

Ambulance Service Related Advisory Opinion Released.
G. Christopher Kelly

In an advisory opinion, number 02-15, the Office of Inspector General (“OIG”) has concluded that it would not impose penalties against a municipally owned ambulance service for routine waiver of Medicare co-payments or deductibles. The OIG is the office of the federal government that, among other duties, serves as the watch dog for violations of the Anti Kick-Back Act. The advisory opinion was requested by a municipal fire district whose name was not disclosed in the opinion. The municipality (“Fire District”) requested that the OIG consider specific facts and determine whether an arrangement proposed by the Fire District would be legal.

The Fire District is a municipal corporation that owns and operates its own ambulance service. It is the only provider of emergency medical services to its residents and it does not provide routine transport services. The Fire District proposes to implement a new arrangement where, by city ordinance, no residents will be billed for its ambulance services. The Fire District will continue to bill insurance companies including Medicare for the services provided to residents, however it will not bill the resident for any amount above their insurance coverage, including deductibles and co-payments. This is commonly referred to as “insurance only billing” and is generally illegal under the Anti Kick-Back Act. Since the Fire District receives county funds, it proposes to treat local property taxes as receipt of these co-payments. The theory being that the Fire District is receiving money from the patients via property taxes, therefore there is no total waiver and money is received from the patient, just in a non-traditional manner.

The Anti Kick-Back Act (“AKA”) makes it a criminal offense to intentionally give or receive anything of value in exchange for the referral of Medicare patient business. Violation of the statute is a criminal felony punishable by a fine of up to \$25,000 and/or imprisonment of up to five years. A conviction of an AKA crime can also lead to exclusion from the Medicare and Medicaid programs, meaning that the provider can no longer bill these insurance programs. There can further be civil liabilities under the AKA through the False Claims Act or other similar laws which would require all funds received as part of the illegal activity to be returned to the government, along with additional heavy penalties.

The OIG has historically disfavored any waiver of co-payments or deductibles. The concern is that waiver of these co-payments or deductibles is made in order to entice patients to use one service over another, which is precisely what the AKA is designed to prevent. The OIG has made exceptions where the waiver is based on financial need of a specific patient. In most other circumstances, the OIG has concluded that co-pay waiver is an illegal attempt to solicit Medicare patients. However, there is a special exemption in the Medicare Carriers Manual (MCM), section 2309.4, which provides that:

...a [state or local government] facility which reduces or waives its charges for patients unable to pay, or charges patients only to the extent of their Medicare and

other health insurance coverage, is not viewed as furnishing free services and may therefore receive program (Medicare) payment.

Although the MCM does not directly address the issue, the OIG concluded that since the Fire District was a local government service and therefore not required by Medicare to collect co-payment or deductibles, the OIG would not impose AKA penalties against the Fire District for the proposed new arrangement. The OIG also made it clear that this waiver of co-pays is only appropriate for actual residents of the fire district. If the waiver was extended to citizens of other districts, the results would likely be a violation of the AKA.

Another special note made by the OIG was directed to ambulance companies who contract with municipalities. According to the advisory opinion, “there is an important difference between a municipality owned ambulance company *voluntarily* waiving co-payments for its own residents and a municipality *requiring* a private company to bill ‘insurance only’ as a condition of getting the municipality’s EMS business.” While the advisory opinion concludes that waiver by the municipality is not a violation, the AKA is specifically intended to deter the solicitation of anything of value in exchange for referrals, which is precisely what such an arrangement with a private company would entail.

The advisory opinion stated that the waiver allowed by the MCM applies only to the municipalities themselves, and not to contracts with outside ambulance services. The OIG gave the following example: “...where a municipality contracts with an outside ambulance supplier for the provision of services to residents of its service area, the municipality cannot require the ambulance supplier to waive out-of-pocket coinsurance amounts *unless* the municipality pays the coinsurance owed or otherwise makes provisions for the payment of such coinsurance.” The OIG indicated that set sums paid annually or at intervals during the year would satisfy the municipality’s duty to make “provisions for the payment of such coinsurance” if the sums were calculated to cover the actual coinsurance obligations. This means that the municipality would not have to keep up with each and every patient’s charges and make payment in the exact amount of the co-payments due, however the municipality must come up with a method to estimate the amount due and pay that reasonable estimated amount. To fail to make a good-faith estimate and payment could possibly subject the municipality and the private ambulance company to False Claims Act violations.

As with any advisory opinion, the OIG stated that the opinion was based on the information given to it by the requesting municipality, and therefore was dependent on its full and truthful disclosure of facts. The opinion can not and should not be relied upon by parties other than the one specifically requesting the opinion. The OIG and the federal government are not bound by this opinion and reserve the right to change their position in the future. Specific facts often lead to very different results (for example the difference between a municipality and a private company contracting with a municipality), therefore, you should consult an attorney before beginning any course of action that you

have questions about. For the same reasons, nothing in this article is intended by the author to be construed as legal advice.

The opinion can be found at

<http://www.oig.hhs.gov/fraud/docs/advisoryopinions/2002/ao0215.pdf>

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