CLIENT ALERTS & INSIGHTS

OIG Addresses Financial Incentives for Employees and Residents who Refer New Residents to CCRCs in Advisory Opinion 10-05

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On May 19, 2010, The U.S. Department of Health and Human Services Office of the Inspector General ("OIG") released its Advisory Opinion 10-05. The opinion addresses a financial incentive or "Rewards" program (the "Arrangement") for referrals of potential new residents to Continuing Care Retirement Communities ("CCRC") which provide independent living, assisted living, and skilled nursing services to residents on one campus.

The Arrangement discussed in the opinion has two parts:

1. a Gift Card program where current residents or employees can receive a gift card when they recommend the independent living community to a prospective resident. They can receive the gift card if the resident or employee submits the prospective resident's name and contact information to the CCRC, the prospective resident is eligible to enter a continuing care contract, and the prospective resident tours the community within ninety (90) days; and
2. a credit/reward program for independent living referrals if a prospective resident moves into the independent living community within twelve (12) months of a tour of the facility. A resident who made the referral can receive a one-time credit toward his or her monthly CCRC fee. An employee that made a referral will receive a check for a specified amount.

The OIG concludes that the Arrangement would not generate prohibited remuneration under section 1128(b) of the Social Security Act (Act), the federal Anti-Kickback Statute and the OIG would not impose sanctions as a result of its conclusions. The OIG's conclusions were primarily based upon the following facts and issues:

1. The Arrangement was focused on attracting new members to the CCRC's independent living services and the independent living services are not reimbursable by a federal healthcare program.
2. Neither of the rewards programs apply to residents who move directly into assisted living or skilled nursing units.
3. Services provided in the skilled nursing and assisted living units are reimbursable by federal healthcare plans, and some residents may require these services from years into the future, but most will not.
4.

Whether an individual resident referred by a current resident or employee will actually end up needing services that are reimbursable by a federal healthcare program at some point in the future is substantially speculative and outside the control of the current resident or employee.

While the OIG's conclusions are not that surprising given the facts of the Arrangement, the opinion does provide a reminder of the issues that the OIG will evaluate in whether or not a resident/patient referral program (or marketing incentives in general) would run-afoul of the Federal Anti-Kickback Statute.

For example, the OIG analysis suggests that it might have concluded differently if:

1. the referrals were made based on the health care needs of the prospective residents;
2. the referrals were made by individuals (such as physicians) who were in a position to influence medical decision-making; or
3. the referrals were made by individuals in positions of trust (such as physicians) who are able to exert undue influence over recommendations of healthcare items and services.

When considering an incentive program for resident/patient referrals, providers should take into account OIG guidance on these issues and the specific factors the OIG has used to evaluate these types of arrangements.

Additional Information

For more information on Advisory Opinion 10-05, the Anti-Kickback Statute, resident/patient referral programs or other related issues, please contact a member of Benesch's Health Care Department:

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