

Gainsharing Activities and Part-Time Physician Employment Receive Approval from OIG

OIG Approves Gainsharing Arrangement

OIG advisory Opinion No. 08-21, released in late November 2008, examined an existing arrangement between a hospital and four cardiology groups and one radiology group that sought to pay the physicians a portion of cost savings resultant from physician efficiency. The cost savings paid to physicians were derived from the use of supplies and equipment during certain procedures. The issue in question was whether the arrangement violated Anti-Kickback statutes as it appeared to provide financial incentive to physicians for the reduction of services provided to patients.¹

The cost-savings payments were based on changes implemented by the physician practices at the hospital over a two-year period. The changes created savings through the standardization of procedures and reduction in the inappropriate use of supplies and medical devices.² While the agreement could have led to illegal payments to physicians, the OIG stated that the hospital had implemented sufficient safeguards. For example, the OIG found that the *"economies gained through the Arrangement resulted from inherent clinical and fiscal value and not from restricting the availability of devices and supplies."*³ Other safeguards included calculating payments based on all procedures performed (regardless of insurance) as well as using historical and clinical thresholds to determine if it was clinically appropriate to standardize or substitute more expensive supplies with cheaper supplies.⁴ Because of transparency of the calculated payments, a cap on the amount of payments, and the fact that there was found to be no encouragement for physicians reduce services, the OIG would not issue sanctions against the group thereby permitted their gainsharing arrangement.

Part-Time Physicians Have Same Legal Status as Full-Time Physicians

In a subsequent Advisory Opinion (No. 08-22), the OIG advised that part-time physicians performing endoscopies in the Requestor of the Opinion's office have the same legal status as full-time physicians. Therefore, part-time physicians can now be paid for services performed (for publicly-insured patients) without violating anti-kickback laws.⁵ The anti-kickback statute prohibits payment for referrals but states that

"bona-fide" employees are exempt from the statute. Because the Requestor of the opinion claimed the physicians are *bona-fide* employees of the practice, the OIG advised that the arrangement did not violate anti-kickback statutes. However, the OIG did note that since it was outside of its scope to determine whether or not an employee is a *bona-fide* employee, if the IRS were to determine the physicians were not *bona-fide* employees, the opinion would be *"without force and effect."*⁶ A recent article from *Modern Healthcare* stated that the opinion, while not groundbreaking, validates that *"part-time bona-fide employees have the same legal status under the anti-kickback statute as full-time bona-fide employees for the purposes of the statute's employment exception safe harbor."*⁷

¹ "OIG Advisory Opinion No. 08-21," Department of Health and Human Services, Office of the Inspector General, November 25, 2008, p.1, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-21.2.pdf> (Accessed 12/19/08)

² "OIG Advisory Opinion No. 08-21," Department of Health and Human Services, Office of the Inspector General, November 25, 2008, p.4, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-21.2.pdf> (Accessed 12/19/08)

³ "OIG Advisory Opinion No. 08-21," Department of Health and Human Services, Office of the Inspector General, November 25, 2008, p.6-7, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-21.2.pdf> (Accessed 12/19/08)

⁴ "OIG Advisory Opinion No. 08-21," Department of Health and Human Services, Office of the Inspector General, November 25, 2008, p.10-11, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-21.2.pdf> (Accessed 12/19/08); "OIG Approves Gainsharing Arrangement Between Hospital, Cardiology Groups," *BNA Health Law Report*, vol. 17, no. 48, December 11, 2008, <http://healthcenter.bna.com/pic2/hc.nsf/id/BNAP-7M8R8G?OpenDocument> (Accessed 12/19/08).

⁵ "OIG Advisory Opinion No. 08-22," Department of Health and Human Services, Office of the Inspector General, December 15, 2008, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-22.pdf> (Accessed 12/19/08)

⁶ "OIG Advisory Opinion No. 08-22," Department of Health and Human Services, Office of the Inspector General, December 15, 2008, p. 2-4, <http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2008/AdvOpn08-22.pdf> (Accessed 12/19/08)

⁷ "HHS' Inspector General Issues Opinion on Part-Time Workers," By Andis Robeznieks, *Modern Healthcare*, December 16, 2008, <http://www.modernhealthcare.com/apps/pbcs.dll/article?AID=20081216/REG/312169954/-1/TODAYSNEWS> (Accessed 12/19/08)



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