



**PICKREL**  
**SCHAEFFER** LLP  
**EBELING**

A Legal Professional Association  
Serving Ohio and the Miami  
Valley for over 90 years!

### **Hospital and Physician Gainsharing Arrangements**

“Gainsharing” refers to an arrangement between a hospital and a group of physicians where the hospitals give the physicians a percentage share of any reduction in the hospital’s cost for patient care as a result of the physician’s efforts to reduce such cost. For example, cost savings were achieved when physicians did not open certain packaged items, such as cell saver units, until the physician actually needed to use it. Previously, these units were opened before every surgery, but only used in about 5% of the procedures. These gainsharing arrangements are thus attractive to hospitals dealing with the ever increasing costs of providing health care services.

Although the Office of Inspector General (OIG) has previously concluded these arrangements potentially constitute “prohibited remuneration” under the Anti-kickback statute, several recent OIG advisory opinions have indicated that, at least under certain circumstances, these arrangements may not result in sanctions. In Advisory Opinions Nos. 05-01 through 05-06, the OIG approved gainsharing arrangements between an acute care hospital, group(s) of physicians (either cardiologists or cardiac surgeons), and a third party “program administrator” that proposed and supervised the arrangements.

These approved arrangements contained some common elements. In each case the specific cost-saving actions and resulting savings were clearly and separately identified, and the parties were able to provide credible medical support that the recommendations would not adversely impact patients. For example, the hospital was able to certify the delay in opening the cell saver units would not exceed two to five minutes and thus would not harm the patient.

Further, the proposed arrangements were for a limited period, such as one year, the amount of cost savings shared by the physician group was fifty percent or less, and the savings were distributed on a per capita basis to the participating physicians. In addition, the physician was not permitted to share in the savings to the extent he or she exceeded the volume of a particular procedure in the base year, and the case mix of the physician had to be monitored to ensure the physician was not “cherry picking” patients in order to receive a share of the savings. Finally, the fact that the physician group’s compensation was based upon a percentage of the hospital’s savings was disclosed to patients before surgery.

Although the OIG’s approval of the arrangements described above lessens the regulatory obstacle, it is still admittedly an arrangement the OIG does not favor. The OIG will scrutinize these arrangements very closely, and even if a proposed arrangement is modeled after the ones previously approved by the OIG, there is no guarantee that the hospital and physicians will not

face liability. Further, these opinions did not take into account Stark law, which also must be considered before entering into such an arrangement. Thus, hospitals and physicians should exercise extreme caution when considering participation in any type of gainsharing arrangement.

This article was co-authored by attorneys Paul E. Zimmer and Sarah B. Carter of Pickrel, Schaeffer & Ebeling, L.P.A., Dayton, Ohio. You can contact the authors at 937-223-1130 about this or any other related issue.