



[We redact certain identifying information and certain potentially privileged, confidential, or proprietary information associated with the individual or entity, unless otherwise approved by the requestor.]

Issued: March 26, 2009

Posted: April 2, 2009

[Name and address redacted]

Re: OIG Advisory Opinion No. 09-02

Gentlemen:

We are writing in response to your request for an advisory opinion regarding a contract for the employment of a mental health practitioner entered into concurrently with a contract for the employer to purchase from the employee certain real estate. Specifically, you have inquired whether the employment of the mental health practitioner constitutes grounds for the imposition of sanctions under the exclusion authority at section 1128(b)(7) of the Social Security Act (the "Act"), or the civil monetary penalty provision at section 1128A(a)(7) of the Act, as those sections relate to the commission of acts described in section 1128B(b) of the Act, the Federal anti-kickback statute.

You have certified that all of the information provided in your request, including all supplemental submissions, is true and correct and constitutes a complete description of the relevant facts and agreements among the parties.

In issuing this opinion, we have relied solely on the facts and information presented to us. We have not undertaken an independent investigation of such information. This opinion is limited to the facts presented. If material facts have not been disclosed or have been misrepresented, this opinion is without force and effect.

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the employment of the mental health practitioner satisfies the criteria set forth in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i) (the

employee exception and safe harbor regulation) and therefore would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the Office of Inspector General (“OIG”) will not impose administrative sanctions on [name redacted] under sections 1128(b)(7) or 1128A(a)(7) of the Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with this employment. This opinion is limited to the employment of the mental health practitioner and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request letter or supplemental submissions.

This opinion may not be relied on by any persons other than [name redacted], the requestor of this opinion, and is further qualified as set out in Part IV below and in 42 C.F.R. Part 1008.

I. FACTUAL BACKGROUND

[Name redacted] (the “Requestor”) is an [state redacted] corporation that provides outpatient mental health services. [Name redacted] (the “Practitioner”) is licensed by the State of [state redacted] as a professional clinical counselor and as a supervising counselor. Prior to her employment by the Requestor, the Practitioner maintained an active mental health practice under the name [name redacted] (the “Practice”) in a building that she owned in [city and state redacted] (the “Building”). The Practitioner and several other clinicians provided services to patients of the Practice. The Requestor certified that in approximately November 2007, the Practitioner approached the Requestor’s CEO, inquiring whether the Requestor would be interested in purchasing the Building for the purpose of operating a clinic there. The Requestor agreed to purchase the Building, on the condition that the Practitioner would be employed by the Requestor as counselor and clinic director in the clinic that the Requestor would operate there (the “Clinic”). Thereafter, the Practitioner entered into a contract to be employed by the Requestor (the “Employment Agreement”), which was expressly contingent upon the Requestor’s purchase of the Building. The Employment Agreement provided that the Requestor would pay the Practitioner compensation based on revenues received for services delivered personally by her as well as total revenues of the Clinic.

The Requestor purchased the Building, and the Practitioner performed services and was compensated pursuant to the Employment Agreement. The Requestor has certified that the Practitioner was its bona fide employee, within the meaning of 26 U.S.C. § 3121(d)(2), and that she was employed to perform services for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs. The compensation she received was based on professional services (including administrative services) she personally performed. The Requestor also has certified that it paid “market value” for the Building, and that the purchase price of the Building did not include payment for referrals.

II. LEGAL ANALYSIS

A. Law

The anti-kickback statute makes it a criminal offense knowingly and willfully to offer, pay, solicit, or receive any remuneration to induce or reward referrals of items or services reimbursable by a Federal health care program. See section 1128B(b) of the Act. Where remuneration is paid purposefully to induce or reward referrals of items or services payable by a Federal health care program, the anti-kickback statute is violated. By its terms, the statute ascribes criminal liability to parties on both sides of an impermissible “kickback” transaction. For purposes of the 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 was to obtain money for the referral of services or to induce further referrals. United States v. Kats, 871 F.2d 105 (9th Cir. 1989); United States v. Greber, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985). Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. Conviction will also lead to automatic exclusion from Federal health care programs, including Medicare and Medicaid. Where a party commits an act described in section 1128B(b) of the Act, the OIG may initiate administrative proceedings to impose civil monetary penalties on such party under section 1128A(a)(7) of the Act. The OIG may also initiate administrative proceedings to exclude such party from the Federal health care programs under section 1128(b)(7) of the Act.

The anti-kickback statute excepts from its reach “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.” Section 1128B(b)(3)(B) of the Act. The safe harbor regulations provide that the term “remuneration” as used in the anti-kickback statute, does not include:

[A]ny 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. For purposes of paragraph (i) of this section, the term *employee* has the same meaning as it does for purposes of 26 U.S.C. 3121(d)(2).

42 C.F.R. § 1001.952(i).

B. Analysis

As indicated above, the anti-kickback statute does not prohibit payments made by employers to their bona fide employees for employment in the furnishing of items or services for which payment may be made under Medicare, Medicaid, or other Federal health care programs. Whether an employee is a bona fide employee for purposes of the employee exception to the anti-kickback statute is a matter that is outside the scope of the advisory opinion process. See section 1128D(b)(3)(B) of the Act. Thus, for purposes of rendering this advisory opinion, we rely upon the certification of the Requestor that the Practitioner was a bona fide employee of the Requestor in accordance with the definition of the term set forth at 26 U.S.C. § 3121(d)(2) and Internal Revenue Service (“IRS”) interpretations of that provision as codified in its regulations and other interpretive sources. The Requestor also has certified that the Practitioner was employed to perform services for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs. The compensation she received was based on professional services (including administrative services) she personally performed. On the basis of the Requestor’s certifications, we conclude that the employment of the Practitioner satisfies the criteria set forth in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i) and, therefore, the wages paid to the Practitioner by the Requestor do not constitute prohibited remuneration under the anti-kickback statute, section 1128B(b) of the Act. If the Practitioner was not a bona fide employee under the IRS definition, this opinion is without force and effect.

The Request also disclosed that, concurrently with the Employment Agreement, the Requestor and the Practitioner entered a contract by which the Requestor purchased the Building in which the Practitioner had conducted her Practice, and in which she continued to work as an employee of the Requestor. The Requestor certified that it paid “market value” for the Building, and that the purchase price of the Building in no way reflected the value of any referrals or generation of business between the parties. Neither the purchase of the Building nor the price paid for it is a factor in our opinion regarding the employment of the Practitioner, and we express no opinion with regard to whether the purchase of the Building implicates the fraud or abuse laws.

III. CONCLUSION

Based on the facts certified in your request for an advisory opinion and supplemental submissions, we conclude that the employment of the Practitioner satisfies the criteria set for in section 1128B(b)(3)(B) of the Act and 42 C.F.R. § 1001.952(i) (the employee exception and safe harbor regulation) and therefore would not generate prohibited remuneration under the anti-kickback statute. Accordingly, the OIG will not impose administrative sanctions on the Requestor under sections 1128(b)(7) or 1128A(a)(7) of the

Act (as those sections relate to the commission of acts described in section 1128B(b) of the Act) in connection with this employment. This opinion is limited to the employment of the mental health practitioner and, therefore, we express no opinion about any ancillary agreements or arrangements disclosed or referenced in your request letter or supplemental submissions.

IV. LIMITATIONS

The limitations applicable to this opinion include the following:

- This advisory opinion is issued only to [name redacted], the requestor of this opinion. This advisory opinion has no application to, and cannot be relied upon by, any other individual or entity.
- This advisory opinion may not be introduced into evidence in any matter involving an entity or individual that is not a requestor of this opinion.
- This advisory opinion is applicable only to the statutory provisions specifically noted above. No opinion is expressed or implied 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 Employment Agreement, including, without limitation, the physician self-referral law, section 1877 of the Act.
- This advisory opinion will not bind or obligate any agency other than the U.S. Department of Health and Human Services.
- This advisory opinion is limited in scope to the specific arrangement described in this letter and has no applicability to other arrangements, even those which appear similar in nature or scope.
- No opinion is expressed herein regarding the liability of any party 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 the Requestor with respect to any remuneration paid to the Practitioner pursuant to her employment by the Requestor, as long as all of the material facts have been fully, completely, and accurately presented, and her employment 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 the Requestor with respect to any action 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,

/Lewis Morris/

Lewis Morris
Chief Counsel to the Inspector General