

Akerman Practice Update

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Aligning Incentives - How Can Hospitals Encourage Physicians to Take Actions to Improve Quality and Reduce Costs?

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Physician Action Affects Quality and Cost

Every hospital administrator strives to have his institution equal or exceed national benchmarks for quality of care provided to patients. The real challenge for hospitals is to achieve this objective in a cost-effective manner.

Making this challenge more difficult is the fact that the quality and the cost of care provided by hospitals are largely dependent upon the actions taken by physician members of the hospital's medical staff in caring for their patients. Although physicians are also concerned about providing high quality care for their patients, they are often unaware of actions which can improve the quality of care in the hospital setting, and they are frequently oblivious to the costs incurred by the hospital as a result of certain physician care choices.

Some health care experts believe it may be possible to align the interests of a hospital and the physician members of the medical staff in order to increase quality and reduce costs by instituting "pay for performance" or "shared savings" programs. Although such arrangements may be problematic under the existing regulatory structure, the Centers for Medicare and Medicaid Services (CMS) has

recently indicated that, if structured properly, such programs may be implemented by hospitals seeking to increase quality of care and contain costs.

Gainsharing

In July, 1999, the Office of Inspector General (OIG) of the Department of Health and Human Services (HHS) issued a Special Advisory Bulletin regarding “gainsharing arrangements” between hospitals and physicians. A gainsharing arrangement involves payments by a hospital to physicians of a portion of the savings or “gains” attributable to the physicians’ efforts. The OIG acknowledged that, while “appropriately structured gainsharing arrangements may offer significant benefits where there is no adverse impact on the quality of care received by patients,” such arrangements are generally prohibited by the Civil Money Penalties (CMP) section of the Social Security Act. Such arrangements also raise questions under the Anti-Kickback Statute. The OIG recognized, however, that hospitals have a legitimate interest in enlisting physicians in the hospitals’ efforts to reduce unnecessary expenses, and that there are many ways to generate cost savings which do not adversely affect patient care. The OIG further noted the hospitals may align incentives with physicians to achieve costs savings in ways that do not violate the CMP provisions or the Anti-Kickback Statute. The Special Advisory Bulletin noted that a personal service contract, where the hospital pays physicians a fixed fee that is fair market value for services rendered, rather than a percentage

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of costs savings, is a permissible compensation arrangement between a hospital and physicians.

In subsequent years, the OIG softened its position regarding gainsharing. The Deficit Reduction Act of 2005 required the Secretary of HHS to establish a gainsharing demonstration program to “test and evaluate methodologies and arrangements between hospitals and physicians designed to ... improve the quality and efficiency of care.” In addition, the OIG issued a series of Advisory Opinions in which it authorized gainsharing arrangements between hospitals and physicians. In each of these Advisory Opinions, the OIG advised that, despite continuing concerns about hospitals paying physicians a portion of cost savings, the proposed arrangement would not be subject to prosecution under the CMP or the Anti-Kickback Statute because of the presence in each arrangement of certain safeguards protecting against adverse impact on patient care and reducing the likelihood that the arrangement was being used to increase referrals to the

hospital from physicians.

Although an Advisory Opinion is indicative of what the OIG is thinking with regard to a particular issue, these opinions are of limited general utility because the protection given by an Advisory Opinion is applicable only to the party requesting the Opinion. In each Opinion the OIG expressly cautions that the Advisory Opinion “has no application to, and cannot be relied upon by, any other individual or entity.”

In addition, the Advisory Opinions addressing gainsharing all involved sharing savings based upon use of specific medical devices and supplies by surgeons or cardiologists in connection with surgical or cardiac catheterization procedures. There are no published OIG Advisory Opinions which specifically address sharing of savings arising from comprehensive hospital inpatient care.

Pay For Performance Programs

OIG Advisory Opinion 08-16, posted October 14, 2008, addressed a pay-for-performance program implemented by a hospital for the purpose of incentivizing physicians to achieve certain quality of care standards. Although this Opinion ostensibly dealt with a pay-for-performance program rather than a gainsharing arrangement, the manner in which the program was structured incorporated certain features which are similar to a gainsharing arrangement. The monies which the requesting hospital paid to physician members of its medical staff for achieving certain quality objectives represented a specified percentage

of bonus compensation which the hospital received from a private health insurance company for achieving specified care objectives.

Although not strictly a “gainsharing” arrangement, whereby a hospital shares a portion of cost savings from a particular program with participating physicians, the proposed arrangement did involve the sharing by the hospital of a designated revenue source (payments from the insurance company) with participating physicians, rather than payment of fixed fee compensation to the physicians. In Advisory Opinion 08-16, the OIG stated that, because of the presence of certain safeguards which protect against the arrangement adversely affecting patient care or inducing physicians to make additional referrals to the hospital, it would not impose sanctions against the hospital under the CMP provisions or the Anti-Kickback Statute. Because the funds payable to the physicians in connection with the subject arrangement were derived from insurance company payments relating to improvements in the quality of care provided to the hospital’s inpatients in a number of areas not involving invasive procedures, Advisory Opinion 08-16 confirms that the opportunity to provide financial incentives to physicians to alter certain practice patterns extends well beyond the operating room or cardiac cath lab.

Proposed Regulations

Additional evidence that CMS is beginning to look more favorably on arrangements pursuant to which hospitals may incentivize physicians

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to take certain actions to improve the quality of care and decrease costs is contained in proposed rules promulgated in July, 2008, as part of the 2009 Proposed Physician Fee Schedule. CMS proposed a regulation which would have provided a safe harbor from the prohibitions of the Anti-Kickback Statute for pay-for-performance programs and shared savings programs (also known as “gainsharing”). A substantial volume of comments – both positive and negative – were submitted in response to the proposed regulation. Concerned that the various safeguards contained in the proposed regulation did not appropriately address all concerns, CMS withdrew the proposed regulations in the 2009 Final Physician Fee Schedule and solicited additional public comments. Currently, there is no indication when CMS will repropose rules which protect pay-for-performance or shared savings programs.

The fact that CMS has proposed rules protecting pay-for-performance and shared savings arrangements and subsequently sought additional comments regarding such arrangements, and the fact that the OIG has issued Advisory Opinions which provide that, if appropriate safeguards are present, financial arrangements between hospitals and physicians designed to improve the quality of care and reduce costs should not be subject to prosecution, is evidence of a favorable regulatory attitude toward properly structured arrangements. Although the precise state of the law with regard to such arrangements remains uncertain, there may be opportunities for hospitals to implement a pay-for-performance or shared savings program.

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