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HHS-OIG Issues Unfavorable Opinion Regarding Medicare Advantage, Gainshare Payments to Employers

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Highlights

The HHS-OIG said it is essential to prevent financial incentives from steering enrollees toward specific Medicare Advantage plans or services in order to avoid undue influence on enrollment decisions

Gainshare payments also must safeguard enrollee benefits, ensuring that financial incentives do not reduce coverage or increase costs

CMS' flexibilities for Employer Group Waiver Plans do not exempt organizations from compliance with the federal Anti-Kickback Statute

The Office of Inspector General of the U.S. Department of Health and Human Services (HHS-OIG) has issued Advisory Opinion No. 24-08 regarding a corporation that offers Medicare Advantage (MA) plans proposing to share a percentage of its savings (gainshare payments) with certain employers to which it provides coverage through Employer Group Waiver Plans (EGWPs).

The HHS-OIG concluded that sharing savings with employer groups could induce the groups to refer its enrollees to the MA organization's group plans, creating a risk of fraud and abuse.

Under this particular proposal, employers who enroll their employees in the group plans would receive a portion of the savings on medical expenses achieved by the MA organization. Employers are given the option of how to use such savings and could allocate them for purposes other than their employees' health benefits.

While the Centers for Medicare & Medicaid Services (CMS) allow MA plans some flexibility, including combining rebates with other payments, the payments must not incentivize companies to steer employees toward the MA plan, potentially violating the federal Anti-Kickback Statute (AKS).

It is important to note that no safe harbor applied to shield the proposal from the risk of fraud and abuse under the AKS. In addition, the arrangement could encourage employer groups to choose the MA organization’s group plans, even if other plans might better serve the enrollees' needs.

In its opinion, the HHS-OIG underscored three considerations to guide the framework of MA organizations offering EGWPs and gainshare payments:

- **Steering Risks**
  When designing gainshare payments, it is critical to prevent financial incentives from causing employer groups to steer enrollees toward specific plans or services. Payments should not be tied to conditions that could unduly influence enrollment decisions, such as incentivizing employer groups based on the total number of enrollees or linking payments to enrollment thresholds.
- **Enrollee Benefits**
  Gainshare payments must be designed to protect enrollee benefits, ensuring that financial incentives do not result in reduced coverage or increased costs for enrollees. Compensation without corresponding improvements in enrollee benefits raises concerns about the fairness and purpose of an arrangement. Payments should be structured to enhance or maintain benefits without creating financial advantages for groups at the expense of enrollees.
- **Limits of CMS Flexibilities**
  The agency acknowledges that CMS affords a number of flexibilities to MA organization’s offering group waiver plans, particularly in how payments and rebates are handled, but emphasizes that these flexibilities do not exempt organizations from compliance with the federal AKS. The HHS-OIG noted it cannot issue a favorable advisory opinion if an arrangement raises concerns about fraud, abuse, or non-compliance with federal regulations.

Key Takeaways

The HHS-OIG is particularly concerned with arrangements that offer financial incentives to third parties, such as employers, especially when these incentives could influence decisions affecting federal healthcare beneficiaries. Such incentives heighten the risk of steering and unfair competition, which the agency closely scrutinizes. Financial arrangements, including payments or rebates tied to healthcare services, must be carefully evaluated to determine if they qualify for safe harbor protections under the AKS.

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