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Report on Medicare Compliance Volume 32, Number 2. January 16, 2023

# OIG OKs Use of Hospital-Employed NP Services Free to Help Doctors

By Nina Youngstrom

In a new advisory opinion, the HHS Office of Inspector General (OIG) gave its blessing to an arrangement in which a hospital provides the services of its employed nurse practitioners (NPs) free to help physicians with inpatient and observation care.[1] Although giving free services to referral sources would generate remuneration under the Anti-Kickback Statute (AKS) "if the requisite intent were present," OIG found little risk of fraud and abuse.

The opinion is "a departure from how OIG typically treats arrangements involving remuneration between hospitals and referring physicians," said Jennifer Michael, former chief of OIG's Industry Guidance Branch, which issues advisory opinions. Generally, OIG frowns on hospitals giving away anything. Despite that, "the outcome is not terribly surprising given OIG's push to value-based care," Michael said. "It seems clear from the facts of this arrangement it will improve care."

Although it's helpful to have an opinion on the use of free NPs and other advanced practice providers (APPs), lawyers said it may have limited utility. For one thing, the opinion applies to services that are medical, not surgical, a fact that played a role in getting OIG's approval, said attorney Holley Thames Lutz, with Dentons US LLP in Washington, D.C. "They may have come to a different conclusion" with a surgical service line, she noted. "The OIG said as much." But Lutz questions whether this should be the case and whether free APPs in this context really is remuneration.

Also, the advisory opinion doesn't mention the Stark Law, even in a footnote, said Michael, with Bass, Berry & Sims PLC in Washington, D.C. "OIG concluded that the provision of these services is remuneration to physicians. That can get complicated not only from an Anti-Kickback Statute perspective but also from a Stark Law perspective." If it's remuneration under Stark, the NPs' services would have to satisfy an exception, she explained. Physicians might have to pay fair market value or payments would fall under the nonmonetary compensation exception. "There's a lot of tracking and monitoring that would be burdensome to the hospital," Michael noted.

The opinion also didn't address patient steering—"the fact the physician might refer patients to the requestor hospital instead of a competing hospital because of this arrangement"—which is a potential risk, Michael said.

## Arrangement Offered to Independent, Employed M.D.s

According to OIG, every year the hospital that requested the advisory opinion sends a letter to employed and independent physicians informing them of the arrangement. Physicians who participate will have the assistance of NPs with inpatient and observation services on two units. Participating physicians are mostly primary care physicians, and the units don't provide surgery or specialty care.

The services provided by the NPs include initiating plans of care, implementing protocols, responding to lab or imaging results, making rounds, educating patients and their families, addressing rapid changes in patients' conditions, overseeing quality-improvement projects and discharge planning. They are provided "in

communication and collaboration with the Participating Physician," who are still required to round every day, OIG said.

The hospital certified to OIG that participating physicians aren't permitted to bill for services provided by the NPs or rely on the NPs' services or documentation to bill for services. The hospital foots the bill for services provided by the NPs and doesn't bill any payer separately for their services. Physicians aren't paid for participating in the arrangement, and the volume or value of their referrals aren't factored in when the hospital invites them to participate. There are no ancillary agreements with the physicians that could induce or reward them for referrals.

Because it's a criminal offense under the AKS to offer or pay remuneration in return for patient referrals to federal health care programs, the arrangement potentially implicates the AKS, OIG concluded.

But the arrangement poses little risk of fraud and abuse for assorted reasons, OIG decided. For example, it's restricted to nonsurgical, nonspecialty units. "We might reach a different conclusion if, for instance, the Arrangement was offered on surgical or specialty units where specialist physicians typically make more lucrative referrals to Requestor." OIG also cited the fact that the hospital doesn't pay the physicians under the arrangement, factor in their referrals or separately bill payers for the NPs' services, among other things. And the arrangement won't increase the costs to federal health care programs because the hospital isn't billing them separately for the NPs' services. "Requestor certified that having the NPs available in these medical units improves care for patients by allowing them to be evaluated more quickly and efficiently so that they can receive diagnoses and treatments as soon as practicable," OIG noted.

## Why Not for Surgical Services?

Although the arrangement is limited to medical services, Lutz said there's a strong argument to be made for free APPs in surgical services. But with Medicare's global surgical payment for surgery, there's a bias against providing free APP services as if they will take over the rounding or evaluation and management (E/M) services for the surgeon, she said. "Just because the APP is there to support the surgical service line doesn't necessarily mean you're relieving surgeons of any obligation. But the knee-jerk reaction is yes, it does."

With the 10-day global surgery package, Medicare pays an all-inclusive payment for the surgery, the daily surgical rounds and E/M office visits during the 10 days after the procedure. "The motto is APPs can do things in addition to what surgeons do, not in lieu of what surgeons are supposed to do," Lutz explained. "If you're the attending, you'll round on the patient every day, but the APP will as well because the APP is in the hospital and can check in more often." APPs help with patient satisfaction, discharge planning, talking to family and other quality of care matters, she said.

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**1** Robert K. DeConti, "Re: OIG Advisory Opinion No. 22-20," U.S. Department of Health & Human Services, December 19, 2022, https://bit.ly/3H1FRp0.