

OIG ISSUES ADVISORY OPINION ON REUNITING A HOSPITAL AND PHYSICIAN GROUP

The Office of Inspector General recently issued an advisory opinion regarding a proposed arrangement for integrating a hospital and multi-specialty physician group. These two provider entities were originally organized as a single entity and the hospital component was subsequently donated to a non-profit corporation. The hospital and physician group requested an advisory opinion from the OIG of whether the components of their proposed arrangement to reintegrate the hospital and physician group would result in potential fines or penalties under the Federal Anti-Kickback statute for either provider.

The hospital and physician group proposed the following as a means of reintegrating the two providers: (i) the physician group would transfer its assets (including the group's nursing and technical support workforce) to the hospital, and the hospital would pay the group an amount equal to the amount necessary to satisfy all encumbrances related to the transferred assets; (ii) the hospital would give the physician group meaningful representation on the hospital's board; (iii) the hospital and physician group would enter into a 10 year professional service agreement for the group to be the exclusive provider; (iv) the hospital would still purchase the medical building owned and currently used by the group; (v) the parties would enter into an administrative services agreement for the hospital to provide certain administrative services for the group, including billing for previously performed services. The physician group would exist as a separate provider after implementation of this proposed arrangement.

An important aspect was the OIG's description of the threshold issued in their review of the proposed arrangement. The threshold issue was framed as, "whether there is remuneration flowing from one party to the other party to induce or reward the referral of federal health care program business." In other words, the OIG's concern appears to be whether remuneration is going to one party and patient referrals are flowing back to the party paying the remuneration. In this arrangement, the OIG noted that the transfer of the group's assets to the hospital are flowing in the same direction as the physician's patient referrals to the hospital.

Accordingly, the OIG stated that there would be little concern under the anti-kickback statute unless there is some referral of business from the hospital to the physician group in exchange for the group's assets or remuneration from the hospital to the group for the group's referral of patients to the hospital. The OIG focused its analysis on the ancillary transactions and other referral opportunities in the five parts of the proposed arrangement described above.

The OIG considered whether the hospital could be referring patients to the group through the exclusive provider agreement in exchange for the group's assets. The OIG concluded that the hospital was not utilizing the exclusive professional services agreement as remuneration to the physician group because the agreement is unlikely to generate new measurable business for the group because the physicians would likely be seeing the same patients.

The OIG also reviewed whether the hospital could be providing remuneration to the group for the group's referral of patients to the hospital. The OIG commented that the following were potential sources of remuneration (other than the payment for the transfer of assets by the group to the hospital): the professional services agreement, the administrative services agreement, and the purchase of the physician group's building by the hospital. The professional services agreement was not determined to be remuneration by the hospital for patient referrals because the group would receive essentially the same compensation for their services under that agreement as the group received prior to entering into that agreement. The amounts paid under the administrative services agreement and the building purchase were also determined not to be remuneration for patient referrals because such amounts were certified by the parties to be consistent with fair market value in arms'-length transactions.

Although the OIG concluded that the aspects of this proposed arrangement did not result in prohibited remuneration under the anti-kickback statute, the OIG did state that the proposed arrangement raises potential issues under the physician self-referral law (also known as the Stark Law). The OIG stated that an advisory opinion should be requested from the Centers for Medicare & Medicaid Services on the application of the Stark Law if such an opinion is desired by the parties.

In summary, this advisory opinion is important to other healthcare business transactions because the opinion includes a description of the threshold issue to the OIG and highlights the fact that all aspects of an arrangement will be reviewed in determining whether there is a potential violation under the Federal anti-kickback statute.

Clay J. Countryman
225.389.3729
clay.countryman@keanmiller.com

AGENCY NURSE WAS EMPLOYEE OF BOTH THE AGENCY AND THE HOSPITAL

In In re Medical Review Panel Proceedings for the Claim of Allan Tinoco v. Meadowcrest Hospital, et al., 2003-0272 (La. App. 4th Cir. 9/17/03), 858 So. 2d 99, a temporary agency nurse working at a hospital was sued in medical malpractice and sought to have the suit dismissed, requiring the claim to be prosecuted through the Medical Review Panel Proceeding. The hospital was a qualified health care provider, and its employees were qualified as a group, but not individually. The hospital reported to the Patient's Compensation Fund that the agency nurse was not an employee and, therefore, not a qualified health care provider under the group. The nurse contended that he was an employee of the hospital and entitled to the benefits of the Medical Malpractice Act. The issue before the court was whether the agency nurse could be considered an employee of the hospital.

The Fourth Circuit determined that, at the time of the incident allegedly causing injury to the patient, the registered nurse was employed by both Meadowcrest Hospital, where Mr. Tinoco was a patient, and by Maxim Healthcare Services, Inc., a health care employment agency engaged in the business of providing registered nurses to hospitals for temporary assignments. As dual employers, both Maxim and Meadowcrest were responsible for any malpractice committed by Nurse Garcia while he was working at Meadowcrest as an agency nurse.

In reaching its decision, the court relied upon the following facts:

- a. The agency nurse worked on the premises at the hospital and provided care to the hospital's patients.
- b. The hospital patient would assume that all nurses in the hospital were employees of the hospital and were selected for their competence in nursing care.
- c. The hospital patient had every expectation that the nursing staff was supervised and controlled by the hospital.
- d. A seriously ill patient in need of nursing care would not consider whether a nurse wore an identification badge with an agency's name or a different style of uniform from the permanent nursing staff.
- e. The agency nurse reported to the charge nurse, who served in a supervisor capacity over both the temporary nurses and the permanent employees of the hospital.
- f. The supervision of the agency nurse was the same as for the hospital's permanent nurses.
- g. The hospital could relieve the agency nurse from his nursing duties at the hospital and prohibit him from returning to work at the hospital, although it could not terminate his contract with the health care employment agency.

Furthermore, the court noted that, unlike physicians with staff privileges at hospitals, nurses did not send patients

individual bills, did not determine the treatment the patients would receive, and did not see patients at offices outside the hospital. While the patient could choose his physician, he could not choose his nurse who would take care of him in the hospital. Also, the patient could terminate a physician's services but could not terminate the nurse's services. However, the court clearly distinguished the situation with emergency room physicians and, in a footnote, analogized the issue of the employment status of emergency room physicians who are independent contractors to that of agency nurses.

In reaching its opinion, the court reviewed several cases involving the employment status of health care providers whose services were used by hospitals, many of which involved emergency room physicians. This case appears to be the first one involving agency contract nurses. Whether a health care provider is considered an employee or an independent contractor is a factual issue which turns on the hospital or principal's right to control. A contract setting forth the independent contractor relationship does not determine this issue. In this case, neither the fact that the agency paid the nurse's wages and paid the payroll taxes on those wages, nor the fact that the nurse maintained his own malpractice insurance, was determinative.

The Patient Compensation Fund had submitted an affidavit that, if the court ruled the nurse was an employee of the hospital or an employee of both the hospital and the agency, the nurse would be considered a qualified health care provider. The appellate court instructed the trial court to determine whether the evidence supported that the agency nurse was a qualified health care provider entitled to the benefits of the Medical Malpractice Act.

This case is very important in that it further expands the employer-employee relationship to include even more health care providers who are independent contractors. The court's analysis demonstrates the heavy emphasis placed upon the facts in each case in deciding this issue. As this case illustrates, the agency nurse, individually, would not be considered a qualified health care provider under the Medical Malpractice Act but might be considered one as a part of the group of qualified health care providers under the hospital. Furthermore, both the agency employer and the hospital were considered the nurse's dual employers, and both were potentially liable for the acts of the nurse.



Deborah J. Juneau
225.389.3703
deborah.juneau@keanmiller.com