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ALERTS

HHS-OIG Declines Sanctions On One-Time, Voluntary Redemption Option For Physician Owners At Retirement Age

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Highlights

HHS-OIG released a favorable opinion on a voluntary redemption option offered to physician owners in a hospital partnership

The agency noted that objective criterion (age) triggering the buy-out was unrelated to the volume or value of referrals or other business generated by the physician and unlikely to alter referral patterns

The agency determined there was little risk for fraud and abuse

The U.S. Department of Health and Human Services Office of Inspector General (HHS-OIG) released Advisory Opinion No. 23-12, a favorable opinion regarding a proposed arrangement by which physician owners of a hospital limited liability partnership would receive a one-time, voluntary redemption offer upon reaching age 67, allowing them to have their ownership interest redeemed by the partnership over two years, contingent upon their agreement to retire from the practice of medicine. Despite implicating the federal Anti-Kickback Statute (AKS), the agency determined it would not impose sanctions.

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Background: Legal Structure and Redemption Rights

The requesting party is a limited liability partnership with two classes of ownership held by (a) a nonprofit medical center and (b) individual physicians with direct partnership interests. The partnership owns and operates a hospital and indirectly owns a second hospital.

The requestor certified that the partnership agreement does not define or contain a mandatory retirement provision, such as requiring retirement at a particular age or that physician partners of a certain age reduce their working hours — which it states leads to economic uncertainty for the partnership, as it is difficult to predict when a physician partner will exercise the redemption-upon-retirement provisions.

In addition to eligibility requirements, the requestor certified that the partnership agreement allows physician partners to hold medical staff privileges, treat patients, and refer patients to any facility at any time regardless of whether such activities would be competitive.

Under the proposed arrangement, the partnership would offer physician partners the option at age 67 to have their partnership interests redeemed in three equal increments over two years in exchange for agreeing to retire from the practice of medicine within six months of receiving their first redemption payment. The redemption price would be consistent with fair market value, which would likely increase from year to year as the remaining partnership interests are redeemed.

The redemption offer would be voluntary and available to those who meet the applicable age criterion, regardless of their referrals or any business they would otherwise generate. They would be required to deliver a "no-referral certificate" in connection with accepting the redemption offer stating they would not make any patient referrals to the affiliated hospitals, medical center, or other physician partners after retirement.

HHS-OIG Agency's Analysis of Remuneration

The HHS-OIG determined the proposed arrangement implicates the AKS because remuneration is paid to physician partners who refer federal healthcare program beneficiaries to the medical center and hospitals, including during the six months between the first redemption payment and retirement. However, despite the lack of safe harbor protection, the HHS-OIG concluded the arrangement would pose a low risk of fraud and abuse, as overutilization to federal health care programs is unlikely.

It reasoned that, first, the right to payment under the redemption offer would be determined on an objective basis (age) unrelated to the volume or value of referrals or other business generated by the physician partners. The HHS-OIG concluded such an objective trigger reduces the risk of steering or overutilization of federal healthcare programs.

Second, payment made under the redemption offer would unlikely result in unfair competition because the physician partners would agree not to refer patients to the partnership's affiliated facilities under the no-referral certificate. Even though there would be a six-month period during which a physician who accepted the redemption offer would continue to refer patients to the hospitals and medical center, this period is time-limited and necessary to allow physicians to wind down their medical practices as required by state law.

Key Takeaways

Advisory Opinion No. 23-12 provides a basic roadmap for transactions with physician owners that do not fit neatly within an AKS safe harbor and demonstrates the importance of memorializing the reasons for which parties may enter into such transactions other than to induce or reward referrals or other business generated by the physician.

In this case, the HHS-OIG found the economic risk of an aging physician workforce with unpredictable retirements was a compelling reason for implementing a voluntary retirement option, provided that appropriate safeguards were in place to reduce the risk of overutilization, patient steering, and anti-competitive behavior. These safeguards included:

- Ensuring payments to physician partners were consistent with fair market value
- Tying redemption rights to an objective criterion (age) unrelated to the volume or value of referrals or other business generated by a physician partner
- Allowing physician partners to refer patients to facilities unaffiliated with the hospitals or medical center
- Limiting any period during which they would be permitted to continue performing services and referring patients to the hospitals and medical center to that which is required to comply with state law
- Requiring retiring physicians to certify they would not be in a position to refer patients to the hospitals, medical center, or other physician partners after retirement

Advisory Opinion No. 23-12 does not opine on whether the proposed arrangement would satisfy Stark Law requirements.

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