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Labs that waive patient fees risk kickback violations, OIG says

By [Lisa Schencker](#)

Laboratories that waive some patients' fees as part of agreements with physician practices risk running afoul of the federal anti-kickback statute, HHS' Office of Inspector General said in an advisory opinion Wednesday.

The opinion could have implications for how labs charge patients. Danielle Sloane, an attorney with Bass Berry Sims in Nashville, said arrangements like the one suggested in this case aren't common, but the opinion might raise questions about other common practices. For example, a lot of labs now waive out-of-network copayments for patients, she noted.

The advisory opinion might make some look more closely at whether that practice improves efficiency for doctors, inducing them to send more federal beneficiaries to particular labs.

"I would imagine coming out of this opinion people will extend it to out-of-network copayment waivers and question it more than they have historically," Sloane said.

The lab involved, which was not named in the opinion but was described as a multiregional medical laboratory with 45 patient-service centers, asked the OIG to weigh in on a proposal that it enter into agreements with physician practices to do all of those practices' lab services. The laboratory said it would waive fees for patients whose insurance would otherwise send them to different labs.

The laboratory said some physician practices had expressed the desire to work with only one laboratory "for ease of communication and consistency in the reporting of test results."

But the conveniences, for doctors, of working with one lab could themselves potentially constitute kickbacks, the OIG said. OIG advisory opinions don't have the power of regulation, but organizations and companies typically look to them for guidance in their own practices.

The opinion is likely a demoralizing one for small labs that may struggle to compete with larger ones that capture a lot of business because physician practices know they accept more insurance plans, she said.

Some of the smaller labs, Sloane said, “feel like they've got technology that reduces costs. ... They think they can save healthcare costs, so this is a setback for them trying to compete and probably a source of frustration, so I feel for the labs that are trying to do the right thing and coming up with these great ideas, but I see the point the OIG has made here.”

Mark Silberman, a partner at Duane Morris in Chicago who represents providers, said he believes the OIG went too far in condemning the proposal.

It sounds to him, he said, as if the idea was aimed at solving common issues without violating the anti-kickback law.

“The administrative burdens on physicians today are overwhelming and the landscape of healthcare is changing so rapidly that, in my experience, technical rulings like this are making it harder on the people who are trying to do it right, and the people who are willing to do it wrong aren't concerned by it,” said Silberman, who is also a former special assistant U.S. attorney.

The laboratory had said the proposal could simplify physicians' operations in a number of ways by allowing them to deal with one lab instead of multiple ones. Different labs, for example, use different reference ranges in reporting test results and each lab requires a different interface for sending test reports electronically, the lab said.

But those greater efficiencies could constitute kickbacks, the OIG said. Doctors also could potentially save money by not having to pay the monthly maintenance fees some medical-record-system vendors charge in connection with their interfaces.

The opinion also states that the proposal could result in substantially higher fees being charged to federal beneficiaries than most other patients, in violation of a different federal law. That's because many patients might have their fees waived while those of beneficiaries of federal programs would not.

It's been years since the OIG referenced that particular law, Sloane said. Its mention in the new advisory opinion shows labs and providers should be on notice that the OIG still cares about that requirement.

“They're still attuned to that,” Sloane said. “If you start undercharging everybody else, and Medicare is paying more ... they haven't forgotten about that.”

John Wyand, a principal at Squire Patton Boggs in Washington, said laboratories have a long history of being targeted by the anti-kickback law. This latest advisory opinion is somewhat in line with that.

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