



OIG Issues Favorable Advisory Opinion on Bonus Compensation Agreements

On October 13, 2023, the Department of Health and Human Services (HHS) Office of Inspector General (OIG) published Advisory Opinion (AO) No. 23-07, approving a proposal from a physician practice to pay physician-employees bonuses based on profits earned from ambulatory surgery center (ASC) procedures performed by the physician-employees.¹ The OIG concluded that the proposed bonus arrangement would not generate any remuneration that was prohibited because the arrangement met the requirements and was protected by a regulatory safe harbor for bona fide employees.²

The OIG typically releases several AOs each year regarding their opinions on certain business arrangements – either existing or proposed – on which a party (such as a healthcare organization) has requested an opinion. An AO is the OIG’s position on whether a certain business arrangement is in conflict with the federal Anti-Kickback Statute (AKS), one of the laws the OIG is charged with enforcing.

The AKS makes it a felony for any person to “*knowingly and willfully*” solicit or receive, or to offer or pay, any “*remuneration*,” directly or indirectly, in exchange for the referral of a patient for a healthcare service paid for by a federal healthcare program.³ Criminal violations of the AKS are punishable by up to ten years in prison, criminal fines up to \$100,000, or both, and civil violations can result in administrative penalties, including exclusion from federal healthcare programs, and civil monetary penalties plus treble damages (or three times the illegal remuneration).⁴ Due to the broad nature of the AKS, legitimate business arrangements may appear to be prohibited. Consequently, the law has a number of exceptions, termed *safe harbors*,⁵ which set out regulatory criteria that, if met, shield an arrangement from liability, and are meant to protect transactions unlikely to result in fraud or abuse.⁶ However, failure to meet all of the requirements of a safe harbor does not necessarily render an arrangement illegal.⁷

The Requestor, a multispecialty physician practice with two ASCs, proposed an arrangement where it would pay each physician-employee a bonus equal to 30% of the net profits from facility fees at ASCs attributable to the procedures rendered by that employee.⁸ The bonuses would be added to the employee’s base compensation.⁹ Interestingly, the Requestor did not ask the OIG to opine on the distributions of the remainder of the ASC’s net profits (70%), or distributions related to a corporate restructuring the Requestor would be undertaking.¹⁰

The OIG concluded that the proposed bonus payments would be protected by the AKS’s Employee Bona Fide Safe Harbor because: (1) the Requestor confirmed that the physicians receiving the bonuses would be bona fide employees of the Requestor; and (2) the bonuses were payments for employment in the physicians’ furnishing of services or items that would be reimbursed by federal healthcare programs.¹¹ While the conditions for the safe harbor were met, the OIG did state that “payment structures that tie compensation to profits generated from services furnished to patients referred by the compensated party are suspect” under the AKS.¹² As noted by legal experts, while the Requestor’s proposed bonuses fall under the protection of the safe harbor, similar payments to physicians as ownership distributions or to independent contractors could pose fraud and abuse risks.¹³

Compensation arrangements that include physician bonuses are often the subject of fraud and abuse law scrutiny, especially when they are tied to referrals.¹⁴ The OIG’s analysis and opinion demonstrates that when arrangements are structured properly to comply with safe harbors, certain bonus compensation arrangements may be considered permissible.¹⁵

- 1 “OIG Approves Net Profit-Based Bonuses for Employed Physicians” By Albert Shay, Jacob Harper, and Felicia Alexander, Morgan Lewis, October 26, 2023, <https://www.morganlewis.com/pubs/2023/10/oig-approves-net-profit-based-bonuses-for-employed-physicians#:~:text=The%20US%20Department%20of%20Health,procedures%20performed%20by%20the%20physicians.> (Accessed 10/27/23); “Re: OIG Advisory Opinion No. 23-07 (Favorable)” Office of Inspector General, Department of Health and Human Services, October 13, 2023, <https://oig.hhs.gov/documents/advisory-opinions/1132/AO-23-07.pdf> (Accessed 10/27/23).
- 2 Shay, Jacob Harper, and Felicia Alexander, Morgan Lewis, October 26, 2023.
- 3 “Criminal Penalties for Acts Involving Federal Health Care Programs” 42 U.S.C. § 1320a-7b(b)(1).
- 4 *Ibid*; “Civil Monetary Penalties” 42 USC § 1320a-7a(a).
- 5 “Re: OIG Advisory Opinion No. 15-10” By Gregory E. Demske, Chief counsel to the Inspector General, Letter to [Name Redacted], July 28, 2015, <http://oig.hhs.gov/fraud/docs/advisoryopinions/15/AdvOpn15-10.pdf> (Accessed 10/27/23), p. 5.
- 6 “Medicare and State Health Care Programs: Fraud and Abuse; Clarification of the Initial OIG Safe Harbor Provisions and Establishment of Additional Safe Harbor Provisions Under the Anti-Kickback Statute; Final Rule” federal Register, Vol. 64, No. 223 (November 19, 1999), p. 63518, 63520.
- 7 “Re: Malpractice Insurance Assistance” By Lewis Morris, Chief Counsel to the Inspector General, United States Department of Health and Human Services, Letter to [Name redacted], January 15, 2003, <http://oig.hhs.gov/fraud/docs/alertsandbulletins/MalpracticeProgram.pdf> (Accessed 10/27/23), p. 1.
- 8 “OIG Approves Paying Employed Physicians Profits from ASCs Operated by Employer” By Justin Brown, Travis Lloyd, William Mathias, and Jennifer Michael, JD Supra, October 19, 2023, <https://www.jdsupra.com/legalnews/oig-approves-paying-employed-physicians-8426846/> (Accessed 10/27/23). “OIG Approves Net Profit-Based Bonuses for Employed Physicians” By Albert Shay, Jacob Harper, and Felicia Alexander, Morgan Lewis, October 26, 2023, <https://www.morganlewis.com/pubs/2023/10/oig-approves-net-profit-based-bonuses-for-employed-physicians#:~:text=The%20US%20Department%20of%20Health,procedures%20performed%20by%20the%20physicians.> (Accessed 10/27/23).
- 9 *Ibid*.
- 10 Brown, Travis Lloyd, William Mathias, and Jennifer Michael, JD Supra, October 19, 2023.
- 11 “Worth the read: Recent HHS-OIG advisory opinion” By Rachel Rose, Physicians Practice, October 26, 2023, <https://www.physicianspractice.com/view/worth-the-read-recent-hhs-oig-advisory-opinion> (Accessed 10/27/23).
- 12 “Re: OIG Advisory Opinion No. 23-07 (Favorable)” Office of Inspector General, Department of Health and Human Services, October 13, 2023, <https://oig.hhs.gov/documents/advisory-opinions/1132/AO-23-07.pdf> (Accessed 10/27/23).
- 13 Brown, Travis Lloyd, William Mathias, and Jennifer Michael, JD Supra, October 19, 2023.
- 14 “OIG Issues Favorable Opinion Regarding Physician Group’s Proposal to Pay Bonuses to its Employed Physicians Based on Net Profits” By Michael Lisitano and Nathaniel Arden, Robinson & Cole, October 19, 2023, <https://www.healthlawdiagnosis.com/2023/10/advisory-opinion-23-7-oig-issues-favorable-opinion-regarding-proposal-to-pay-bonuses-to-its-employed-physicians-based-on-net-profits/> (Accessed 10/27/23).
- 15 *Ibid*.



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