

Eli's Hospice Insider

Compliance: Consider This Newly Greenlit Strategy For Alleviating Aide Shortage

OIG gives thumbs up to paying patients' family members to become aides.

The current staffing shortage is leading hospice providers to get creative - but beware of too much creativity landing you in legal hot water. That's what one unnamed home health agency company was worried about, and it sought an Advisory Opinion from the HHS Office of Inspector General on the matter.

More than 90 percent of the provider's patients are medically fragile children whose services are paid for by Medicaid. The requestor's agencies propose implementing a program where it hires those patients' family members - as well as any qualified person who is interested - and pays for them to obtain their certified nurse aide certification.

How it would work: The state in which the provider operates "has a State plan that provides Medicaid reimbursement for services provided by parents or other relatives to medically fragile children who qualify for Medicaid-covered home health aide services if those parents or relatives are: (i) certified in [State redacted] as CNAs; and (ii) employed by an HHA," the OIG says in Advisory Opinion No. 22-03 posted Feb. 14. "Under the Proposed Arrangement, Requestors would offer to pay the tuition costs of nurse aide certification programs for new employees who have been hired to work as CNAs but who have not yet passed the requisite State certification exam," the OIG explains.

"While the Proposed Arrangement would not be limited to parents or relatives of children requiring home health aide services, Requestors ... anticipate that the vast majority of individuals who would participate in the Proposed Arrangement would be parents or relatives of Medicaid-eligible, medically fragile children," the opinion says. And while the employees wouldn't be required to refer their children to the HHA where they work, most likely would do so.

After hire but before CNA certification, the employees would get paid as bona fide employees for attending orientation, updating education, and furnishing services as allowed by the state. "Requestors would pay: (i) the employees' program tuition costs directly to the school operating the nurse aide certification program in which the employee is enrolled; and (ii) salaries to the employees for completing the modules and any services they perform pre- and post-CNA certification," the opinion lays out.

Employees would have to pass their CNA test to continue employment, and would have to work for the agency for one year or pay back the tuition costs, the opinion indicates.

Decision: The proposed arrangement does implicate the Federal Anti-Kickback Statute and the Beneficiary Inducements Civil Money Penalty, the OIG acknowledges. But the plan would "satisfy the statutory exception and regulatory safe harbor for employees, and therefore the remuneration exchanged under the Proposed Arrangement would not constitute prohibited remuneration under the Federal Anti-Kickback Statute," the watchdog agency concludes. Likewise, because it meets "the statutory exception and regulatory safe harbor for employees, the Proposed Arrangement would meet the exception to the Beneficiary Inducements CMP" as well, the opinion says.



How This Opinion May Help Other Providers

"This Advisory Opinion technically applies only to the Requestor," notes Washington, D.C.-based healthcare attorney **Elizabeth Hogue**. But "there's no doubt that Advisory Opinions are often used by others to evaluate whether

arrangements are likely to pass muster," Hogue tells AAPC. "So this Advisory Opinion is likely to be useful [for] Medicare certified agencies and non-pediatric agencies, too," she says.

"In the current health care employment market, providers may look for creative solutions to attract the workforce necessary to provide patient care," says attorney **Nathaniel Arden** and legal intern **Erin Howard** with law firm Robinson+Cole. "This Advisory Opinion demonstrates the OIG's willingness to permit one such solution where appropriate safeguards are in place and an applicable AKS exception or safe harbor is met," Arden and Howard note in online legal analysis.

"An employee tuition reimbursement program would not normally be a fraud and abuse issue, but here, they are proposing to pay family members to obtain a CNA license," observes attorney **Robert Markette Jr.** with law firm Hall Render in Indianapolis. "Such licensure and training has real value, because the family member, once licensed, could use that license with any agency. This would seem to make this a potential CMP/Beneficiary inducement issue, but the opinion allows the agency to do that in line with the parameters set forth in the letter," Markette highlights.

"It's helpful to have the OIG's blessing on this arrangement, especially in view of current staffing shortages," Hogue judges.

Providers looking to pattern their own program after the one in the opinion would have many considerations, however.

"Agencies that are considering this type of program will want to be certain that, in their state, Medicaid allows family members to be employed to care for beneficiaries," Markette offers. "They should also consider if there are state fraud and abuse laws that prevent them from pursuing this type of program," he tells AAPC.

In a similar vein, some HHAs may want to "put together programs to train [aides]," Markette notes. "This then gave the agency a pipeline." (In the Advisory Opinion, an unrelated third party provides the CNA training.)

"Agencies might now consider paying for CNA training as an option," Markette indicates. "If we are just hiring employees, who are not related to potential Medicare/Medicaid beneficiaries, there isn't an inducement issue and a tuition reimbursement program could be a recruitment tool used by agencies," he notes.

But that doesn't mean the program would be free of potential legal violations. "The issues at that point are much more employment law-related," he cautions. "Agencies will likely want to consider once the minimum service time is up what they do to keep the CNAs. A non-compete might keep them from going to another HHA, but what about SNFs?" Markette asks. "The agency ought to consider how much more a SNF pays a CNA. Can the agency keep its salary and benefits competitive with the SNF?" he notes.

For just such reasons, agencies "want to be sure that they have clearly written policies, especially as it relates to the tuition and later forgiveness," Markette advises. "If an employee leaves early, the agency wants to be sure that the agency can recoup the tuition payments from the employee and do so without creating any issues related to wage and hour law. Those agreements will need to be carefully prepared to conform with state laws," he says.

"Employers will need to seek competent legal advice, especially if they want to deduct any outstanding amounts from the last paycheck," Markette urges. "Deductions from pay can be extremely risky and should only be pursued with the advice of counsel," he warns.

Note: The seven-page Advisory Opinion is at <https://oig.hhs.gov/documents/advisory-opinions/1022/AO-22-03.pdf>.