

OIG Permits Senior Community's Referral Fee Arrangement

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Providers of senior housing and services are sometimes approached by placement agencies that promise to direct potential residents to them in return for a fee. Such arrangements can be beneficial to seniors who are making the transition to an institutional setting, as well as to the facilities to which they are directed. The former receive information and guidance about their options, while the latter receive valuable marketing assistance. These arrangements can raise issues, however, under the federal anti-kickback statute, which makes it a criminal offense to knowingly solicit, receive, offer or pay remuneration in an effort to induce the referral of federal health care program business. Any payment to a placement agency for the referral of residents for the receipt of services covered by Medicare or Medicaid would constitute a clear violation of the statute.

There has been less clarity about the status of referral arrangements involving residents who are not currently receiving services covered by Medicare or Medicaid but who may later do so. This scenario arises where the new resident moves into an independent or assisted living community that is part of a larger organization that includes skilled nursing facilities. The question then is whether the possibility that the resident may later receive services covered by Medicare or Medicaid makes the payment of a referral fee to the placement agency illegal.

On January 21, 2014, the Office of Inspector General released OIG Advisory Opinion No. 14-01, discussing precisely this issue. In it, OIG stated that a specific placement agency arrangement would not violate the anti-kickback statute for several reasons:

- The placement fees were based on the initial rent and services paid for by a new resident. Even though the resident might ultimately be transferred to a skilled nursing facility to receive services covered by Medicare or Medicaid, there was a reduced risk of fraud and abuse because the fee was based solely on the charges for non-health services.
- The contract between the placement agency and the provider prohibited the placement of new residents whose charges would immediately be covered by Medicare or Medicaid.

- The communities in which new residents were placed offered residential and assisted living services that were not subject to reimbursement by Medicare or Medicaid. Although a resident might be transferred to a skilled nursing facility in the future for services covered by Medicare or Medicaid, this was considered to be speculative and outside the control of the placement agency.
- The provider did not track internal resident transfers, therefore suggesting that the residents sent by the placement agency were not being directed to skilled nursing care that might be reimbursed by Medicare or Medicaid.

The OIG opinion indicates that there is no anti-kickback violation where an arrangement between a provider and placement agency ends with the placement of a new resident in an independent or assisted living community, and where any transfer of the resident to a skilled nursing facility owned by the same provider would be unrelated to the arrangement. Providers and placement agencies involved in referral arrangements should apply the above factors, and take other measures to make clear that the transfer of referred residents to skilled nursing care is remote, unpredictable, and unrelated to the placement agency arrangement.

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