

Report on Medicare Compliance Volume 32, Number 38. October 23, 2023 OIG Approves Employed Physician Bonuses Based on Revenue From ASCs

By Nina Youngstrom

A proposal to give physician employees a bonus based on the profits they generate from certain procedures performed at ambulatory surgery centers owned by their employer got a green light from the HHS Office of Inspector General (OIG) in an advisory opinion posted Oct. 13.^[1] The 30% bonus sailed through because it's protected both by a statutory exception to the Anti-Kickback Statute (AKS) and a regulatory safe harbor that confers AKS immunity.

"There's a real distinction between what you can do with your employees and what you can do with your independent contractors," said attorney Eric Tower, with Blank Rome in Chicago.

The employment exception is very broad, noted attorney Larry Vernaglia, with Foley & Lardner LLP in Boston. "If you can fit within it, you can do really creative things," he said. Some people might have read the employment safe harbor more narrowly and perceived a 30% bonus on facility fees as a payment for physician referrals, but "here OIG is making it clear it's a bright line. You can pay doctors in all kinds of ways, and it will be protected in all kinds of ways."

According to OIG, the multispecialty physician practice that requested the advisory opinion proposes to reward its 11 employed physicians with bonuses on top of their base salaries. When they perform outpatient surgeries at either of two ambulatory surgery centers (ASCs) operated by the practice, the physicians will receive 30% "of the requestor's net profits from the ASC facility fee collections attributable to that physician's procedures performed at the ASC for that quarter."

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