

OIG RULES HOSPITALS CAN PAY PHYSICIANS FOR ON-CALL SERVICES –  
PITS HOSPITALS AGAINST MEDICAL STAFFS FOR UNCOMPENSATED CARE  
DOLLARS

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A recent opinion by the Office of Inspector General of the Department of Health and Human Services (“OIG”) is likely to place hospitals and their medical staffs at opposite ends of the bargaining table, when it comes to paying for caring for the uninsured and indigent.

The OIG, in its second ruling on the subject in a year and a half, has ruled that hospitals can not only compensate physicians for on-call services performed on behalf of their uninsured patients on a *per diem* basis, but can also do so on a fee-for-service basis, if key elements are present in the compensation arrangement.

The ruling should help end years of efforts by some hospitals to hide behind concerns that compensating physicians for treating indigent patients could violate the Federal anti-kickback statute.

The OIG’s opinion addressed a common situation where a hospital’s medical staff bylaws require all members of its active medical staff to provide on-call coverage for its emergency department and care for patients referred to them while they are providing emergency department coverage. The hospital under review, like many other hospitals, did not compensate its physicians for on-call service they render to emergency department patients who are indigent and uninsured. Often, however, hospitals receive government subsidies for caring for the indigent – subsidies not shared with the medical staff.

Of note in the OIG opinion is the candid finding that most physicians dislike the duty of performing on-call coverage for the emergency department because telephone calls requesting the physician to respond come at all hours, disrupting their professional and personal lives. In addition, the opinion recognizes that the on-call obligation creates additional medical liability for care rendered to persons with whom there is often no previously established patient-physician relationship, increasing the risk of claims of medical malpractice.

Due to the disruption and increased liability, and the lack of compensation, physicians only provide the minimum emergency coverage required under the hospital bylaws. The “historic sense of duty” to their profession, that led physicians to provide this care in the past, is, to quote the OIG, a “sentiment . . . no longer shared by all.” Rather, physicians commonly view on-call coverage as an unwanted obligation, jeopardizing the hospital’s ability to serve patients.

Under the plan approved by the OIG, physicians at the hospital which requested the opinion will be compensated at a rate of a \$100 flat fee for emergency consultations on an eligible patient, \$300 per admission for a physician’s service for inpatient care and management, a \$350 flat fee for the primary surgeon of record performing a surgical procedure on a patient admitted from the emergency department, and \$150 for an endoscopic procedure performed on an eligible patient admitted from the emergency department. According to the hospital, these fees are within the range of fair market value for the services rendered and the payments are made without regard to referrals or any other business generated between the hospital and the physicians.

In approving the plan, the OIG opined that the key inquiry is whether the compensation is: (i) fair market value in an arm's-length transaction for actual and necessary items or services; and (ii) not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties. If these key factors are met, the anti-kickback statute neither compels hospitals to pay for on-call services, nor compels physicians to provide on-call services without compensation.

The American Medical Association and other physician organizations have, for years, advised physicians that their medical staffs should not be represented by hospital counsel, but should have their own separate counsel. Now that the OIG has made it clear that medical staff members can be paid for their emergency department coverage, yet another reason exists for independent medical staff counsel. Millions of dollars in fees lie in the balance.

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