

Publications

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OIG Raises Anti-Kickback Concerns About Subscription-Based Referral Management Platforms

Key Takeaways:

- OIG's Advisory Opinion 26-15 asserts that a subscription-based referral management software arrangement could implicate the federal Anti-Kickback Statute.
- Health care providers, hospitals and technology companies should evaluate referral platform arrangements in light of this new opinion.

The U.S. Department of Health and Human Services Office of Inspector General (OIG) recently issued Advisory Opinion 26-15, addressing a subscription-based referral management software platform. OIG concluded that the arrangement raises concerns under the federal Anti-Kickback Statute (AKS) because — according to the requestor of the opinion — providers that pay subscription fees receive a competitive advantage in obtaining referrals for post-acute care services as compared to providers that do not pay the fees. In this alert, we examine OIG's analysis and highlight considerations for organizations that develop, market or use referral management technology.

How the Subscription-Based Referral Platform Operates

The requestor operates home health agencies and relies on referrals from hospitals as part of the discharge planning process. Under the arrangement at issue, the requestor pays subscription fees to a technology vendor that operates an online referral management platform connecting hospitals with home health agencies.

According to the opinion, this platform enables participating home health agencies to receive and respond to electronic referral requests from hospitals. Hospitals present to patients the names of all available home health agencies, regardless of whether the agencies subscribed to the platform, but only subscribing agencies have the ability to receive and accept referrals electronically through the software. Non-subscribing agencies instead rely on fax, email, telephone or other manual methods of communication, which result in delays that reduce the ability of those non-subscribing providers to secure referrals (according to the requestor). In addition to fees from post-acute providers, the technology vendor also receives fees from hospitals that use its software.

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Why OIG Concluded the Arrangement Raises AKS Concerns

OIG concluded that the arrangement implicates the AKS because the home health agency pays the vendor in return for arranging referrals of federally reimbursable services. OIG determined that the arrangement does not qualify for protection under the referral services safe harbor (42 C.F.R. § 1001.952(f)) and then concluded that the arrangement poses more than a minimal risk of fraud and abuse, based primarily on concerns regarding patient steering and unfair competition. Relying on the requestor's certification that hospitals often award referrals on a first-come, first-served basis, OIG concluded that paying subscribers gain a significant competitive advantage by being able to respond electronically and more quickly than non-subscribing agencies. In OIG's view, the arrangement effectively allows providers to improve their access to referrals by purchasing software subscriptions rather than competing on the quality of care they provide.

OIG also expressed concern that providers paying subscription fees "could face pressure to recoup" those costs, potentially creating incentives for overutilization or billing for medically unnecessary services reimbursable by federal health care programs.

This opinion largely reiterates OIG's analysis in Advisory Opinion 11-06, a 15-year-old unfavorable opinion addressing a similar arrangement. Interestingly, AO 26-15 does not engage with some key changes over that decade-and-a-half period. For example, OIG modified the personal services safe harbor in 2020 in a manner that could open the door for arrangements like those discussed in AO 26-15 to fit within that safe harbor (by no longer requiring "aggregate compensation" to be set in advance). In addition, OIG has issued at least two favorable opinions (Advisory Opinions 19-04 and 23-04) focused on an online provider directory that is at least a cousin of the referral software addressed here.

Given the limitations of the advisory opinion model, the industry is left with significant ambiguity about how to interpret these different signals. Furthermore, software platforms like the one in AO 26-15 may be able to show significant benefits that are not reflected in unfavorable advisory opinions, such as the potential to improve patient care and decrease costs by creating efficiencies, establishing reliable data sharing and integrating electronic data systems. Although AO 26-15 does not weigh these potential benefits, affected companies should consider how these benefits impact the risk profile of similar arrangements.

Implications for Technology Vendors, Providers and Hospitals

Like any OIG advisory opinion, AO 26-15 applies only to the specific facts presented and the requesting party. Even with its limited scope, this opinion could attract new scrutiny to these software platforms. As referral management software and other technology-enabled referral platforms become more common across the health care industry, organizations that develop, market or use these technologies should consider whether OIG's analysis has implications for their existing arrangements.

Organizations in the following sectors should consider reviewing their referral management arrangements with legal counsel to determine what impact, if any, AO 26-15 may have on their current practices or future business models:

- Health care technology vendors that develop, market or operate referral management, discharge planning or care coordination software.
- Post-acute care providers, including home health agencies and other providers that use referral management software to receive patient referrals.
- Hospitals and health systems that use referral management technology as part of their discharge planning and referral processes.

Notably, the advisory opinion does not address the many variations of referral management technology arrangements that may present different compliance considerations under the AKS. As a result, organizations should evaluate their arrangements based on their particular facts and circumstances. Should you have any questions regarding this advisory opinion and its impact on your referral management arrangements, please reach out to one of the authors or your regular Polsinelli attorney.