LAW OFFICES OF
GOODELL · STRATTON
EDMONDS & PALMER
ESTABLISHED 1881 LLP

By: Cody G. Robertson, Associate Attorney

Should You Be Paid to Cover Call?

Within the administrative ranks of most hospitals, you will find individuals who view call coverage as a requisite part of all physicians' professional and social duties. As many of these individuals tell it, there was in fact a time in the not-so-distant past when physicians were actually glad to cover call in the local emergency department, and did so with nary a complaint to be heard. While the accuracy of this utopian vision of the past is subject to scrutiny, it is hardly debatable that the reality of today is not quite so rosy.

Since the passage of the Emergency Medical Treatment and Active Labor Act (EMTALA) in 1986, hospitals have been required to maintain a panel of physicians representative of the specialties they offer to provide 24 hour on-call emergency care. Historically, hospitals have fulfilled this requirement by making some amount of uncompensated call-coverage a prerequisite of hospital privileges. However, faced with the very real financial and personal burdens attendant of work in emergency care, many physicians, particularly those practicing in high-demand specialties, are becoming increasingly reluctant in recent years to provide uncompensated call coverage.

As a result, many hospitals are finding it difficult to meet their EMTALA obligations. Hospitals in this predicament are effectively faced with two options; either reprimand those physicians that refuse to provide uncompensated call coverage in accordance with the staff bylaws, or provide them with additional compensation for the time they spend on-call. From a physician's perspective, the latter may seem the obvious choice. However, upon closer examination, this option is fraught with its own risks that must be carefully considered.

Of greatest concern has been the risk of violation of fraud and abuse laws attendant with compensated call arrangements. As mentioned previously, physicians are typically obligated as part of their medical staff membership to provide call coverage without compensation. Thus, when hospitals agree to pay physicians for call coverage, such payments may appear to be an added inducement for physicians to refer patients to the hospital.

The Office of Inspector General for Medicare and Medicaid Services (OIG) is mindful of this risk, and has in fact explicitly stated that compensated call arrangements are potentially violative of the Federal Anti-Kickback Rule. The Anti-Kickback Rule makes it illegal to knowingly and willfully offer, pay, solicit, or receive remuneration to induce the referral of any item or service payable by a federal healthcare program, and the OIG

has made clear that it will scrutinize all compensated call arrangements on a case-by-case basis to ensure they do not violate this Rule.

Because of the hardline stance taken by the OIG, hospital administrators, many of whom were feeling pressured to compensate some or all of their physicians for call time and many more of whom had already begun doing so, breathed a collective sigh of relief when, on September 20, 2007, the OIG released an advisory opinion offering some insight into what it considers an acceptable compensated call arrangement. That opinion marked the first time the OIG recognized that legitimate reasons exist for compensating on-call physicians.

In its opinion, the OIG indicated that its key concern in evaluating on-call arrangements is whether compensation paid is based on the fair market value for actual and necessary services rather than the volume or value of referrals or other business generated between the parties. The OIG also pointed to relative equality of compensation between physicians and practice areas as well as built-in transparency and accountability as factors that would be viewed favorably in compensated call arrangements. While the opinion acknowledged that some discrepancy may exist between the rates of pay between specialties, it emphasized that a physicians' specialty should be considered only insofar as it affected the nature and severity of the cases generally treated in the emergency department and the likelihood that the physician would be required to provide uncompensated care.

Although the advisory opinion stressed that hospitals are not required to compensate physicians for call time, it would appear that this point was largely lost on much of the OIG's audience. In its 2008 Physician On-Call Pay Survey, Sullivan, Cotter and Associates, Inc. reports that a sizeable majority of the hospitals surveyed pay their physicians for call coverage, with a full two-thirds reporting that their physician on-call pay expenditures increased since the release of the OIG's September 2007 opinion. Thus, if this issue has not yet been addressed at your hospital, it likely will be in the near future. Since the Anti-Kickback Rule holds both hospitals and physicians accountable for illegal arrangements, it is imperative that physicians take an active role in ensuring that on-call pay arrangements are structured appropriately. When in doubt, a knowledgeable health care attorney should be consulted.

This article was originally published in Vol. 2 No.1 of Greater Kansas MD News published by Sunshine Media, Inc.