PHYSICIAN RECRUITMENT INCENTIVES

Do's and Don'ts

by Susan W. Berson, J.D.

Along with skyrocketing malpractice premiums and decreasing reimbursement rates, the U.S. is experiencing severe shortages of health care providers, including medical oncologists, radiation therapists, and oncology nurses. Financial incentives have always played a role in recruitment efforts, and these incentives are even more important today. Providers—especially physicians—want some promise of financial security before uprooting their families or establishing a practice in a given community.

While offering recruitment incentives makes perfect business sense for a hospital, federal and state laws must be considered. These laws do not flatly prohibit not-for-profit or for-profit hospitals from offering recruitment incentives, but instead establish parameters that must be followed and identify what incentives are acceptable in what situations. Failure to follow these laws can result in significant penalties, exclusion from government programs, and loss of tax-exempt status.

Tax Laws

For a hospital to receive and maintain tax-exempt status from the Internal Revenue Service (IRS), the hospital must serve a community need and not act to benefit private individuals. In 1994 the IRS determined that Hermann Hospital in Houston, Tex., had not acted in such a fashion when it offered certain recruitment incentives, and the IRS threatened to revoke the hospital's tax-exempt status. Hermann and the IRS negotiated a closing agreement that allowed the hospital to maintain its tax-exempt status, but established significant guidelines for recruitment incentives. These guidelines have evolved through the issuance of further guidance from the IRS in 1997, 1998, and 2002.

Although the IRS does not find recruitment incentives a per se violation of a not-for-profit hospital's tax-exempt status, the IRS pronouncements provide important guidance on both the types of incentives that may be offered and to whom the incentives may be offered. The IRS reiterates the need for any incentive to 1) *demonstrably* meet a community need such as access to services or better quality of care, 2) not result in private inurement (benefit), and 3) not violate other laws such as the anti-kickback statute.

Recruitment incentives cannot be tied to increased referrals to the organization. Under certain circumstances, incentives may be paid to physicians in the community (versus relocating physicians) if such physicians do not have a meaningful practice base. Depending on the circumstances, permissible incentives include loans, income guarantees, payment of malpractice premiums (all for limited periods of time), and payment of relocation expenses.

Anti-kickback and Self-referral Laws

While the IRS has provided important tax guidance on permissible incentives, certain differences exist between the legalities of recruitment incentives for tax purposes and the legality of such incentives under the federal and state anti-kickback and self-referral laws.

The Stark law contains an exception for recruitment payments by a hospital to a physician as an incentive to relocate (provided certain other requirements are met); however, some incentives discussed in the IRS pronouncements would fall outside the exception (specifically, payments to physicians already in the hospital's community).

The anti-kickback statute includes a recruitment safe harbor, but incentives paid to physicians in the hospital's community would not be covered because the safe harbor requires, among other things, that the physicians be moving their practice at least 100 miles and that the lion's share of revenue be generated from new patients.

In addition to the safe harbor regulations, the Office of the Inspector General (OIG) has provided some guidance on permissible recruitment incentives under the anti-kickback statute. In OIG Advisory Opinion No. 01-4, the OIG indicated that a specific recruitment arrangement between a hospital and a physician that did not comply with all the requirements of the physician recruitment safe harbor would not be the subject of enforcement action. In this instance, the OIG determined that, while the arrangement did not meet all the requirements for the safe harbor exception, the hospital had done a bona fide needs analysis, was located in a medically underserved area, and the physician would not be bringing an existing stream of referrals to the hospital.

IRS pronouncements and the OIG safe harbor regulations, referral exceptions, and advisory opinions highlight the multitude of factors that must be considered when structuring a recruitment arrangement.

Determining the legality of the arrangement in a fact-specific manner is necessary as well. Hospitals should involve the Board of Directors in the development and approval process of incentive arrangements. While hospitals should follow the general parameters provided, they must carefully analyze each recruitment arrangement on its own merits.

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