



Client Alert

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OIG Issues Favorable Advisory Opinion regarding Bundle Billing Arrangement between Basic Life Support and Advanced Life Support Suppliers

The Office of the Inspector General of the U.S. Department of Health and Human Services (OIG) recently published OIG Advisory Opinion No. 12-12 (issued on September 6, 2012; posted on September 13, 2012) in response to a request concerning a proposed bundle billing arrangement for basic life support/advanced life support joint responses by an ambulance supplier and a paramedic supplier. Based on the facts of this particular arrangement, the OIG determined that the arrangement would not generate prohibited remuneration under the anti-kickback statute and thus would not be grounds for imposing administrative sanctions.

Proposed Arrangement

The supplier of basic life support (BLS) ambulance services, a not-for-profit, 501(c)(3) corporation (BLS Supplier), has the designation of Primary Service Area Responder (PSAR) in the city in which it operates. Thus it is the primary 911 responder at the BLS level in this particular city. The supplier of advanced life support (ALS) paramedic services, also a not-for-profit, 501(c)(3) corporation (ALS Supplier), holds the PSAR designation at the ALS level in the same city. State law requires the BLS Supplier to call the ALS Supplier for paramedic intercept services¹ within the city whenever ALS services are necessary, that is, when a "BLS/ALS Joint Response" is called for.

Under the payment rules of the Centers for Medicare & Medicaid Services (CMS) applicable to BLS/ALS Joint Responses, unless there is a written agreement between a supplier of BLS services and a supplier of ALS services, Medicare does not cover the ALS supplier's services. Here, the burden is on the beneficiary to pay the expense of any ALS service that exceeds the BLS level of payment. On the other hand, CMS payment rules do permit bundle billing between BLS and ALS suppliers if they have previously entered into a written bundle billing agreement.² As noted by the OIG, State Medicaid payment rules allow bundle billing under similar circumstances.

Although the BLS Supplier and the ALS Supplier have not yet done so, under the proposed arrangement they would enter into a written agreement setting forth payment terms and conditions for BLS/ALS Joint Responses. Under such

¹ These are ALS services, such as EKG monitoring, chest decompression, or I.V. therapy, provided by an entity that does not provide the ambulance transport.

² CMS, Medicare Benefit Policy Manual, Pub. No. 100-02, ch. 10, § 10.5.

agreement, the BLS Supplier would bill Medicare/Medicaid at the appropriate ALS rate and, upon receipt of payment, the BLS Supplier would pay the ALS Supplier the difference between the payment received and the BLS Supplier's customary BLS reimbursement. The BLS Supplier would also collect copayments from beneficiaries and pay the ALS Supplier the difference between the amount received and the portion of the copayment attributable to BLS services. Finally, there would also be the possibility of the BLS Supplier or the city paying the ALS Supplier amounts to, in effect, equate for income otherwise lost to the ALS Supplier for not directly billing city residents.

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 program³. 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-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 both⁴. 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.⁵

OIG's Analysis of Proposed Arrangement

The OIG determined that the proposed arrangement did not implicate the anti-kickback statute because it did not involve prohibited remuneration:

The Proposed Arrangement is not an arrangement involving remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. ALS Supplier is a paramedic intercept supplier that is not in a position to refer or influence the referrals of Federal health care program business or any other business to BLS Supplier. In turn, BLS Supplier, under State law, must call ALS Supplier for paramedic intercept services within the City whenever ALS services are necessary. BLS Supplier does not otherwise serve as a source of referrals of Federal health care program business or any other business to ALS Supplier.⁶

³ 42 U.S.C. § 1320a-7b

⁴ 42 U.S.C. § 1320a-7b(b).

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

⁶ OIG Advisory Opinion No. 12-12, 5.

The OIG did, however, indicate that the BLS Supplier could be considered a referral source of the ALS Supplier for the paramedic intercept services that, under state law, the BLS Supplier was required to “refer” to the ALS Supplier. But since the BLS Supplier would retain only the BLS rate of payment, the OIG concluded that the proposed arrangement involved no remuneration from the ALS Supplier to induce such referrals. But the OIG indicated that if the BLS Supplier’s payment under the bundle billing agreement exceeded the BLS rate of payment, the agency may have come to a different conclusion. This is despite the fact that the BLS Supplier apparently had no discretion under state law but to refer to the ALS Supplier for such paramedic intercept services, which would presumably complicate a showing of requisite intent under the anti-kickback statute.

Conclusion

Two factors were important to the OIG’s favorable opinion regarding this proposed bundle billing arrangement. First, apart from the referrals to the ALS Supplier that the BLS Supplier was required under state law to make, the OIG did not consider these parties to be referral sources of one another. Second, the OIG determined that there would be no prohibited remuneration flowing between the parties. Interestingly, the OIG did not comment on the fact that the ALS Supplier would benefit from the BLS Supplier’s billing activities, services for which the BLS Supplier would apparently not be compensated. Presumably, this would have been an issue if the OIG considered the ALS Supplier a potential referral source for the BLS Supplier.

See [OIG Advisory Opinion No. 12-12](https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-12.pdf)⁷.

⁷ <https://oig.hhs.gov/fraud/docs/advisoryopinions/2012/AdvOpn12-12.pdf>

Mr. Hoffman would like to thank Jason Sosnovsky who assisted significantly with the preparation of this article. Mr. Sosnovsky is a recent law school graduate and an employee of Arnall Golden Gregory LLP in our life sciences practice. Mr. Sosnovsky is not yet admitted to the State Bar of Georgia.

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