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HEALTH CARE LAW ALERT

OIG Reverses Position on EHR Referral Fees

In Advisory Opinion No. (“Op. No.”) 14-03, OIG reversed an earlier opinion allowing EHR vendors to provide a fee discount for laboratory test referrals sent between physicians and laboratories that participated in the EHR vendor’s network (i.e. “in-network” referrals). In its earlier opinion (Op. No. 11-18) OIG found that the proposed fee discount of up to \$1 for referrals to in-network providers was too small to create an incentive for improper referrals.

OIG issued a notice terminating Op. No. 11-18 the same day it issued Op. No. 14-03, reversing course to find that the fee discount **could** influence ordering providers to choose in-network laboratories for services ordered with a high degree of frequency, as referrals out-of-network would cause referring physicians to forfeit the discount to the EHR vendor’s monthly subscription fee.

The “Requestor” of Op. No. 14-03 was a laboratory that provided referring physicians a free software program to transmit test orders, but was told by referring physicians that they would continue referring lab tests only if Requestor participated in EHR vendor’s network. Using the same reasoning set forth in its termination notice, OIG found that referring physicians, who were charged up to \$1.00 each time they sent lab referrals out-of-network, had a material incentive to stay in-network because lab tests were ordered with considerable frequency. Moreover, by participating in EHR vendor’s network, which provided little to no additional utility beyond Requestor’s free software, Requestor was relieving referring physicians of a financial obligation, and thus, doing indirectly what it could not do directly: compensating referring physicians for lab referrals.

Although OIG’s advisory opinion is limited to the facts presented, laboratories participating in such an arrangement should be wary of the anti-kickback implications of OIG’s reasoning in Op. No. 14-03 and the notice of termination for Op. No. 11-18. In particular, arrangements where laboratories pay a per-order fee that is not related to the fair market value of the service provided by the EHR vendor, and where physician referrers pay nothing or a diminishing fee per in-network referral, are suspect under OIG’s revised rationale in Op. No. 14-03.

Full copies of OIG’s advisory opinions are provided below:

OIG Op. No. 14-03:

<https://oig.hhs.gov/fraud/docs/advisoryopinions/2014/AdvOpn14-03.pdf>

Notice of Termination OIG Op. No. 11-18:

https://oig.hhs.gov/fraud/docs/advisoryopinions/2014/Notice_of_Termination_11-18.pdf

OIG Op. No. 11-18:

https://oig.hhs.gov/fraud/docs/advisoryopinions/2014/11-18_Terminated_Opinion.pdf

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