FAVORABLE

OIG WATCH

09-02

Employment concurrent with real estate purchase from the employee

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What OIG Said

OIG blessed the employment arrangement but explicitly refused to opine on whether the concurrent real estate purchase created kickback risk.

- ✓ A mental health practice hired a practitioner and simultaneously purchased the building where she operated her practice. The employment contract was expressly contingent on the building purchase, and her compensation was based on revenues from services she personally performed plus total clinic revenues.

- ✓ OIG confirmed the employment arrangement fit the employee safe harbor because she was a bona fide employee under IRS rules, was employed to perform services payable by federal programs, and her compensation was based on professional services she personally performed.

- ✓ However, OIG explicitly declined to address the real issue: whether buying the building from the practitioner at the same time as hiring her implicated fraud and abuse laws. OIG stated only that the buyer certified they paid "market value" and that the purchase price "in no way reflected the value of any referrals or generation of business."

- ✓ The takeaway: When you bundle multiple transactions with a referral source (employment + real estate purchase, or employment + management agreement), OIG will evaluate each transaction separately and may refuse to bless the entire arrangement even if individual pieces pass muster. You bear the burden of proving each transaction is independently defensible at fair market value.

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Diligence Checklist

What you need to be ready to show in diligence

- ✓ Have independent fair market value appraisals for each transaction in a bundled arrangement. Show that each component was valued independently and doesn't include premiums for referrals or business generation.
- ✓ Document why deals needed to be simultaneous or contingent, and prove that pricing for each component would be the same if transacted separately. Avoid structures where one favorable deal appears to subsidize another.
- ✓ For revenue-based employment compensation, show payments are tied to services the employee personally performs, not referrals they generate or business they control.
- ✓ Keep evidence that each transaction was independently negotiated and would be commercially reasonable standing alone, even without the other deals.

If you're doing multiple simultaneous transactions with a physician and you can't prove each component is independently valued at fair market value, OIG signals they'll decline to bless the arrangement, even if individual pieces might fit safe harbors.

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Structure not diligence-ready?

Cabra Consulting helps healthcare organizations make sure compensation and transaction structures are independently valued, clearly scoped, and defensible in diligence.

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