FAVORABLE

OIG WATCH

# 23-07

Profit-based bonuses for ASC-employed physicians

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# What OIG Said

*OIG said ASC profit-sharing can be okay if paid as W-2 compensation to bona fide employees for their own procedures.*

- ✓ OIG reviewed a proposed bonus structure where W-2 physicians would get 30% of net profits from ASC facility fees linked to their own outpatient procedures.
- ✓ OIG acknowledged this is remuneration, which could trigger Anti-Kickback if linked to referrals, but said the “employee” exception protects it here.
- ✓ OIG accepted the structure because the bonuses were paid to bona fide W-2 employees for personally performed services, not as owners or independent contractors.
- ✓ OIG emphasized that similar bonuses outside the employee safe harbor, such as through ownership or JV distributions, would raise serious fraud and abuse concerns.



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# Diligence Checklist

*What you need to be ready to show in diligence*

- ✓ Prove each physician receiving bonuses is a bona fide W-2 employee under IRS rules, not a contractor, not an owner.
- ✓ Show the compensation methodology (including base + bonus) is supportable under FMV and commercial reasonableness standards.
- ✓ Have documentation showing the bonus is tied to services personally performed, not to referrals or volume from others.
- ✓ Keep clear employment agreements that define compensation terms, scope of work, and bonus triggers.
- ✓ Be prepared to re-evaluate if ownership structure or employment status changes.

*If you're using profit-based comp outside the W-2 safe harbor, especially with equity holders or JVs, this is the profile OIG said will draw fire.*



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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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