

## Office of Inspector General (OIG) Provides Additional Guidance About Incentive Compensation

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The OIG recently provided additional guidance regarding incentive compensation for referrals in an Advisory Opinion. Specifically, a continuing care retirement community (CCRC) provided incentive compensation to its employees.

The CCRC that requested the Advisory Opinion offers three levels of care to residents: independent living, assisted living, and skilled nursing. Residents of the CCRC have the right to higher levels of care as their needs increase after payment of an entrance fee and pre-established monthly fees. Residents who use levels of care other than independent living pay the same monthly fee that they paid while living independently, plus charges for meals and other ancillary items.

Most residents of the CCRC live independently. A substantial portion of the residents receiving skilled nursing care are not CCRC residents. Instead, they are directly admitted from outside the CCRC and do not have contracts with the CCRC. Two-thirds of CCRC residents living independently are unlikely to ever require skilled nursing care. The remaining one-third of residents are likely to need skilled care after living independently at the CCRC for an average of eight years.

The CCRC gives current employees of the CCRC who recommended the community to prospective residents a gift card, if the following criteria are met:

- Employees submitted the names and contact information of prospective residents to the CCRC;
- The CCRC determined that the individual was eligible to enter into a continuing care contract; and
- Prospective residents toured the community within ninety (90) days.

In addition, if prospective residents moved into independent living at the CCRC within twelve months after touring the community, employees received a check as part of their employment compensation. No payments are made for residents who moved into the assisted living or skilled nursing care units.

Based upon the above, the OIG said that the crucial question is: Would the employees who receive incentives be “arranging for” or “recommending” the purchase or order of items or services payable by a federal health care program? In answer to this question, the OIG concluded that the incentive compensation described above is permissible.

The OIG first acknowledged that prospective residents included beneficiaries of federal health care programs. The OIG also acknowledged that the skilled nursing services and assisted living services may be reimbursed in whole or in part by federal health care programs. The OIG went on to make it clear that the following were the bases for its opinion:

- Residents for which incentive compensation was paid were recruited into independent living where no health care services are provided and the CCRC does not participate in federal health care programs. It is unclear whether residents recruited by employees will ever require services paid for by federal health care programs.

- Employees who make referrals are not health care professionals in a position to make recommendations about health services or to influence medical decision-making.
- Decisions to enter the CCRC are primarily life style choices, as opposed to decisions about health care.

This most recent Advisory Opinion raises a number of questions regarding the appropriateness of incentive compensation for employees under circumstances different from those described above. Suppose, for example, that services paid for by federal health care programs are clearly involved. Does this mean that incentive compensation cannot be paid to employees under these circumstances?

OIG Advisory Opinions are an important source of information about the issue of incentive compensation, although they technically apply only to the organization that requested the opinion. There are a variety of other sources of guidance on this topic. To date, the guidance available is sometimes inconsistent. Providers are well-advised to seek the advice of legal counsel on this topic.

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