

CLIENT ALERT

## OIG Scrutinizes Certain Prospective Employee Sign-On Bonuses, Potentially Limiting the Reach of the AKS Employment Safe Harbor in New Advisory Opinion

JANUARY 26, 2026

On December 30, 2025, the U.S. Department of Health and Human Services Office of Inspector General (the OIG) issued an unfavorable advisory opinion (AO 25-12 or the Opinion) regarding a home care agency's (the Company) proposal to market sign-on bonuses to prospective employees of the Company, who would provide in-home support services primarily to the family members of these prospective employees (the Proposed Arrangement). Pursuant to AO 25-12, the OIG concluded that the Proposed Arrangement would result in prohibited remuneration under the federal Anti-Kickback Statute (the AKS) and implicate the civil monetary penalty provision prohibiting inducements to beneficiaries (the Beneficiary Inducements CMP).

### ***The Proposed Arrangement***

The Company provides its clients with in-home support services (the Services) covered by the State Medicaid program for eligible members. The Services include (i) personal care services (e.g., bathing and dressing), (ii) homemaker services (e.g., routine light house cleaning and meal preparation), and (iii) health maintenance activities (e.g., skilled tasks such as medication administration, medical management, or respiratory care). The Services are provided by individuals (Attendants), who are employed by the Company and are typically related to the client receiving the Services (i.e., a parent, sibling, or child). The Attendants are not required to be licensed or certified.

The Company expects that most prospective employees who would be the potential Attendants are also the decision-makers for the clients with respect to the selection of a home care agency that provides the Services. Specifically, because the Attendants are family members of these clients, they would likely have the power to select the home care agency that serves their family members.

Under the Proposed Arrangement, the Company would offer a sign-on bonus (the Bonus) in its marketing efforts to employ prospective Attendants. The Bonus would be advertised only as the amount of the bonus alongside the position overview, employee qualifications, and pay rate ranges. The Bonus would also be listed in the Company's recruitment and marketing materials, including print and digital media advertisements (i.e., social media posts, videos, and testimonials).

The Company further indicated that the purpose behind the Bonus would be to entice prospective Attendants to choose the Company over other home care agencies for the provision of the Services to clients.

## FRAUD AND ABUSE IMPLICATIONS – EMPLOYMENT SAFE HARBOR

In AO 25-12, the OIG opined that the Proposed Arrangement implicates both the AKS and the Beneficiary Inducements CMP, determining that it presents enough of a risk of fraud and abuse that it could not issue a favorable advisory opinion. The OIG further found that the Proposed Arrangement failed to satisfy any of the AKS safe harbors, including the safe harbor protecting remuneration paid by employers to bona fide employees for employment in the furnishing of any item or service covered by Medicaid or other federal health care programs (the Employment Safe Harbor).

The unfavorable Opinion ultimately fell on two primary issues with respect to the Proposed Arrangement: (1) the Attendants would primarily be family members of the clients, and (2) the Attendants would be responsible for selecting the home care agency on behalf of their family member in need of the Services for which payment would be made by the State Medicaid program. Given this, the OIG found that the Proposed Arrangement would constitute an “all but guaranteed referral before employment commences,”<sup>[1]</sup> which was likely to lead to:

- Inappropriate Steering. The advertisement of the Bonus would constitute a solicitation to induce a pre-employment referral, not an amount paid by an employer to a bona fide employee. The Bonus would inappropriately steer Attendants to select the Company based on the amount of the Bonus, rather than the quality of Services provided.
- Unfair Competition. The practice of offering the Bonus presents further concerns of unfair competition, as home care agencies would be motivated to offer increasingly high sign-on bonuses for the purpose of inducing referrals.
- Quality of Care Concerns. As noted above, offering a sign-on bonus diminishes the importance of quality of care in selecting a home health care agency by instead shifting the decision toward the amount of money offered to the prospective employee. Quality of care could further suffer as the agency diverts resources that would otherwise be dedicated to client care to pay these bonuses.

## KEY TAKEAWAYS

Using the Employment Safe Harbor, the OIG has historically upheld broad protections for standard, bona fide employment compensation arrangements, including bonuses and the advertisements of same, even if they involve services related to referrals.<sup>[2]</sup> Recent case law mirrors the OIG’s approach to the Employment Safe Harbor, even in the case of bonuses received for referred patients, particularly in cases where the referral advances access to quality health care.<sup>[3]</sup>

Perhaps AO 25-12 could be viewed as narrowing the scope of the AKS Employment Safe Harbor; however, the Opinion carefully stated that the advertisement of the Bonus appears to be a solicitation for an all but guaranteed referral **before employment commences**. It is also noteworthy that parties that receive an unfavorable advisory opinion may be seeking this result, as the Opinion mentions the marketing practices of the Company’s competitors.

While only binding on the Company, the Opinion provides helpful guidance for other healthcare providers considering similar compensation and/or marketing arrangements for prospective employees.

If you have additional questions or need further assistance, please reach out to Banee Pachuca (Partner, Houston), Eric Knickrehm (Partner, Washington D.C.), Meredith Heim (Associate, Chicago), Ryan Greenberg (Associate, Houston), or your Winston & Strawn relationship attorney.

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[1] OIG Advisory Opinion No. 25-12 (HHS-OIG Dec. 30, 2025).

[2] See OIG Advisory Opinion No. AO 23-07 (HHS-OIG Oct. 10, 2023) (issuing a favorable opinion for bonuses paid to employed physicians based on net profits from their procedures and recognizing it as a common practice); see *also* OIG Advisory Opinion No. AO 21-15 (HHS-OIG Nov. 5, 2021) (finding a straightforward employment arrangement presents a low risk of fraud and abuse).

[3] *Carrel v. AIDS Healthcare Found., Inc.*, 898 F.3d 1267 (11th Cir. Aug. 7, 2018) (affirming protection for employee bonuses tied to patient referrals and emphasizing the need for clear employment status and service linkage); *U.S. ex rel. Cheongsiatmoy v. Univ. of S. California*, 2023 U.S. Dist. LEXIS 57611, \*1, \*18 (C.D. Cal. Feb. 9, 2023) (citing *Carrel*)

(finding the employment safe harbor permits employees to be paid incentives for patient referrals or receive volume-based compensation, though recognizing that permissible remuneration under the employment safe harbor must be for the employment in the provision of covered items or services and not just any payment made to an employee); see also *U.S. ex rel. Wall v. Vista Hospice Care, Inc.*, 2016 U.S. Dist. LEXIS 80160 (N.D. Tex. June 20, 2016) (granting summary judgment for AKS claims because bonuses paid to employees fell under the bona fide employee safe harbor).

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