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Practice Compliance Key Considerations for Physicians and Administrators in Taking Right Steps

By McRae Sharpe, CMPE

Practice administrators and physicians received a powerful reminder regarding their individual responsibilities for compliance this summer when the Office of the Inspection General issued a fraud alert concerning physician compensation. The particulars within employment agreements and medical director contracts must adhere to the Stark Law and the anti-kickback statues, and according to numerous healthcare industry observers, the OIG's most recent alert is a warning that cautions it is not enough for the physician to rely on the hospital for compliance. Doctors will be under the same kind of scrutiny as hospitals regarding contracts.

The recent history of hospitals paying out huge sums fast-approaching $1billion in overall fines and settlements illustrate the federal government's strong stance in the enforcement of Stark. The serious commitment to pursue potential violations is also evidenced by the promised addition to the number of investigators the government plans to specifically assign to Stark cases.

Much has been written about the compensation in the Tuomey case; however, it is often overlooked that the relator in the case was a physician who did not enter into an employment agreement on the advice of counsel.

The Stark Law places parameters on healthcare organizations and physicians on how they contract with one another. The one constant: Any transaction that hospitals or practices have with physicians must be governed by fair market value and commercial reasonableness. In addition to employment contracts, Stark covers joint ventures, the purchase of a practice's assets, payment for medical director agreements, rental agreements, on-call payments and others.

The Stark Law does not only impact hospital and physician agreements, but it can also dictate how a physician practice distributes income within the practice. Stark identifies 10 designated health services (DHS) to which a physician might refer, including many which are provided by a physician practice, such as lab and imaging services. The practice will qualify for an in-office exception if all the requirements are met, including how the DHS income is distributed within the practice. Consider the following:

> The practice owns an MRI machine that is on site. The physician may read the MRI and be paid for the interpretation of the MRI. However, the doctor cannot be paid for the technical component in direct relation to how he or she may have ordered it. In a private practice, the profit that is made from that technical component is going to be part of the profit in the practice not directly assigned to a physician. It will be distributed to the physician as income. However, it cannot be distributed back to the physicians in direct relation to how they ordered it. Assume that in a practice with five physicians there is a $100,000 profit at the end of the year from the technical component of having the MRI machine on site. The money can be split equally. Alternatively, the division of income can be based it on the non-DHS revenue or on the evaluation and management codes – as long it is not based in the direct proportion in which has been ordered.

Once a physician becomes a hospital employee and the MRI is no longer part of the practice, the physician can no longer get credit for profits associated with the technical testing work. For instance, if the MRI becomes part of the hospital from a practice acquisition the patient scans would then be taking place in a hospital outpatient setting, not as part of the physician practice. Therefore, it no longer qualifies for the in-office setting. However, doctors can be compensated for reading the MRI because it falls under the stipulation of work that they have personally performed.

Noting Medical Directors

For physicians engaged in contracts with the hospital, such as medical directorships, the contracts should be in writing, have a term of one year and be considered fair market value and commercially reasonable. The duties of the directorship should be consistent with the needs of the hospital or other organization and require specific performance. The agreement should require the physician to submit documentation for time spent and services performed. Considering the OIG warning referenced above, the OIG would be of the opinion that the physician will be responsible for understanding the duties, performing the duties and providing documentation to the healthcare organization.

Other areas of compliance

As part of a standard operating procedure, both independent and hospital-owned practices should consider a compliance plan that includes the following:

- Designation of a Compliance Officer
- Establishing a Compliance Committee
- Education and training – including new employees
- Auditing and monitoring
- Billing and collecting policies in
- Developing effective lines of communication and reporting
- Disciplinary Guidelines
- Corrective action initiatives
- Coding compliance
- Quality of Care
- Financial and billing records
- Records integrity
- Compliance with Fair Debt Collection Practices Act
- Handling of Credit balances
- Supervision of nurse practitioners and physician assistants (For more on physician extenders, please click here).

Third-Party Perspective Helpful With Stark Law Compliance

The best strategy for reducing the risk in any area of compliance and evaluation of possible violations is to secure professional advisors, for both legal and a financial/practice management issues. The k Good

advisors are invaluable, and effective counsel typically involves both legal advice and perspectives on compensation, billing and collection practices and valuation with any of the transactions requiring payment to physicians or contracts with physicians.

A business advisory firm with healthcare expertise will typically concentrate on assessing the fair market value and the commercial reasonableness involved with a physician's actual compensation. When it comes to any of the employment arrangements with doctors, there are technical issues involved around how compensation can be paid, including stipulations for private practice contracts and employment agreements with hospitals.

Tests for Determining Fair Market Value and Commercial Reasonableness

One of the key roles for a business advisory firm is to perform an assessment of the practice to determine the historical compensation and productivity. The relationship between a doctor's compensation and his or her productivity is a vital component when analyzing a contract against the provisions outlined by Stark. (For more insights on the role that fair market value and commercial reasonableness play in physician compensation, please click here).

From a fair-market value standpoint, there's really no better indicator than what the practice or hospital has historically been able to produce. For example, if they haven't negotiated fee schedules up to a community value or if they have ever paid the staff where they are not ranged efficiently, there could be some reasons for why the doctors are under-compensated. Those reasons can be taken into account. It should be noted that the historical relationship between production and the rate of compensation becomes part of the fair-market value. Benchmarks with third-party surveys, including results from the Medical Group Management Association, the American Medical Group Association and Sullivan-Cotter can also play a role in determining the fair market value of contracts.

On the other side of contract equation is the question of commercial reasonableness. It must be determined whether or not there are any alternatives in the market where the contract is being issued. If there are alternatives in the market, the question then becomes are those options at a lower rate than what is being considered for the proposed contract? In some instances in which a hospital is trying to attract and retain a specialist in a rural area with limited medical resources, for example, the compensation package may be at a slightly higher rate than a neighboring market with a larger population. Yet, because the rural area is some distance from the larger neighboring market, the need to attract and retain a physician within a smaller market can be considered commercially reasonable given the right set of circumstances. (For this to be allowed, the area has to be identified as federally underserved).

The most frequent issue disputed issue in these cases is the rate of compensation. The formula is straightforward: Doctors under contract must have production on a percentile basis that relates to compensation. The determination of Work Relative Value Units (Work RVUs) is a key to establishing a compensation range for physicians, especially given that most hospitals pay on Work RVUs or on professional cash collections. It takes some diligence to get to those correct numbers. For instance, there are some very precise ways that Work RVUs can be calculated, including the fact they have to be discounted for the modifiers. Another issue with Work RVUs is factoring multiple procedures, which is a

complex area that requires knowledge and expertise.

At the end of the day, there must be an understanding of what the compensation rate has been within a market as well as the other factors involved. From there, it's possible to arrive at the compensation the hospitals can provide or offer to the physicians. As outlined here, the process and issues can become quite complex with a number of nuances that must follow fair market value and commercial reasonableness.

We Can Help!

Compliance with the Stark Law and anti-kickback statutes is one of the most serious considerations for any administrator as the potential penalties are so large that it can damage an organization of any size. As the enforcement scrutiny increases, contract issues related to Stark will also become a greater concern for physicians. It's vital that administrators take the proper steps to get it right on the front end. The Elliott Davis Decosimo Healthcare Team features the resources and expertise necessary to provide hospitals and practices with effective planning and guidance regarding issues related to Stark. To learn more about our approach to comprehensive practice reviews, contact the Elliott Davis Decosimo healthcare team at 866-417-4059.