



## Giving Your Physician Agreements a Check-Up

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On June 9, 2015, the Department of Health and Human Services Office of Inspector General (“OIG”) issued a fraud alert regarding physician compensation relationships and potential liability for illegal kickbacks under the federal anti-kickback statute. The federal anti-kickback statute is a criminal statute that prohibits the exchange of any type of remuneration for referral of federal health care program business (42 U.S.C. § 1320a-7b). Physicians and health care providers are often aware of the federal Stark law, which prohibits self-referrals of Medicare patients for certain defined designated health services when the physician has a financial interest, unless an exception applies (42 U.S.C. § 1395nn). However, health care providers should also be cognizant of the requirements of the safe harbors to the federal anti-kickback statute, a criminal statute, when entering into any financial arrangement. The federal anti-kickback statute reaches all referrals or generation of business and is not limited to the referral of designated health services (like the Stark Law).

In its fraud alert, the OIG focuses on suspect medical directorships and office staff arrangements. Compensation to a medical director that accounts for the volume or value of referrals to a facility by the medical director risks violating the anti-kickback statute, as might arrangements where physicians are not actually providing the services described in their agreements.

Whether an anti-kickback statute safe harbor protects a particular agreement from scrutiny depends on the facts of that arrangement. Here are some common red flags in physician agreements:

1. Is the agreement for a term of at least one year? The anti-kickback safe harbors for personal services or management services only apply to arrangements that are captured in a written agreement, signed by the parties, and that last for a period of at least one year.
2. Does compensation vary? Performance- or quality-based incentives that vary might pass muster, as may physician productivity bonuses in connection with employment, but compensation that otherwise varies based on referrals may disqualify the arrangement from safe harbor protection. Compensation must also reflect the fair market value of the services provided.
3. Does the agreement describe all the services provided? The written agreement should completely describe all of the duties and responsibilities of the parties and accurately reflect the expectations of medical directors or other physician contractors. The services must not exceed what is commercially reasonable.

The OIG’s fraud alert may mean increased scrutiny and enforcement activity targeting physician arrangements. The alert serves as a

reminder to physicians and entities to review existing agreements to ensure they are active and compliant with the safe harbor regulations.



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