

# OIG Publishes Favorable Advisory Opinion Related to the Employment Safe Harbor

**Health Care Law Brief Blog** on **November 30, 2021**

In an advisory opinion posted November 10, 2021 ([AO 21-15](#)), the Office of the Inspector General of the United States Department of Health and Human Services (OIG) appeared to soften a disturbing position that it had taken in 2012 regarding the employment safe harbor.

The issue is the breadth of the employment safe harbor, which is also specifically included in the Federal Anti-Kickback Statute (AKS) as a statutory exception. In Advisory Opinion 12-06 ([AO 12-06](#)), the OIG confronted referring physicians attempting to profit from anesthesiology services. Without going into the details of that complicated opinion, AO 12-06 evaluated a situation where a new entity was created (owned by the referring physicians' professional entity) that would employ or contract with anesthesiologists to provide services at the ASC. The OIG noted that, "neither the employment safe harbor nor the personal services and management contracts safe harbor would protect the remuneration" reflected in the distribution of profit generated by the employees to the owners of the practice. This statement effectively meant that the OIG had largely eviscerated the employment and personal services safe harbors because those safe harbors would only apply where the referring employer or contractor did not potentially profit from the employment or contract. But this is almost never the intent, and in fact, failure to profit might itself raise FMV and commercial reasonableness issues. It is also difficult to imagine that Congress, in adding the statutory exception to the AKS, meant it only to apply where the referring employer did not anticipate a profit.

In its recently-published AO 21-15, the OIG cleared the air a bit. It blessed the employment of a CRNA to provide anesthesia services to a pain management practice, while aware that the practice would likely profit off its referrals to the CRNA as a result of the CRNA's assignment of its billing rights. The OIG first noted that it continues to maintain that the employment safe harbor does not protect the distribution of profits to referring shareholders related to the employment. However, the OIG noted that *bona fide* employment in which a professional reassigns billing rights in exchange for compensation is "a commonplace practice in the health care industry, explicitly authorized by ... the Medicare program." Since at issue was a "straightforward employment agreement" where the employer "assumes certain duties that may be typical of an employer and where ... the CRNA is a bona fide employee," the OIG deemed the employment to present a low risk of abuse and approved the relationship.

While it is disappointing that the OIG continues to argue that the employment exception does not protect a standard and accepted component of health care employment, it appears that the OIG is aware of the problems its position creates. Its new position accepts *bona fide* employment despite the profit to be generated for the CRNA's employer based on the CRNA's referrals.

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- **Edward S. Kornreich**