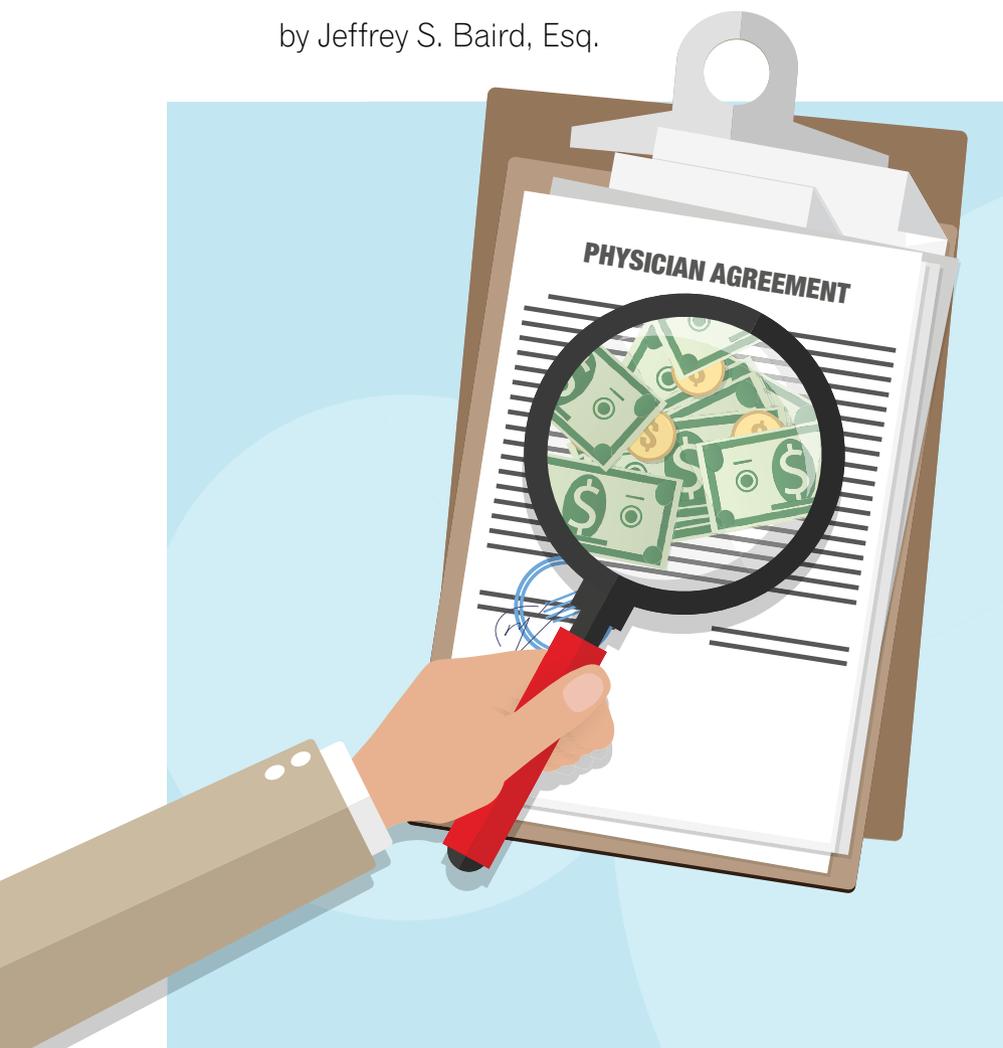




OIG Fraud Alert: Physician Compensation Arrangements

by Jeffrey S. Baird, Esq.



There are two important principles to which a pharmacy must adhere. The first is that the pharmacy "lives in a glass house." If the pharmacy is doing something it should not be doing, then "someone knows about it." This "someone" might be an existing employee, a former employee, a competitor, or an employee of

a person (such as a physician) with whom the pharmacy has a business relationship. A person who is aware of what the pharmacy is doing wrong might end up becoming a qui tam (whistleblower) relator (plaintiff).

The second principle is this: If your brain tells you one thing, and your

gut tells you something else, then you need to ignore your brain and trust your gut. As humans, we are capable of rationalizing dishonest or unethical decisions. However, our gut never lies.

PHARMACY-PHYSICIAN RELATIONSHIP

With these principles in mind, let us examine the relationship between a pharmacy and a physician. It is not uncommon for pharmacies to enter into medical director arrangements in which the pharmacies pay compensation for the physicians' services. The challenge is this: Is this a legitimate arrangement in which the pharmacy is paying fair market value compensation for substantive services, or is this a "sham" meant to simply provide compensation to a referral source?

On June 9, 2015, the Office of Inspector General addressed this issue by issuing a fraud alert labeled "Physician Compensation Arrangements May Result in Significant Liability." The fraud alert states that "Physicians who enter into compensation arrangements such as medical directorships must ensure that those arrangements reflect fair market value for bona fide services the physicians actually provide. Although many compensation arrangements are legitimate, a compensation ar-

Continued on page 18 ►

► *Continued from page 16*

arrangement may violate the anti-kickback statute if even one purpose of the arrangement is to compensate a physician for his or her past or future referrals of federal health care program business. OIG encourages physicians to carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them.”

OIG recently reached settlements with 12 individual physicians who entered into questionable medical directorship and office staff arrangements. OIG alleged that the compensation paid to these physicians under the medical directorship arrangements constituted improper remuneration under the anti-kickback statute for a number of reasons, among them being that the payments took into account the physicians’ volume or value of referrals and did not reflect fair market value for the services to be performed, and because the physicians did not actually provide the services called for under the agreements.

OIG also alleged that some of the 12 physicians had entered into arrangements under which an affiliated health care entity paid the salaries of the physicians’ front office staff. Because these arrangements relieved the physicians of a financial burden they otherwise would have incurred, OIG alleged that the salaries paid under these arrangements constituted improper remuneration to the physicians. OIG determined that the physicians were an integral part of the scheme and subject to liability under the civil monetary penalties law.

STEEP PENALTIES FOR FRAUD

Those who commit fraud involving federal health care programs are subject to possible criminal, civil,

As humans, we are capable of rationalizing dishonest or unethical decisions.

However, our gut never lies.

and administrative sanctions. For more information on physician relationships, see OIG’s “Compliance Program Guidance for Individual and Small Group Physician Practices” available at <http://bit.ly/physician-compliance>, and OIG’s “A Roadmap for New Physicians: Avoiding Medicare and Medicaid Fraud and Abuse” available at <http://bit.ly/avoid-fraudroadmap>.

If you have information about physicians or other providers engaging in any of the activities described here, contact the OIG Hotline at <http://bit.ly/oighotline>, or by phone at 800-447-8477 (800-HHS-TIPS).

Under the Medicare anti-kickback statute, it is a felony for a pharmacy to knowingly or willfully offer or pay any remuneration to induce a person to refer a person for the furnishing or arranging for the furnishing of any item for which payment may be made under a federal health care program, or the purchase or lease or the recommendation of the purchase or lease of any item for which payment may be made under a federal health care program.

SAFE HARBORS

There are a number of “safe harbors” to the anti-kickback statute. If an arrangement falls within a safe harbor, then, as a matter of law, it does not violate the anti-kickback statute.

When entering into a medical director agreement with a referring physician, the arrangement needs to comply with the personal services and management contracts safe harbor to the anti-kickback statute. Among other requirements, the medical director agreement (MDA) must be in writing and signed by the physician and pharmacy. The MDA must also specify the services to be provided by the physician. If the MDA provides for services on a sporadic or part-time basis, then it must specify the scheduled intervals, their precise length, and the exact charge for each interval. The term of the MDA must be for not less than one year, and the compensation must be set in advance, be consistent with fair market value, and must not take into account any business generated between the parties. Additionally, the services performed must not involve a business arrangement that violates any state or federal law.

Note it is difficult for an MDA to comply with the details of the “sporadic or part-time basis” requirement. For this reason, the best that an MDA can normally hope to accomplish is to substantially comply with the safe harbor. ■

Jeffrey S. Baird, Esq. is chairman of the Health Care Group at Brown & Fortunato, P.C., a law firm based in Amarillo, Texas. He represents pharmacies, infusion companies, home medical equipment companies and other health care providers throughout the United States. Baird is board certified in health law by the Texas Board of Legal Specialization. He can be reached at (806) 345-6320, or jbaird@bf-law.com.