OIG Advisory Opinion Reviews Employment Exception to Anti-Kickback safe harbor in Mental Health Provider Employment Arrangement

DATE: April 2, 2009

LEGAL DOCUMENT: OIG Advisory Opinion No. 09-02.

ISSUE: Was the employment of a mental health practitioner at the same time the employer purchased the practitioner’s office building a violation of the Anti-Kickback statute.

HOLDING: The employment of the mental health practitioner satisfies the criteria set forth in section 1128B(b)(3)(B) of that Act and 42 C.F.R. § 1001.952(i) employee exception and safe harbor regulation) and therefore would not generate prohibited remuneration under the anti-kickback statute.

FACTS: The employer was a corporation that provides outpatient mental health services (“Employer”). The mental health practitioner (the “Practitioner”) was licensed by the State as a professional clinical counselor and as a supervising counselor. Prior to her employment, the Practitioner maintained an active mental health practice in a building that she owned (the “Building”).

The Employer and Practitioner entered into an agreement whereby the Employer agreed to purchase the Building, on the condition that the Practitioner would be employed by the Employer as counselor and clinic director in the clinic that the Employer would operate there (the “Clinic”). The Practitioner’s compensation was based on revenues received for services delivered personally by her as well as total revenues of the Clinic.

The Employer 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 Employer also certified that it paid “market value” for the Building, and that the purchase price of the Building did not include payment for referrals.

The Practitioner received compensation based only upon professional services (including administrative services) she personally performed. If the Practitioner was not a bona fide employee under the IRS definition, the OIG stated the opinion was without force and effect.

Blake D. Crocker, JD, LL.M.
© Crocker & Crocker, P.C.

---

1 “(2) any individual who, under the usual common law rules applicable in determining the employer-employee relationship, has the status of an employee” 26 USC § 3121(d)(2)