

HEALTH LAW FOCUS

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SUBSIDIES FOR PHYSICIAN MEDICAL MALPRACTICE INSURANCE: NEW OIG GUIDANCE

As a result of changes in the medical malpractice insurance market, physician malpractice coverage has become unavailable or unaffordable in certain areas of the country. When physicians practice without insurance or with lower limits of liability, a hospital's liability exposure can be increased and injured patients can be left without a source of recovery. Because physicians are threatening to retire, relocate, close their practices to new or high risk patients and refuse to take ER calls, some states are looking at legislative and other solutions. In response to this problem, some hospitals and health systems have provided (or have considered providing) financial assistance to physicians for the purpose of obtaining medical malpractice insurance.

One health system recently sought guidance from the Office of Inspector General of the Department of Health and Human Services (the "OIG") as to whether the provision of financial assistance to physicians to subsidize their malpractice insurance premiums is viewed by federal regulators as violative of the federal anti-kickback statute or the Stark law. On January 15, 2003, the OIG released a guidance letter addressing that issue (the "OIG Guidance").¹ A summary of the OIG Guidance follows.

The OIG Guidance was directed to an unnamed hospital system and addressed a proposed arrangement under which the hospital system would provide temporary financial assistance in obtaining medical

malpractice liability insurance to physicians on its medical staffs in West Virginia, Nevada, Florida and Texas. Although all of the terms of the proposed arrangement are not described in detail in the OIG Guidance, the proposed arrangement apparently involves the direct payment of medical malpractice premium subsidies by the hospital system to members of the hospitals' medical staffs on an interim basis.

In the past, the OIG has expressed concerns that "malpractice insurance subsidies paid to or on behalf of potential referral sources may be suspect under the anti-kickback statute," while at the same time acknowledging that all such subsidies are not *per se* illegal. Although the OIG declined to make a determination as to whether the proposed arrangement described in the OIG Guidance would violate the anti-kickback statute or the Stark law, the OIG expressed its awareness of the current disruption in the medical malpractice liability insurance market in some states. In particular, the OIG noted the potential serious effects on federal health care beneficiaries' access to, and on the quality of, medical care that could occur if physicians curtail or cease practicing as a result of increased costs or unavailability of medical malpractice liability insurance. The OIG also offered its assurances that it would take such considerations (*i.e.*, the professional malpractice insurance crisis) into account in evaluating whether temporary financial arrangements designed to help assure continued access to care would be subject to prosecution under the anti-

¹ See correspondence of Lewis Morris, Chief Counsel to the Inspector General, dated January 15, 2003. The correspondence is available at <http://oig.hhs.gov/fraud/docs/alertsandbulletins/MalpracticeProgram.pdf>.

kickback statute. (The OIG did not address the Stark law considerations but has forwarded the matter to the Centers for Medicare and Medicaid Services for comment on Stark law issues.)

Although the OIG advised the health system that a formal determination as to the legality of the proposed arrangement could be issued only in accordance with the regulatory requirements for advisory opinions, the OIG took a favorable view of the presence of the following safeguards in the proposed arrangement:

- The assistance would be provided on an interim basis for a fixed period of time in states experiencing severe access or affordability problems, although the assistance might be extended if, at the end of the period, there were a continuing disruption in a state's medical malpractice insurance market.
- Assistance would be offered only to current active medical staff or to physicians joining the medical staff who were new to the locality or had been in practice for less than one year (thus, the proposed arrangement was not intended to lure local physicians away from competing hospitals).
- Financial assistance would not be related to the volume or value of referrals or other business generated by a physician.
- Each physician receiving financial assistance would pay at least as much as he or she currently pays for professional liability insurance (*i.e.*, the assistance would be limited to the amount of premium increases).
- Physicians receiving financial assistance would be required to perform services for the hospital system and give up certain litigation rights, and the value of such services and relinquished rates would be equal to the fair market value of the subsidy provided.

- Assistance would be available regardless of the location at which the physician provided services, including, but not limited to, other hospitals.

Although the OIG Guidance falls short of sanctioning the proposed arrangement discussed therein, the OIG acknowledged that it will take into account the medical malpractice insurance crisis in certain states. Thus, the OIG Guidance may be an indication that carefully structured arrangements intended to provide physicians reasonable relief with respect to the cost and availability of medical malpractice liability insurance (as opposed to arrangements that are designed to disguise improper inducements to physicians) may be viewed as innocuous by the OIG under the anti-kickback statute.

Because of the highly factual nature of any insurance arrangement or program, it is difficult to make generalizations about the impact of the OIG Guidance on many programs, such as hospital-sponsored captive insurance programs. We will be discussing the OIG Guidance with our clients at the next opportunity and will continue to monitor developments in this area.

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