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OIG Advisory Opinion Finds “Insurance Only” Billing by Part-Time Ambulance Supplier May Violate Anti-Kickback Statute

The Office of the Inspector General of the U.S. Department of Health and Human Services (OIG) recently published *OIG Advisory Opinion No. 12-11* (issued on September 4, 2012; posted on September 11, 2012) in response to a request concerning a proposed arrangement in which a supplier of basic life support (BLS) ambulance services (the BLS Supplier) would routinely waive cost-sharing amounts for emergency medical services (EMS) provided on a part-time basis. According to the *OIG*, such “insurance only” billing could potentially generate prohibited remuneration under the federal anti-kickback statute and lead to the imposition of administrative sanctions, subject to the requisite finding of intent.

Proposed Arrangement

Under the proposed arrangement, the BLS Supplier, a for-profit entity, would enter into arrangements with various municipalities to provide EMS coverage on a part-time basis during designated time slots when the primary ambulance supplier¹ would be unavailable. The BLS Supplier would bill Medicare and other health insurers for EMS but would waive all cost-sharing amounts owed by residents of the municipalities. Moreover, the municipalities themselves would not be required to pay such amounts on behalf of their residents. At issue was whether such insurance-only billing would implicate the federal anti-kickback statute.

Anti-Kickback Statute

The federal anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce referrals of items or services reimbursable by a federal health care program.² As noted by the *OIG* in this *Advisory Opinion*:

Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-

¹ Typically, these are volunteer first-aid squads. Back-up or part-time coverage is necessary for those situations where the volunteer squads cannot handle the supply of patients. As described by the *OIG*, back-up coverage is required where the volunteer squads are operating during specific hours but are unable to handle the volume of emergencies, and part-time coverage is required where the volunteer squads have determined in advance that they would be unable to provide EMS coverage during specific time slots.

² 42 U.S.C. § 1320a-7b.

kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible “kickback” transaction. For purposes of the anti-kickback statute, “remuneration” includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

Violation of the anti-kickback statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both.³ Conviction leads to automatic exclusion from participation in federal healthcare programs, including Medicare and Medicaid. The OIG may also initiate administrative proceedings to impose civil monetary penalties of \$50,000 per violation plus damages of up to three times the total amount of remuneration offered, paid, solicited, or received.⁴

OIG’s Analysis of Proposed Arrangement

In this Advisory Opinion, the OIG restated its longstanding concerns regarding routine waivers of Medicare cost-sharing amounts for reasons unrelated to individual, good-faith assessments of financial need. Under the proposed arrangement, the OIG found problematic the fact that the municipalities would “effectuate” such waivers by requiring the BLS Supplier to not bill such cost-sharing amounts to their residents and by not paying such amounts to the BLS Supplier on behalf of their residents. In discussing this particular aspect, the OIG stated the following:

In short, if the municipalities wish to assume cost-sharing obligations owed to an independent ambulance supplier, such as BLS Supplier, for ambulance services provided to their residents on a part-time basis, they must pay the owed amounts. Failure on the part of the municipalities to make the payments—or to permit BLS Supplier to bill residents for them—implicates the anti-kickback statute.

In arriving at this determination, the OIG distinguished this proposed arrangement from one involving cost-sharing waivers that it earlier approved in Advisory Opinion 99-1 (January 27, 1999). The OIG noted that, in Advisory Opinion 99-1, the ambulance services at issue were “back-up” to those of the primary supplier; in other words, such services were provided “only in isolated and unanticipated circumstances where the volunteer first aid squad was unavailable (e.g., where the volunteer first aid squad was already preoccupied responding to existing calls in its service area).” But, according to the OIG, by instead providing “part-time” services under the proposed arrangement, “the BLS Supplier would itself be the primary supplier of BLS emergency ambulance services during designated time slots.” This distinction was apparently enough for the OIG to determine that the proposed arrangement could potentially generate prohibited remuneration under the anti-kickback statute.

Conclusion

The distinction between “back-up” and “part-time” coverage by EMS ambulance suppliers appears critical

³ 42 U.S.C. § 1320a-7b(b).

⁴ 42 U.S.C. § 1320a-7a(a)(7); 42 C.F.R. §§ 1003.102(b)(11) & 1003.103(h).



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to the OIG's thinking as to whether an insurance-only billing arrangement may implicate the anti-kickback statute. But, in this Advisory Opinion, the OIG failed to articulate why this distinction matters in the context of services provided in response to 911 dispatches. The OIG also indicated that whether it is a municipality-owned EMS ambulance supplier rather than a private company that engages in insurance-only billing would be an important consideration:

We note that insurance-only billing by municipalities that operate their own emergency ambulance services raises different questions not addressed here. There is an important difference between a municipally-owned ambulance company voluntarily waiving cost-sharing amounts for its own residents and a municipality requiring a private company to bill "insurance only" as a condition of getting the municipality's part-time EMS business, including Medicare business.

While any Advisory Opinion applies only to the requesting party, it can nonetheless provide important insight as to how the OIG may currently view a particular issue or arrangement with respect to the anti-kickback statute. While focusing on part-time suppliers, this Advisory Opinion may possibly reflect a hardening OIG stance on cost-sharing waivers offered by private ambulance suppliers generally.

Click [here](#) for OIG Advisory Opinion No. 12-11.

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