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What Health Providers Can Learn From Recent OIG Report

Law360, New York (January 28, 2014, 6:15 PM ET) -- Remember bumbling, lovable Sgt. Hans Schultz on the old "Hogan's Heroes" television series? He avoided knowing about the escapades of the wily GI POWs by covering his eyes with his hand and chanting, "I see nothing! I see nothing!"

Well, it turns out that the Sgt. Schultz defense can work with the Office of Inspector General of the Department of Health and Human Services when it comes to knowledge that might otherwise trigger a violation of the federal Anti-Kickback Statute. It worked in the first OIG advisory opinion of 2014, OIG Advisory Opinion No. 14-01, posted Jan. 21.

The opinion came in response to a request for an opinion on the Anti-Kickback Statute implications of an arrangement calling for a percentage-based fee paid to a placement agency in return for referring new residents to senior residential communities. The nub of the issue was that the residents who were referred to the senior residential communities might at some point in the future receive services provided by facilities affiliated with the residential communities and paid for by Medicare or Medicaid.

The company requesting the opinion is a parent company that owns and controls subsidiaries involved in senior housing and geriatric care. The subsidiaries include 11 senior residential communities, two skilled nursing homes and a management company. The senior communities offer various services, including care by licensed nurses, such as medication administration and wound care. Nearly all of the residents in the retirement communities pay for their rent and other services out of their own pockets or through private insurance, but a "small percentage" of residents in three of the 11 communities are on a Medicaid program for the elderly. In addition, the nursing home staff also provides federally payable services such as speech, occupational and physical therapy to residents of the retirement communities, both in-home and in the nursing facilities.

At issue was a placement contract between an unrelated placement agency and two of the eleven residential communities. Under the placement contract, the agency finds new residents for the two communities and receives a fee each time it does so. The fee is a prescribed percentage of a new resident's first month's charges, or in some cases the first two months', excluding any charges for services paid for by a federal program.

The placement contract forbids the agency to refer any residents who are known to rely in any way on Medicare, Medicaid or other federal or state funding sources for services provided by any of the parent's subsidiaries. Correspondingly, the contract also provides that the retirement communities will not accept the referral of such residents from the agency. Although one of the two communities has some residents who are on the Medicaid program for the elderly, they were not referred by the agency.

Nevertheless, it is possible that some of the residents placed by the agency in return for the percentage-fee payment will at some future time receive services provided by affiliates of the two retirement communities and paid for by Medicare or Medicaid. What's more, the companies have the ability to track residents and determine which residents eventually receive federally funded services provided by the affiliates. However, the request for the opinion included a certification that the companies did not track such information. As discussed below, it's unclear whether or not the nontracking commitment is absolute.

So, the issue is whether a violation of the Anti-Kickback Statute exists when one company pays a percentage-based fee to a placement agency for referral of residents who may at some point in the future receive Medicare- or Medicaid-funded services provided by an affiliate of the company that pays the fee, when the company has the ability to track the residents who eventually receive such services but does not do that tracking.

The OIG began its analysis by observing that the Anti-Kickback Statute's scope covers any arrangement where any one purpose of the arrangement is to receive remuneration for a referral of Medicare or Medicaid services or to induce further referrals. Noting that the placements in question include residents who might eventually receive Medicare or Medicaid services provided by entities within the affiliated group, the OIG stated that "there is remuneration that implicates" the Anti-Kickback Statute.

The opinion then went on to observe that percentage-payment arrangements are "inherently problematic" because in their very nature they relate to the volume and value of business generated between the payer entity and the recipient entity.

After laying that rather sobering foundation and explicitly noting that the arrangement in question "could potentially generate prohibited remuneration" under the Anti-Kickback Statute, the opinion stated that the OIG "will not impose administrative sanctions" under the statute. In other words, the arrangement may very well be illegal, but the OIG will allow it to proceed without penalty.

Why would the OIG decline to enforce what it believes is "inherently problematic" and "could potentially generate prohibited remuneration"? Well, the opinion offers four factors that it deems satisfactory to "adequately reduce the risk" of improper payments under the statute.

First, the percentage fee, while inherently problematic, is based solely on rent and services payable during the first one or two months of a resident's stay at the retirement community. And the "absence of a link" between the fee and any services that might be paid for by a government program "serves to reduce the risk of fraud and abuse."

Second, the placement contract expressly prohibits the referring or acceptance of residents known to rely in any way for Medicare or Medicaid services that might be provided by any of the affiliates of the two residential communities.

Third, the placement agency's referrals are only for housing and services that are not payable by federal health care programs. The two retirement communities that have contracted with the agency do not provide any services paid by Medicare or Medicaid, and their residents do not have access to the services provided by the staffs of the affiliated nursing homes. True, some of the residents placed by the agency may later receive such services, but that would be a change in circumstances that is "speculative and outside the control" of the placement agency.

As though to underscore the importance of this third factor, the opinion includes a footnote declaring that no opinion would be rendered on a "past arrangement" that included referrals by the agency to one of the retirement communities whose residents had access to therapy services provided by the staff of an affiliated nursing home and paid for by a federal program.

Fourth — and this is where the Sgt. Schultz defense come into play — the request for the opinion included a certification that neither the parent company nor any of the affiliates "track referrals or common residents or patients" among the affiliates. Nor do they limit a resident's choice of providers, practitioners, or suppliers.

In other words, the facilities have the ability to follow the trail of residents referred by the agency and to know which ones eventually receive Medicare or Medicaid services provided by other entities within the affiliated group, but they promise that they don't do so. Like Sgt. Schultz, they could see what was going on; but also like him, they don't. They cover their eyes. They see nothing.

But wait a minute. It may not be quite correct to say that they see nothing. Like Sgt. Schultz they have the ability, if they want, to peek once in a while. And it's unclear from the opinion whether or not they do peek once in a while. We can see this by focusing on the subtle disconnect between the opinion's recitation of the facts and its articulation of this fourth factor.

The recitation of facts in the factual background section of the opinion states that the parent company has certified that although it can track the residents it does not "regularly" do so. In other words, Sgt. Schultz doesn't peek very often. But in the legal analysis section of the opinion, the certification becomes absolute: they have certified that they "do not track referrals." In other words, Sgt. Schultz never peeks.

So, what lessons can health care providers draw from this opinion?

First and most easily, we know that technically no one other than the party requesting the opinion can rely on it. That's always the case with these opinions.

Second, we are reminded that percentage-based contracts are inherently risky. Why? Because in their very nature they reflect the "value" and the "volume" of referrals, and that is precisely what the Anti-Kickback Statute forbids.

Third, we should be sobered by the explicit declaration that the opinion does not extend to the placement agency's previous referrals to one of the residential communities whose residents had access to therapy services provided by an affiliated nursing home. And at least according to the wording of the opinion, it is "access" to the services, rather than actual utilization, that is problematic.

Finally, there's the Sgt. Schultz defense. We know that it has some value, but left open is the question of precisely how much value it has. We know that it has some value because the opinion makes it clear that the ability to track referrals is not in itself evidence of impermissible intent under the Anti-Kickback Statute. What is unclear is whether the provider must avoid tracking altogether, as the legal analysis indicates, or alternatively, whether it is sufficient to avoid regular tracking, as the factual background section states. Clearly, though, the former is the safer of the two alternatives.

In other words, it's clear that Sgt. Schultz can stay out of trouble with Col. Wilhelm Klink by covering his eyes. He may even be able to get away with peeking from time to time. But it's risky.

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