

# Health Law Alert

A report  
for clients  
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## Physician Practice Group OIG Advisory Opinions 08-22 and 08-10: Where is the Line?

The Office of the Inspector General (the “OIG”) recently issued two Advisory Opinions that further complicate the regulatory landscape involving physician practice group relationships. In Advisory Opinion No. 08-22, posted on December 15, 2008, the OIG determined that a proposed part-time employment relationship between a not-for-profit physician group and two physicians would not violate the Anti-Kickback Statute. The physician employees, who would perform endoscopies part time on the physician group’s premises under the agreement, each have a separate medical practice at separate premises for the remainder of the workweek. The OIG simply noted that, consistent with the safe harbor regulations, the Anti-Kickback Statute contained an exception for *bona fide* employees, which allows an employer to make payments to an employee in a *bona fide* employment relationship for the provision of covered items or services. Relying on the physician group’s certification that (i) the part-time physician employees were *bona fide* employees (as defined in Internal Revenue Service guidelines), (ii) the physicians would be performing endoscopies, which are covered services, and (iii) the compensation would be fair market value, the OIG concluded that the arrangements met the requirements of the Anti-Kickback Statute and the regulatory safe harbor.

The physician group obviously requested Advisory Opinion No. 08-22 in reaction to Advisory Opinion No. 08-10, which the OIG posted on August 26, 2008. In Advisory Opinion No. 08-10, the OIG held that arrangements between a physician group practice providing cancer treatment services in a free-standing

facility and certain groups of urologists that had made referrals to such facility could result in illegal remuneration prohibited by the Anti-Kickback Statute, despite the fact that the leases and personal service agreements associated with the arrangements were compliant with the relevant safe harbors. The OIG noted that the proposed arrangements were a form of “joint venture” because “based on the facts presented here, we are unable to exclude the possibility that the parties’ contractual relationship is designed to permit the [physician group] to do indirectly what it cannot do directly; that is, pay the [urologist groups] a share of the profits from [the] referrals.” According to the OIG in this Advisory Opinion, the source of the remuneration was “the opportunity” to obtain the difference between the reimbursement received by the urologist groups from the federal health care programs and the rent and fees paid by the physician group to the urologist groups. Further, the OIG stated that “[e]ven if each of the individual agreements making up the Proposed Arrangement could satisfy the applicable safe harbor conditions . . . the safe harbors would only protect the remuneration paid by the [urologist groups] . . . for actual services rendered or space or equipment rented.” See Advisory Opinion No. 08-10.

However, Advisory Opinion No. 08-22 held that in the context of a part-time employment relationship—despite sharing many of the same regulatory concerns existing in the lease of space or a contractual agreement for services—the difference between the amount of money received by the employer and the amount paid to the employee for services furnished by the employee on a referral basis from the employer is not a kickback. Yet that same profit may be considered a kickback if paid to an independent contractor or for the lease of space and equipment, or some combination thereof. In any case, these Advisory Opinions are evidence of the regulatory authorities’ growing antipathy with pod-laboratory arrangements, but create potential liability in virtually every safe harbor context. Thus, the OIG’s confusing and largely ad hoc analysis in these Advisory Opinions may well require future advisory opinions to redraw lines that the safe harbors themselves had already drawn.

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