

Report on Medicare Compliance Volume 32, Number 35. October 02, 2023 In Another Unfavorable Advisory Opinion, OIG KOs Lab Deal; Requester Again Wanted a No

By Nina Youngstrom

For the second time in about six weeks, the HHS Office of Inspector General (OIG) posted an unfavorable advisory opinion, this time about a plan by one lab to buy the technical component of anatomic pathology services from other labs to help them get paid.^[1] Again, the requestor obviously wanted OIG to say no way to the proposed arrangement, an attorney said, and it obliged on the grounds that the risk of violating the Anti-Kickback Statute (AKS) “is not sufficiently low.” OIG explained that, among other things, paying fair market value to the labs and carving out federal health care program business “would not protect the Proposed Arrangement from implicating, and potentially violating, the Federal anti-kickback statute,” according to the advisory opinion, which was posted Sept. 28.

Like last time, the requestor described what a competitor plans to do in the hope of warning it off, said attorney Larry Vernaglia, with Foley & Lardner LLP in Boston.^[2] But “this is even worse than the last one” in terms of the “particulars of the transaction,” he said. “The requestor is a competitor unhappy with the way the competition is doing business. They could have explained bona fide reasons why this model made sense, but they didn’t.”

According to the advisory opinion, the requestor runs anatomic pathology laboratories across the country and is reimbursed for technical and professional services by commercial payers. The technical component is the physical preparation of specimens and the professional component is the analysis of the specimen by a pathologist, with the outcomes reported to referring physicians.

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