UNFAVORABLE

OIG WATCH

10-23

Per-test fees bundling sleep testing + marketing services in hospital deal

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What OIG Said

OIG said bundling marketing services into success-based fees creates opaque compensation and a direct financial incentive to generate referrals, even if the underlying clinical fees are fair market value.

- A sleep testing vendor contracted with a hospital to provide equipment, staff, and clinical services, but also bundled in marketing services where the vendor's employees visited physician offices, attended health fairs, and promoted the hospital's sleep testing program.

- The vendor charged a single per-test fee covering both clinical services and marketing. OIG said this is remuneration that "could potentially" violate Anti-Kickback.

- OIG's concern: the more successful the vendor's marketing efforts are at generating test orders, the more per-test fees the vendor receives. That's "success-based" compensation for marketing that's inherently linked to business generated.

- Critical problem: compensation for the "part-time and variable" marketing services is hidden inside the per-test fee, which "does not allow for transparent assessment of the marketing services provided and the compensation paid for them."

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Diligence Checklist

What you need to be ready to show in diligence

- ✓ Separate marketing services from clinical services, don't bundle them into the same variable fee structure. If you're paying for marketing, price it separately with transparent, documented compensation.
- ✓ Prove that any marketing compensation isn't success-based (i.e., doesn't increase with volume generated). Fixed fees or hourly rates for defined marketing work are less problematic than "we pay you more when your marketing works."
- ✓ Show that the party providing clinical services doesn't also have a direct financial stake in driving referral volume through their own promotional efforts.
- ✓ Have independent FMV support for each component: clinical services, equipment, and any ancillary services like marketing. Bundled fees make it impossible to defend what you're actually paying for each piece.
- ✓ Document exactly what marketing services are being provided, by whom, and for what compensation. OIG flagged "sporadic, variable marketing services" with "opaque success-based compensation" as the risk profile.

If you're bundling ancillary services into variable "per-click" fees, especially marketing or business development, and you can't transparently prove what you're paying for each component, this is exactly the profile OIG said could draw sanctions.

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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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