion and recognizing that legitimate reasons may exist for paid on-call arrangements, the OIG reiterated its concern regarding the potential misuse of such arrangements by both physicians and hospitals as had been previously cited in its Advisory Opinion (No. 07-10) issued September 20, 2007 ("2007 Opinion" and together with the 2009 Opinion, the "Opinions"). Specifically, the OIG cautioned that (1) physicians may demand on-call compensation as a condition of providing services at the hospitals, and (2) payments by hospitals could be used to entice physicians to generate business for the hospital.

In light of these risks, the OIG has underscored its concerns regarding the scope of on-call arrangements and how payments under such arrangements should be determined. It is important for all hospitals and physician groups that are either contemplating paying for on-call services or have already entered paid on-call service arrangements to carefully review the terms of these arrangements, in light of the OIG's Opinions.

The 2009 Opinion Proposed Arrangement.

In the 2009 Opinion, the hospital proposed to compensate physicians for on-call services because it has been unable to ensure adequate on-call coverage in its emergency department. The shortage of coverage was due, in part, because the hospital provides services to a large share of indigent and uninsured patients and its physicians are generally not reimbursed for these services. Pursuant to the hospital's proposal, physicians are compensated for on-call services provided to patients that do not have insurance but will eventually qualify for a specific state-funded program. Further, to be eligible to participate in the arrangement, each physician must: (1) be an active member of the hospital's medical staff, (2) sign an agreement outlining the physician's responsibilities pursuant to the arrangement (e.g. respond within 30 minutes, evaluate the patient in person, and provide additional evaluation and care as deemed clinically appropriate), and (3) provide on-call coverage as part of an organized schedule. Compensation for on-call services would be provided on a set schedule based on the type of service actually provided.

OIG Legal Standard and Analysis of 2009 Opinion Proposed Arrangement.

The OIG has stated that the key factors when analyzing paid on-call arrangements "is whether the compensation is: (i) fair market value in an arm's-length transaction for actual and necessary items or services; and (ii) not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties." When determining whether a proposed arrangement fits within this standard, the OIG looks for "problematic compensation structures that might disguise kickback payments," such as:

- compensation for "lost opportunity" that does not reflect bona fide lost income;
- compensation when no identifiable services are provided;
- aggregate on-call payments that are disproportionately higher than regular medical practice income; and
- compensation for professional services where there is separate reimbursement from insurers or patients (i.e., possible "double billing").

In its approval of the arrangement in the 2009 Opinion, the OIG outlined several factors that ensured a low risk of fraud and abuse, including: (i) payments would be made for actual services provided to uninsured patients, so there is no concern that the arrangement is disguising compensation for a "lost opportunity" or that there will be double billing; (ii) the hospital has a legitimate rationale for compensating physicians; (iii) the arrangement

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would impose tangible responsibilities on physicians; and (iv) the arrangement appears to be an equitable mechanism to compensate physicians who actually provide care that the hospital must furnish to be eligible for state funding.

Implications of OIG's Analysis.

The rationale in the 2009 Opinion appears to be an extension of the 2007 Opinion, where the OIG similarly approved a proposed arrangement that compensated physicians at a per diem rate. The hospital in the 2007 Opinion proposed to compensate physicians for on-call services because it was unable to obtain adequate on-call coverage due to the high percentage of uninsured patients that presented in its emergency department. Compensation was calculated at a rate that accounted for: (i) the likelihood of being required to respond while on-call, (ii) the likelihood of providing uncompensated treatment, and (iii) the likely extent of such treatment. Further, the physicians participating in the program were required to adhere to certain requirements. In approving the arrangement in the 2007 Opinion, the OIG reasoned that the per diem payments were "tailored to cover substantial, quantifiable services."

Importantly, the OIG's decision in the 2009 Opinion is also based, at least in part, on the physician being compensated for "tangible services." Further, in its explanation in the 2009 Opinion, the OIG noted that the proposed arrangement "unlike some on-call arrangements that pay regardless of actual emergency department calls...only reimburses physicians for time they actually spend providing services in the Emergency Department." Thus, the 2009 Opinion appears to take a firmer stance that paid on-call arrangements be based on actual services provided. Thus, under the 2009 Opinion, the OIG appears to be taking the stance that withers a physician's ability to obtain reimbursement for actual services provided is a factor that needs to be considered.

Conclusion.

While the Opinions discuss paid on-call arrangements within a limited set of facts, the OIG has raised general concerns regarding these arrangements and its analysis will likely extend to all paid on-call arrangements. Hospitals and physician groups should be mindful of the OIG's concerns while determining the appropriate compensation for on-call services.

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If you have any questions, please contact the GWT attorney with whom you regularly consult.

About Garfunkel, Wild & Travis, P.C.

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