OIG Opines that Physician Bonuses May be Tied to ASC Facility Fees



10/31/2023

On October 10, 2023, the Department of Health and Human Services Office of Inspector General (OIG) issued Advisory Opinion No. 23-07, concluding that a medical practice may pay bonuses to physician employees that are tied to profits from facility fees attributable to procedures performed by the employed physicians at an ambulatory surgical center (ASC) owned by the medical practice. The requestor of the Advisory Opinion is the operator of a multi-specialty medical practice with 11 physician employees that owns and operates two ASCs. The requestor proposed a bonus system whereby physician employees of the medical practice would receive a bonus equal to 30% of the medical practice's net profits from facility fees collected by the medical practice attributable to surgical procedures performed by the employed physicians at one of the medical practice's ASCs. The medical practice certified that the physician employees were bona fide employees of the medical practice within the definition of "employee" under Federal law.

The OIG determined that while payment structures connecting compensation to profits from patient referrals may be problematic under the Federal Anti-Kickback Statute (AKS), since the physician employees are bona fide employees of the medical practice, the bonus compensation in this case is protected by the statutory exception and regulatory safe harbor for employees under the AKS and therefore would not constitute prohibited remuneration under the AKS, notwithstanding the potential risks of fraud and abuse these types of compensation arrangements may generally present. The OIG noted that similar arrangements involving bonus payments to independent contractors or other non-employees, or under a different corporate structure, might raise fraud and abuse concerns. The OIG also noted that the medical practice certified that the proposed arrangement did not implicate the Federal physician self-referral law, known as the Stark Law, and therefore the OIG was not offering any opinion regarding whether the proposed arrangement violates the Stark Law.

Click Here to read the entire October 2023 Healthcare Law Update now!

For more information, contact:
John D. Fanburg, Chair | 973.403.3107 | jfanburg@bracheichler.com
Isabelle Bibet-Kalinyak | 973.403.3131 | ibibetkalinyak@bracheichler.com
Harshita Rathore | 973.364.8393 | hrathore@bracheichler.com

Attorney Advertising: This publication is designed to provide Brach Eichler LLC clients and contacts with information they can use to more effectively manage their businesses. The contents of this publication are for informational purposes only. Neither this publication nor the lawyers who authored it are rendering legal or other professional advice or opinions on specific facts or matters. Brach Eichler LLC assumes no liability in connection with the use of this publication.