Physician Compensation Under the Microscope: Lessons Learned from Recent Settlements

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Understanding Legal Requirements for Physician Compensation Arrangements

Stark Law

The Physician Self-Referral Statute ("Stark Law"), 42 U.S.C. 1395nn, prohibits:

1. Physicians from referring Medicare/Medicaid patients for certain designated health services (DHS) to an entity with which the physician or a member of the physician's immediate family has a financial relationship—
2. It also prohibits an entity from presenting or causing to be presented a bill or claim to anyone for a DHS furnished as a result of a prohibited referral.

Unless an exception applies.

3

Strict Liability Law

- Intent is Not Relevant
  - Does not matter if the prohibited financial relationship results from innocent error or inadvertence
- Technical Violations = Violations

Bona Fide Employment (42 C.F.R. §411.357(c))

- Employment for identifiable services
- Remuneration is:
  - Consistent with fair market value
  - Not determined in a manner that takes into account (directly or indirectly) volume or value of referrals, except for productivity bonus based on services performed personally by the physician
  - Commercially reasonable even without referrals

Personal Service Arrangements (42 C.F.R. §411.357(d))

- Signed writing specifying all services furnished by physician
  - Incorporate other agreements by reference or cross-reference master contract list maintained and updated centrally
- 1-year term
- Compensation:
  - Set in advance
  - Does not exceed fair market value
  - Except for "physician incentive plan," is not determined in a manner that takes into account the volume or value of referrals
- Reasonable and necessary services for legitimate business purposes of the arrangement
- Services do not involve counseling or promotion of business arrangement or other activity that violates any Federal or State law

Anti-Kickback Statute

- Criminal offense to knowingly and willfully offer, pay, solicit or receive any remuneration to induce referrals of items or services reimbursable by a federal health care program
  - No actual knowledge or specific intent required
- "Remuneration" includes the transfer of anything of value, in cash or in kind, directly or indirectly, covertly or overtly

Anti-Kickback Statute Liability

- Criminal and civil penalties
- $25,000 per offense
- Imprisonment up to 5 years
- Civil monetary penalties (exclusion and $50,000)
- False Claims Act liability (3 times damages)

Employment Safe Harbor (42 U.S.C. §1320a-7b(b)(3)(B); 42 C.F.R. §1001.952(i))

- Paid by employer to employee
- Employee has *bona fide* employment relationship with employer
- Employment is for furnishing of any item or service reimbursable under Medicare, Medicaid, or other Federal health care programs

Personal Services Safe Harbor (42 C.F.R. §1001.952(d))

- Signed writing covering specifying services that are reasonable and necessary to accomplish business purpose
  - If less than full-time, specifies exact schedule and charge
- 1-year term
- Compensation:
  - Is set in advance
  - Is consistent with fair market value
  - Does not take into account any business generated between parties for which payment may be made by Federal health care program
- Services do not involve counseling or promotion of activity that violates law

Special Considerations For FMV, Commercial Reasonableness, and Group Practice Compensation

Focus on Fair Market Value

- Stark Statute: Value in arm's length transactions, consistent with general market value... (1877 (h)(3) of the Social Security Act)
- Narrower regulatory definition (42 CFR §411.351)
  - Value in arm's-length transactions, consistent with general market value
  - General market value means compensation as result of bona fide bargaining between well informed parties not otherwise in position to generate business for other party
  - Compensation does not take into account volume or value of anticipated or actual DHS referrals

Focus on Fair Market Value

- AKS safe harbor regulations require FMV, but AKS does not define it.
- Special Fraud Alert – Clinical Laboratory Services (October 1994)
  - Presumption: Compensation outside of FMV is in exchange for referrals
- OIG Compliance Guidance for Individual and Small Group Practices (October 2000)
  - "The OIG's definition of 'fair market value' excludes any value attributable to referrals of Federal program business or the ability to influence the flow of business."

Focus on Fair Market Value

- OIG Supplemental Guidance for Hospitals (January 2005)
  - Need appropriate processes for making and documenting reasonable, consistent, and objective determinations of FMV
  - Is the determination of FMV based upon a reasonable methodology that is uniformly applied and documented?
  - If FMV based on comparables, ensure market rate for comparable services is not distorted.

Focus on Commercial Reasonableness

- Stark Commentary:
  - Subjective Concept (Phase I): Sensible, prudent business agreement from the perspective of the parties
  - Objective Concept (Phase II): Would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential for DHS referrals

Focus on Group Practice Compensation - Requirements

- Requirements
  - Single legal entity
  - Two or more members
  - Full range of each member's services provided to Group Practice patients
  - 75% of Group Practice's encounters provided by members
  - Substantially all (75% or more) of each member's clinical services provided through the Group
  - Distribution of Group Practice's profits and expenses based on pre-determined formula
  - Decision making made by a representative body

Focus on Group Practice Compensation - Benefits

- Physicians can be paid:
  - Overall profit share (including profits generated from DHS) or
  - Productivity bonus based on services provided incident-to physician's services
- Safe harbor methods for productivity bonuses or profit sharing
  - If don't meet safe harbor, other methods acceptable if adequately documented

Lessons Learned from Recent Enforcement Actions

Recent Enforcement Actions

- *U.S. ex rel. Schaengold v. Memorial Health, Inc. (S.D. Ga.) (Dec. 23, 2015)*
  - $9.8 million settlement to resolve allegations that the hospital entered into physician employment arrangements as part of practice purchase that exceeded FMV, took into account the volume or value of referrals, and were not commercially reasonable
  - Allegations that hospital considered referrals to hospital, pointing to acceptance of projected and actual substantial losses related to physicians
  - Allegations that board of directors ignored warnings from former hospital CEO of possible Stark Law violations related to arrangements

Recent Enforcement Actions

- *U.S. ex rel. Payne, et al. v. Adventist Health (Sept. 21, 2015)*
  - $118 million settlement to resolve allegations that Adventist violated the False Claims Act by maintaining improper compensation arrangements with referring physicians and by miscoding claims
  - Allegations that Adventist initiated a corporate policy to purchase physician practices or employ physicians to control patient referrals in surrounding areas
  - Allegations that Adventist willing to absorb persistent losses because they were offset by referral revenue to the hospital
- *U.S. ex rel. Reilly v. North Broward Hosp. Dist. (Sept. 15, 2015)*
  - $69.5 million settlement to resolve FCA allegations related to physician compensation arrangements that were above FMV and not commercially reasonable due to internal tracking of contribution margins from referrals

Recent Enforcement Actions

- *U.S. ex rel. Barker v. Columbia Regional Healthcare System Inc. (Sept. 4, 2015)*
  - $35 million settlement to resolve former executive's False Claims Act suits accusing the Georgia Hospital chain of overpaying referring oncologist
- *U.S. ex rel. Drakeford v. Tuomey (Oct. 16, 2015)*
  - $72.4 million settlement before sale following protracted litigation related to improper 10-year employment contracts to 19 specialists in exchange for performing all outpatient procedures at the Hospital or its other facilities
- *U.S. ex rel. Baklid-Kunz v. Halifax Hosp. Med. Ctr. (M.D. Fla.)*
  - $85 million settlement to resolve FCA allegations that the hospital violated the Stark Law by entering into employment contracts with six oncologists above FMC and containing improper incentive bonus pools based on operating margin

Best Practices for Establishing and Auditing Physician Employment Arrangements

Arrangement Review Process

- Use contract management tool to manage agreements.
- Establish centralized contracting process for consistent review and approval of all arrangements.
- Develop template agreements meeting legal requirements.
- Confirm fair market value of arrangement.
  - Consider when outside valuations will be required.
  - DON'T forum shop opinions
  - Choose experienced, reputable valuator.
- Document appropriate business justification for arrangement.
  - DON'T pay for referrals.

Compensation Structure Development

- Simple – easily administered and physicians understand it
- Consistent – minimal variation driven only by sound and appropriate principles
- Auditable – can be regularly reviewed
- Compliant – Link to production, collections, need or other measure to support amount

Arrangement Tracking

- Require periodic reevaluation of FMV and commercial reasonableness
- Update arrangements if change in relationship
  - Compensation changes must follow centralized process.
- Enforce detailed payment tracking
  - NO payment without documentation.
  - If the arrangement involves services, track service and activity logs.
  - If the arrangement involves space or equipment, monitor use of leased space or equipment.

Arrangement Audit Process

- Step One – Establish audit parameters.
  - Who performs the audit?
  - Will the audit be performed under privilege?
  - What is the purpose and scope of the audit?

Arrangement Audit Process

- Step Two – Gather documents for review.
  - Master contract list
  - Copies of agreements
  - Fair market value support for compensation
  - Inventory of equipment and space in use by physicians
  - Time records and logs
  - General ledger accounts, accounts payable distribution, and vendor master file
  - Accounts payable and payroll information for payments to physicians
  - Accounts receivable for payments from physicians
  - Minutes or other similar documents to memorialize rebuttable presumption procedures followed

Arrangement Audit Process

- Step Three – Review and analyze documents.
  - Is there a written agreement for all payments to/from physicians?
  - Has the agreement expired?
  - Are payments being made in compliance with the agreement?
  - Has the relationship changed since the agreement's execution?
  - Is the agreement at FMV and commercially reasonable?
  - Are the parties complying with the agreement terms?
  - Does the agreement comply with the requirements of the applicable Stark exception/AKS safe harbor?

Arrangement Audit Process

- Step Four – Interview personnel and gather additional documentation to verify information and fill in any gaps.
  - Performance of duties
  - Continued business need
  - Change in relationship or arrangement
  - Review of facility to identify undocumented space or equipment rentals

Arrangement Audit Process

- Step Five – Take corrective action as needed to ensure continued compliance.
  - Termination or amendment of agreements
  - Implementation of new agreements
  - Consideration of potential refund or disclosure obligations

Questions