When Physician Retirement Arrangements May Be Legal

By **Magda Rodriguez** (February 28, 2024)

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The regulatory framework governing the healthcare sector is undoubtedly complex, and, as such, providers and organizations often seek guidance from the U.S. Department of Health and Human Services' Office of Inspector General regarding the legality of their operations or arrangements with providers.

Recently, a limited liability partnership sought clarification and guidance from the OIG relating to a one-time voluntary redemption offer extended to its physician partners who reach the age of 67.

Opining favorably, OIG Advisory Opinion No. 23-12 noted that while this arrangement would generally amount to unlawful remuneration in violation of the federal Anti-Kickback Statute,[1] the particular facts and circumstances of the arrangement were such that it would not impose administrative sanctions against the requester.

The Details of the Redemption Arrangement

The requester, a limited liability partnership whose name has been redacted, wholly owns a hospital and operates another hospital. It has two classes of partners: Class H, which is a medical center entity, and Class P, which includes individual physician partners.

The OIG specifically and favorably noted that the partnership agreement expressly allowed the physician partners to hold medical staff privileges at any facility, treat patients at any facility and refer patients to any facility, irrespective of the competitive nature of the location.

The arrangement proposed by the requester served what they believed to be a legitimate business purpose. Specifically, while there was a redemption of units upon a physician partner's voluntary retirement, there was no mandatory age for retirement. Therefore, the requester had fear of a liquidity crisis if the physician partners were to retire in close succession.

To alleviate this concern, it sought to offer its physician partners a one-time offer of redemption at age 67. If accepted, the physician would be paid in three equal increments over a two-year time frame.

The requester acknowledged that the payment structure over the two-year period may lead to increased remuneration as the units increase in value, versus making one lump-sum payment. Nonetheless, the requester states that the amount paid at each stage of the payment structure is equal to fair market value.

In exchange, the physician would have to agree to retire from the practice of medicine within six months of receiving the first of the three payments. The physician would also need to expressly certify that, as of the date of retirement or lack of eligibility under the partnership agreement's criteria, he or she would not refer or be in a position to refer patients to either the owned or operated hospitals, the medical center entity, or any other physician partner.

The repurchased units are thereafter offered to both new and existing physician partners irrespective of their age, referrals or business they generate for the owned or operated hospitals, medical center entity or other physician partners.

Anti-Kickback Implications

As previously noted, the OIG stated that this arrangement would implicate the federal Anti-Kickback Statute.

The Anti-Kickback Statute prohibits the offer, acceptance or solicitation of remuneration — which is anything of value, in cash or in kind — in order to receive or induce referrals for service or items covered by federal healthcare programs, such as Medicare or Medicaid.[2]

The statute also prohibits incentives to encourage the purchase, lease or ordering of goods, facility, services or items covered by federal healthcare programs.[3] Its intent is to prioritize patient care over financial gain and prevent fraud, unfair competition and waste. There are both criminal penalties, as well as civil and administrative penalties associated with the violation of the Anti-Kickback Statute.[4]

In this particular arrangement, if the physician partner accepts the one-time redemption offer, he or she receives the first redemption payment and can continue to make referrals of patients who are beneficiaries of federal healthcare programs to physician partners, the owned or operated hospitals and medical center entity that has an ownership interest in the partnership.

The OIG determined that this amounted to unlawful remuneration during the retiring physician's last six months of practice, to which no safe harbor or exception applied.

Nonetheless, evaluating the facts and circumstances of this arrangement, the OIG concluded that it would not impose administrative sanctions on the requester. The value of this opinion is the key consideration that the OIG utilized to reach this determination.

The OIG's Key Considerations

The OIG highlighted specific key considerations in reaching its determination that the redemption arrangement would not be subject to administrative penalties under the Anti-Kickback Statute.

1. Objective Criteria

The OIG made note of the requester's indiscriminate application of the redemption offer to its physician partners upon reaching the age of 67. The arrangement is devoid of any implication or intent to provide remuneration on account of referrals or business generated. The OIG found that this reduces the risk of increased cost, abuse or waste for federal healthcare programs.

2. Certificate Not to Refer Patients

The OIG found that the no-referral certificate referenced above sufficiently mitigated the risk of unfair competition.

While the opinion recognizes that the physicians would have six months in between their receipt of the first payment under the arrangement and the time of retirement, it was

sufficiently satisfied with the business and legal rationale provided by the requester — namely, that the time frame was necessary to wind up the physician's business and comply with state laws.

It also found that the risk of changing a referral pattern to benefit the owned or operated hospitals, other physician partners or the medical center entity in the last six months of practice was sufficiently low.[5]

Conclusion

While it is imperative to note that the opinion cannot be relied on by any other person or entity but the requester, OIG Advisory Opinion No. 23-12 provides valuable insight for medical practitioners and healthcare entities alike.

These opinions shed light on important considerations and mitigating factors that may be useful when attempting to balance healthcare operational needs with statutory conformity.

By affirming the application of this redemption arrangement while noting the regulatory safeguards implemented by the requester, the opinion underscores the importance of having objective criteria, transparency and compliance.

The opinion is also limited to the application of only administrative sanctions for a violation of the Anti-Kickback Statute and does not absolve the requester from liability under other statutory or regulatory provisions, whether federal, state or local, which could be applicable to this redemption arrangement.

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[1] 42 U.S.C. § 1320a-7b(b).

[2] 42 U.S.C. § 1320a-7b(b)(1).

[3] Id.

[4] Id.

[5] The OIG left open the issue of how long the period between payment and retirement could be in order to avoid additional anti-kickback exposure.