

Re: **OIG Accents the IRS's Determination of "Bona Fide Employee"**

Dear Sir or Madam:

On July 13, 2004, the OIG issued Advisory Opinion No. 04-09, addressing whether a certain proposed arrangement would generate prohibited remuneration under the anti-kickback statute. Significantly, in finding that the arrangement would not violate the anti-kickback statute, the OIG accepted, as a matter of fact, that a consulting physician who was determined to be a *bona fide employee* by the IRS, is in fact a *bona fide employee* in the eyes of the OIG without the need for further analysis of the relationship. Interestingly, the group practice that sought the OIG's advice in this matter had first obtained a ruling by the IRS that the consulting physicians with whom they entered into the proposed arrangement were *bona fide employer*, prior to seeking the OIG's opinion on whether the arrangement for payments for consulting services would violate the anti-kickback statute.

This opinion is important to physicians in light of the *bona fide employee* exception under the anti-kickback statute which expressly permits payments by an employer to a bona fide employee for the provision of covered items or services. Independent contractor relationships are not afforded the same protection, and compensation to independent contractors is generally subject to greater scrutiny. For example, if a group practice pays an independent contractor a percentage of collections related to the contractor's professional fees, this may constitute a kickback. However, if the provider is a bona Me employee, the arrangement is more likely to be permitted. The employee-contractor distinction may also be significant when a medical practice or other health care entity wants to enter into a professional relationship with another provider on a limited case-by-case basis. In determining how the health care entity may legally compensate the provider, the question frequently revolves around whether the practitioner is an independent contractor or an employee.

Advisory Opinion No. 04-09 suggests that an IRS determination of the status of a worker will be determinative from the standpoint of anti-kickback analysis. Therefore, if you or your health care entity are in, or are contemplating, a professional relationship with any provider and you are not certain that the provider is or would be considered a *bona fide employee*, it may be worthwhile obtaining a ruling from the IRS on the provider's status as an employee. This may put the arrangement directly into the employee exception to the anti-kickback statute, as described above, and may avoid future scrutiny from the OIG.