

HEALTH CARE LAW UPDATE

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Hospital Law Issues

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OIG Approves Hospital On-Call Coverage Program with Physicians

The OIG recently released an advisory opinion approving a hospital's program to pay physicians to provide emergency department on-call services. This is significant because it is the first time the OIG has issued an opinion on hospital payments to physicians for on-call coverage.

The Facts

The tax-exempt hospital operates an emergency department ("ED") as required by state law. Nearly 25% of the ED's patients are uninsured or underinsured and 10% are admitted as inpatients. The growing financial burdens of providing uncompensated patient care and malpractice insurance costs led many physicians to cease providing ED on-call coverage and uncompensated inpatient follow-up care. Consequently, the hospital was forced to send ED patients to other institutions for emergency treatment and follow-up inpatient care.

The hospital developed a program, covering nearly all surgical and medical specialties, pursuant to which it will pay physicians to: (i) participate in ED call coverage; (ii) respond to ED calls in a timely manner; (iii) provide inpatient care to patients seen at the ED while on-call, regardless of ability to pay; (iv) participate in the hospital's risk management and performance improvement initiatives (for e.g., discharge planning, utilization issues, and review of patient observation); and (v) timely complete medical records.

In exchange, the physicians will be paid a per diem rate for each day spent on call, except for 18 days per year that each physician must contribute *gratis* to the rotation schedule. The per diem rate is based on two factors: the physician's specialty and whether coverage is provided on a weekday or weekend.

The difference in per diem rates among specialties is based on: the likelihood of having to respond while on-call at the ED; the severity of illnesses encountered by that specialty; the likelihood of providing inpatient services for uninsured patients when on-call; and the degree of inpatient care required of that specialty.

The hospital obtained an opinion from an independent consultant that the per diem rates reflect fair market value and do not take into account the volume or value of patient referrals from the physicians.

To ensure that quality of care and performance do not deteriorate during the implementation of the program, the hospital included several safeguards, such as dividing up the call schedule as equally as possible within each specialty, monitoring on-call response times, and assessing the quality of care delivered. In addition, if any physician fails to adhere to the program's requirements, he/she will be suspended until they demonstrate compliance and, if they fail to do so, they will be terminated from the program.

The OIG's Analysis

The OIG noted that, in general, on-call payments pose a substantial risk of being

used to disguise unlawful remuneration in exchange for referrals. As a result, on-call payment programs should be closely scrutinized on a case-by-case basis. In ruling favorably on this program, the OIG relied on the following features of the program:

A. The hospital had a history of difficulty in attracting physicians to take call, which resulted in the hospital outsourcing emergency care and other related treatment to other facilities. Thus, it had a legitimate, unmet need for on-call coverage and services to indigent patients.

B. The per diem rate was certified to be fair market value for actual services to be provided by the physicians.

C. The program required the physicians to provide services beyond participating on the on-call schedule, such as: (i) providing follow-up inpatient care regardless of the patient's ability to pay; and (ii) providing 18 days of uncompensated care annually as part of the program. Thus, the per diem payments are for substantial quantifiable services, a large portion of which are furnished to uninsured patients in the ED and subsequent inpatient services (thereby putting the physicians at risk of having to furnish additional services for no additional payment).

D. The per diem rate is applied uniformly to all physicians within a given specialty, and the only variable is whether the services are provided on a weekday or weekend.

E. These services help the hospital maintain its charitable mission and thus provide an obvious public benefit.

Practical Recommendations

Hospitals considering implementing on-call coverage payment programs may wish to consider the following recommendations when structuring their programs:

1. The program should address a verifiable need of the hospital, such as, for example, a documented historical difficulty in recruiting physicians to take call coverage.

2. Require physicians to provide meaningful and needed services, such as, for example, ongoing inpatient care;

3. Compensate physicians in a reasonable manner in light of the actual services provided and the likelihood that they will receive compensation from third party sources.

4. Be mindful of the requirements of medical staff bylaws, some of which require physicians to participate in call coverage; payments should only be for services beyond what is already required.

5. The program should: (a) be open to all physicians and specialties; (b) provide an equal distribution of call duties; (c) obligate the physicians to provide follow-up care regardless of patients' ability to pay; (d) require documentation of actual services provided; and (e) be structured so that all costs are absorbed by the hospital and not accrue to federal healthcare programs.

6. The following should be avoided: (a) payments for "lost opportunity" that do not reflect bona fide lost income; (b) payments that do not compensate for any identifiable services provided; and (c) payments that, as a whole, are disproportionately high compared to the physician's regular medical practice income.

We send these Updates to our clients and friends to provide information on recent developments in the law. The Updates, however, should not be relied on for legal advice in any particular matter. If you would like additional information, please contact: Gary W. Herschman at 973-643-5783 or Anjana D. Patel at 973-643-5097.

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