

Health Law Alert

A report
for clients
and friends
of the Firm May 2007

IRS Confirms Tax-Exempt Hospitals May Subsidize the Purchase of Electronic Health Records Technology Under New HHS Regulations but Imposes Additional Limitations

A May 11, 2007 Memorandum from the Director of Exempt Organizations of the Internal Revenue Service concludes that hospitals may provide financial assistance to members of their medical staff for the purchase of electronic health records technology and services without jeopardizing their tax-exempt status. The Memorandum is an important clarification for hospitals interested in making use of new regulations under the Anti-Kickback Law and the Stark Law that permit hospitals and others to assist providers in purchasing electronic health records technology and services under certain conditions. Surprisingly though, the Memorandum imposes new conditions that limit the flexibility of hospitals in providing financial assistance.

Background

Until recently, the provision of financial assistance by hospitals and others to support the purchase by physicians of Electronic Health Records (“EHR”) technology and services has been hampered by the Anti-Kickback Law and Stark Law implications of such arrangements. Last August, however, the U.S. Department of Health and Human Services (“HHS”) promulgated a new Stark Law exception and a new Anti-Kickback Law safe harbor (the “HHS Regulations”) to facilitate the provision of financial assistance for the purchase of EHR technology and services. Although there are 13 conditions that must be met for an arrangement to be protected by the HHS Regulations, generally, they

expressly permit hospitals and others to subsidize up to 85% of the cost of EHR technology and related services (including certain ancillary technology and services) for a wide range of providers if the technology is certified as interoperable, includes an electronic prescribing component, and the recipients are not chosen in a manner that rewards referrals.

Following the promulgation of the HHS Regulations, the American Hospital Association (“AHA”) requested clarification from the IRS as to whether charitable hospitals that offered such financial assistance would jeopardize their federal tax-exempt status. Tax-exempt organizations are prohibited from conferring a private benefit unless the benefit is only incidental to their exempt purpose and is not substantial. The AHA expressed concern that IRS might take the position that financial assistance for the purchase by private physicians of EHR technology and services constitutes a prohibited private benefit or inurement.

IRS Memorandum

The Memorandum resolves the question posed by the AHA, clearly stating that the provision of financial assistance by a hospital to its medical staff will not constitute an impermissible private benefit or inurement in violation of Section 501(c)(3) of the Internal Revenue Code, provided that the arrangement complies with the HHS Regulations and that certain other conditions are satisfied.

The Memorandum, however, imposes (through the “other conditions”) three noteworthy limitations. First, the Memorandum blesses only subsidies by a hospital to members of its medical staff, i.e., physicians with privileges at the hospital making the subsidy. The HHS Regulations, by contrast, permit hospitals to provide financial assistance to a broader scope of recipients.

Second, the Memorandum appears to impose an additional condition on arrangements under the HHS Regulations by requiring that, to the extent permitted by law, the recipient of the assistance will provide the hospital with access to all electronic medical records created by the physician using the subsidized technology or services.

Third, the Memorandum provides that the offer of financial assistance must be made to the hospital's entire medical staff. The HHS Regulations, however, do not require a hospital to offer a subsidy to its entire medical staff—so long as recipients are chosen without regard to the volume or value of referrals or other business generated between the parties. Thus, under the HHS Regulations, a hospital may limit financial assistance based on the size of the recipients' practices, the number of hours the recipients practice, the recipients' overall use of technology in their practice, or the amount of uncompensated care provided by the recipients.

In conclusion, while the issuance of the Memorandum is helpful in that it clarifies that the provision of financial assistance by a tax-exempt hospital to its medical staff to support the purchase of electronic health records technology and services does not constitute an impermissible private benefit or inurement, the IRS has imposed meaningful new limitations on the provision of financial assistance by hospitals under the new Stark and Anti-Kickback regulations.

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