

New Medicare Law Advances Gainsharing

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On April 16, 2015, President Obama signed into law H.R.2, the Medicare Access and CHIP Reauthorization Act of 2015 (the "Act"), which provides for sweeping changes to how Medicare pays doctors. Specifically, the Act seeks to move Medicare in a direction toward payment based on the quality and value of care, rather than just the volume of services. In furtherance of this goal, the Act amends a Civil Monetary Penalties (CMP) law provision that has restricted the growth of gainsharing programs nationally.

Prior to the Act, the CMP law imposed penalties on hospitals for making payments to physicians to reduce or limit care. As a result of this provision and its interpretation by the Office of Inspector General (OIG) of the Department of Health and Human Services, hospitals and physicians were restricted in their ability to establish arrangements by which a hospital would agree to pay a physician a portion of patient care cost savings that are attributable to the physician's assistance in cost-saving efforts. However, as the government has sought to rein in healthcare costs in recent years, such arrangements (often referred to as "gainsharing") have been permitted where certain cumbersome safeguards that reduce program effectiveness are in place. In an effort to support hospital arrangements that provide cost-effective, high-quality healthcare, the Act revises the CMP law to give life to certain gainsharing arrangements that would have previously been prohibited.

Critically, in 1999, the OIG, despite noting the potential benefits of gainsharing to reduce unnecessary services (as opposed to necessary services), effectively shut down many gainsharing programs when it issued a Special Advisory Bulletin stating that gainsharing arrangements in connection with the Medicare prospective payment system were impermissible under the CMP law, which prohibited any hospital from knowingly making payments to physicians as inducements to limit or reduce services to Medicare or Medicaid beneficiaries under a physician's care, even if the services sought to be reduced were deemed unnecessary. In the last ten years, however, as the public and the government have increasingly pressured healthcare providers to contain costs, gainsharing arrangements have started to regain acceptance as a legitimate way to control costs so long as certain safeguards are in place to ensure the delivery of quality care. Since 2005, the OIG has issued 16 opinions that concluded that certain gainsharing arrangements contained sufficient safeguards to obviate the need for sanctions under the CMP. However, such safeguards presented substantial limitations to gainsharing programs.

The Act amends the CMP law, which applies to relations with both employed and voluntary physicians, to specify that the prohibition on hospital payments to a physician as an inducement to reduce or limit services only applies to "medically necessary" services. This new language will likely give the OIG the authority (which it has historically asserted it lacks) to enact regulations that create certain exceptions to this broad prohibition or provide advisory opinions on matters that the CMP law was formerly deemed to control. In fact, in October 2014, the OIG published a proposed rule that would amend the safe harbors to the Anti-Kickback Statute (AKS) and the CMP rules to protect certain payment practices and business arrangements from criminal prosecution or civil sanctions under the AKS (Proposed Rule).[\[1\]](#) Although the OIG stated in the preamble of the Proposed Rule that it lacked authority to create a new exception to the CMP gainsharing prohibition, it nevertheless invited comments on what constitutes reducing and limiting services, and also on what safeguards should be put in place to protect patients and the Medicare program from abuse. While the OIG has not yet issued a final rule, it is likely that in light of the amended CMP provision under the Act, the finalized regulations will offer providers clarity on acceptable gainsharing arrangements.

The long-requested amendment to the CMP law provision is likely to influence the nature of the gainsharing regulations that the OIG is contemplating and generally should encourage the development of programs to reduce costs in part by incentivizing all healthcare system participants to be cost-conscious.

[\[1\]](#) 79 Federal Register 59717 (Oct. 3, 2014).

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- **Edward S. Kornreich**