



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information, unless otherwise approved by the requestor(s).]

Issued: February 9, 2022

Posted: February 14, 2022

[Name and address redacted]

Re: OIG Advisory Opinion No. 22-03

Dear [Name redacted]:

The Office of Inspector General (“OIG”) is writing in response to your request for an advisory opinion on behalf of [names redacted] (“Requestors”) regarding Requestors’ proposal to pay salaries to, and nurse aide certification program tuition costs on behalf of, new employees who Requestors have hired to work as certified nurse aides for Requestors’ home health agencies (the “Proposed Arrangement”). Specifically, you have inquired whether the Proposed Arrangement, if undertaken, would constitute grounds for the imposition of sanctions under: the civil monetary penalty provision at section 1128A(a)(7) of the Social Security Act (the “Act”), as that section relates to the commission of acts described in section 1128B(b) of the Act (the “Federal anti-kickback statute”); the civil monetary penalty provision prohibiting inducements to beneficiaries, section 1128A(a)(5) of the Act (the “Beneficiary Inducements CMP”); or the exclusion authority at section 1128(b)(7) of the Act, as that section relates to the commission of acts described in the Federal anti-kickback statute and the Beneficiary Inducements CMP.

Requestors have certified that all of the information provided in the request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties in connection with the Proposed Arrangement, and we have relied solely on the facts and information Requestors provided. We have not undertaken an independent investigation of the certified facts and information presented to us by Requestors. This opinion is limited to the relevant facts presented to us by Requestors in connection with the Proposed Arrangement. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement, if undertaken, would not generate prohibited remuneration under the Federal anti-kickback statute or Beneficiary Inducements CMP. Accordingly, the OIG would not impose administrative sanctions on Requestors in connection with the Proposed Arrangement under section 1128A(a)(7) of the Act, as that section

relates to the commission of acts described in the Federal anti-kickback statute; the Beneficiary Inducements CMP; or the exclusion authority at section 1128(b)(7) of the Act, as that section relates to the commission of acts described in the Federal anti-kickback statute and the Beneficiary Inducements CMP.

This opinion may not be relied on by any person¹ other than Requestors and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

Requestors own and operate home health agencies (“HHAs”) in [State redacted] that employ certified nurse aides (“CNAs”) who provide home health aide services to the HHAs’ patients, over 90 percent of whom are medically fragile children.² [State redacted] 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. 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.

While the Proposed Arrangement would not be limited to parents or relatives of children requiring home health aide services, Requestors certified that they 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. Requestors also anticipate that these parents or relatives would refer such children to one of Requestors’ HHAs. Requestors would offer the Proposed Arrangement regardless of financial need and would advertise the Proposed Arrangement as a benefit available to all new employees hired to provide CNA services without reference to the potential for new employees to provide home health aide services to their children or relatives.

Under the Proposed Arrangement, Requestors would hire individuals seeking to become CNAs, and during the initial period of these individuals’ employment (i.e., prior to their certification as CNAs), they would participate in a nurse aide certification program to become CNAs and take the State CNA exam. During this time, the employees also would participate in Requestors’ mandatory orientation and education modules and may perform services that are reimbursable by

¹ We use “person” herein to include persons, as referenced in the Federal anti-kickback statute and Beneficiary Inducements CMP, as well as individuals and entities, as referenced in the exclusion authority at section 1128(b)(7) of the Act.

² For purposes of this advisory opinion, “medically fragile children” refers to children in [State redacted] who need long-term support services at a level comparable to services typically provided in a skilled nursing facility or acute hospital and whose condition meets the Social Security Administration definition of disability.

Medicaid.³ 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;⁴ and (ii) salaries to the employees for completing the modules and any services they perform pre- and post-CNA certification. Under the Proposed Arrangement, Requestors would make employees' continued employment contingent on their successful completion of the nurse aide certification program and passing the State CNA exam.⁵ Requestors certified that the employees would be bona fide employees from the time Requestors hire them (i.e., both prior to and after their certification as CNAs).⁶

Under the Proposed Arrangement, an employee would not be required to reimburse Requestors for any tuition costs that Requestors paid on behalf of the employee, as long as the employee remains employed with Requestors for at least 1 year after becoming a CNA (i.e., after completing a nurse aide certification program and passing the State CNA exam). If the employee is employed by Requestors for less than 1 year after becoming a CNA, Requestors would require the employee to reimburse Requestors a prorated amount of the tuition costs paid by Requestors based on the portion of the 1-year period that the individual would not be working as a CNA for Requestors. Requestors certified that a CNA's responsibility to reimburse tuition costs would be solely dependent on the CNA's employment status and not the CNA's ability to refer patients to Requestors. Requestors certified that they would not terminate the employment of parent or relative CNAs if the children for whom they provide care do not receive home health aide services from Requestors' HHAs at any point. In these cases, Requestors would continue to employ the CNAs, provided they remain employees in good standing and are willing and available to provide CNA services to other patients either on a permanent or on-call basis.

³ Requestors certified that the [State redacted] Medicaid program may pay for services provided by individuals who have completed a nurse aide certification program but who have not yet passed the State CNA exam, as long as the individuals providing the services are supervised in accordance with State requirements.

⁴ Requestors certified that they would pay the tuition costs at any school that has a nurse aide certification program that meets Requestors' quality and cost criteria. Requestors do not operate their own nurse aide certification program. Requestors also certified that they would comply with all applicable tax requirements related to educational assistance.

⁵ The scope of the Proposed Arrangement is limited to employees who complete the nurse aide certification program and pass the State CNA exam and who provide services that are reimbursable by Medicaid or other Federal health care programs as employees of Requestors. We have not been asked to opine, and express no opinion, regarding Requestors' payment of salaries to, or tuition costs on behalf of, individuals who either do not complete the nurse aide certification program or pass the State CNA exam and who do not provide services that are reimbursable by Medicaid or other Federal health care programs as employees of Requestors.

⁶ Advisory opinions may not address whether an individual is a bona fide employee. Section 1128D(b)(3)(B) of the Act. Thus, for purposes of this advisory opinion, we rely on Requestors' certification that these individuals would be bona fide employees in accordance with the definition of the term set forth at 26 U.S.C. § 3121(d)(2).

II. LEGAL ANALYSIS

A. Law

1. Federal Anti-Kickback Statute

The Federal anti-kickback statute makes it a criminal offense to knowingly and willfully offer, pay, solicit, or receive any remuneration to induce, or in return for, the referral of an individual to a person for the furnishing of, or arranging for the furnishing of, any item or service reimbursable under a Federal health care program.⁷ The statute's prohibition also extends to remuneration to induce, or in return for, the purchasing, leasing, or ordering of, or arranging for or recommending the purchasing, leasing, or ordering of, any good, facility, service, or item reimbursable by a Federal health care program.⁸ For purposes of the Federal anti-kickback statute, "remuneration" includes the transfer of anything of value, directly or indirectly, overtly or covertly, in cash or in kind.

The statute has been interpreted to cover any arrangement where one purpose of the remuneration is to induce referrals for items or services reimbursable by a Federal health care program.⁹ Violation of the statute constitutes a felony punishable by a maximum fine of \$100,000, imprisonment up to 10 years, or both. Conviction also will lead to exclusion from Federal health care programs, including Medicare and Medicaid. When a person commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such person under section 1128A(a)(7) of the Act. The OIG also may initiate administrative proceedings to exclude such person from Federal health care programs under section 1128(b)(7) of the Act.

Congress has developed several statutory exceptions to the Federal anti-kickback statute.¹⁰ In addition, the U.S. Department of Health and Human Services has promulgated safe harbor regulations that specify certain practices that are not treated as an offense under the Federal anti-kickback statute and do not serve as the basis for an exclusion.¹¹ However, safe harbor protection is afforded only to those arrangements that precisely meet all of the conditions set forth in the safe harbor. Compliance with a safe harbor is voluntary. Arrangements that do not comply with a safe harbor are evaluated on a case-by-case basis.

⁷ Section 1128B(b) of the Act.

⁸ Id.

⁹ E.g., United States v. Nagelvoort, 856 F.3d 1117 (7th Cir. 2017); United States v. McClatchey, 217 F.3d 823 (10th Cir. 2000); United States v. Davis, 132 F.3d 1092 (5th Cir. 1998); United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir. 1985).

¹⁰ Section 1128B(b)(3) of the Act.

¹¹ 42 C.F.R. § 1001.952.

The statutory exception and regulatory safe harbor for employees are potentially applicable to the Proposed Arrangement. The statutory exception protects “any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services.”¹² The safe harbor regulations provide that the term “remuneration,” as used in the Federal anti-kickback statute, does not include “any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.”¹³ For purposes of the employees safe harbor, the term “employee” has the same meaning as it does for purposes of 26 U.S.C. § 3121(d)(2).¹⁴

2. Beneficiary Inducements CMP

The Beneficiary Inducements CMP provides for the imposition of civil monetary penalties against any person who offers or transfers remuneration to a Medicare or State health care program beneficiary that the person knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner, or supplier for the order or receipt of any item or service for which payment may be made, in whole or in part, by Medicare or a State health care program. The OIG also may initiate administrative proceedings to exclude such person from Federal health care programs. Section 1128A(i)(6) of the Act defines “remuneration” for purposes of the Beneficiary Inducements CMP as including “transfers of items or services for free or for other than fair market value” and includes a number of exceptions to the definition, including an exception for any permissible practice specified in a statutory exception to the Federal anti-kickback statute or a safe harbor regulation.¹⁵

B. Analysis

1. Federal Anti-Kickback Statute

The Proposed Arrangement would implicate the Federal anti-kickback statute because Requestors’ payment of salaries to, and program tuition costs on behalf of, employees who are parents or relatives of medically fragile children would be remuneration that could induce the parents or relatives to refer such children to Requestors’ HHAs for services that are reimbursable by one or more Federal health care programs. We conclude, however, that the Proposed Arrangement would satisfy the statutory exception and regulatory safe harbor for employees.

Under the Proposed Arrangement, Requestors would pay salaries to, and tuition costs on behalf of, employees who would furnish items and services that are reimbursable by a Federal health

¹² Section 1128B(b)(3)(B) of the Act.

¹³ 42 C.F.R. § 1001.952(i).

¹⁴ Id.

¹⁵ Section 1128A(i)(6)(B) of the Act.

care program. Therefore, we conclude that such payments would constitute “amount[s] paid by an employer to an employee . . . for employment in the furnishing of any item or service for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.”¹⁶ Additionally, Requestors certified that employees seeking to become CNAs under the Proposed Arrangement would be bona fide employees from the time Requestors hire them (*i.e.*, both prior to and after their certification as CNAs) and that these individuals would be employees within the meaning of 26 U.S.C. § 3121(d)(2). For these reasons, we conclude that the Proposed Arrangement 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.

2. Beneficiary Inducements CMP

Requestors’ offer to pay salaries to, and nurse aide certification program tuition costs on behalf of, parents or relatives of Medicaid-eligible, medically fragile children would likely influence such parents or relatives to select one of Requestors’ HHAs for the provision of services to the children. Therefore, to the extent the parents or relatives are in a position to choose an HHA on behalf of the children, this remuneration would implicate the Beneficiary Inducements CMP. However, because we conclude that the Proposed Arrangement would meet the requirements of the statutory exception and regulatory safe harbor for employees, the Proposed Arrangement would meet the exception to the Beneficiary Inducements CMP for any permissible practice specified in a statutory exception to the Federal anti-kickback statute or a safe harbor regulation.

III. CONCLUSION

Based on the relevant facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the Proposed Arrangement, if undertaken, would not generate prohibited remuneration under the Federal anti-kickback statute or Beneficiary Inducements CMP. Accordingly, the OIG would not impose administrative sanctions on Requestors in connection with the Proposed Arrangement under section 1128A(a)(7) of the Act, as that section relates to the commission of acts described in the Federal anti-kickback statute; the Beneficiary Inducements CMP; or the exclusion authority at section 1128(b)(7) of the Act, as that section relates to the commission of acts described in the Federal anti-kickback statute and the Beneficiary Inducements CMP.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is limited in scope to the Proposed Arrangement and has no applicability to any other arrangements that may have been disclosed or referenced in your request for an advisory opinion or supplemental submissions.

¹⁶ See 42 C.F.R. § 1001.952(i).

- This advisory opinion is issued only to Requestors. This advisory opinion has no application to, and cannot be relied upon by, any other person.
- This advisory opinion may not be introduced into evidence by a person other than Requestors to prove that the person did not violate the provisions of sections 1128, 1128A, or 1128B of the Act or any other law.
- This advisory opinion applies only to the statutory provisions specifically addressed in the analysis above. We express no opinion herein with respect to the application of any other Federal, State, or local statute, rule, regulation, ordinance, or other law that may be applicable to the Proposed Arrangement, including, without limitation, the physician self-referral law, section 1877 of the Act (or that provision's application to the Medicaid program at section 1903(s) of the Act).
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- We express no opinion herein regarding the liability of any person under the False Claims Act or other legal authorities for any improper billing, claims submission, cost reporting, or related conduct.

This opinion is also subject to any additional limitations set forth at 42 C.F.R. Part 1008.

The OIG will not proceed against Requestors with respect to any action that is part of the Proposed Arrangement taken in good faith reliance upon this advisory opinion, as long as all of the material facts have been fully, completely, and accurately presented, and the Proposed Arrangement in practice comports with the information provided. The OIG reserves the right to reconsider the questions and issues raised in this advisory opinion and, where the public interest requires, to rescind, modify, or terminate this opinion. In the event that this advisory opinion is modified or terminated, the OIG will not proceed against Requestors with respect to any action that is part of the Proposed Arrangement taken in good faith reliance upon this advisory opinion, where all of the relevant facts were fully, completely, and accurately presented and where such action was promptly discontinued upon notification of the modification or termination of this advisory opinion. An advisory opinion may be rescinded only if the relevant and material facts have not been fully, completely, and accurately disclosed to the OIG.

Sincerely,

/Robert K. DeConti/

Robert K. DeConti
Assistant Inspector General for Legal Affairs