

PROFESSIONAL SERVICES AGREEMENT OR LEASE: NOT KNOWING THE DIFFERENCE COULD COST YOU

Over the past few years, rural health care providers have struggled to recruit full-time physicians to their communities. This has caused a number of providers to consider part-time arrangements with physicians. The rural provider considering a part-time arrangement has at least two options: 1) the provider could allow the physician to lease space within its facility; or 2) it could enter into a professional services agreement with the physician. A summary of both options is set forth below.

1. PROFESSIONAL SERVICES AGREEMENT

One option that a provider may consider is entering into a professional services agreement (“PSA”). A PSA is a staffing arrangement between a hospital and a non-employed physician that can take several forms. In some cases, the hospital bills and collects for all services and pays the physician a flat rate for performing the underlying service. In other cases, a physician bills the physician’s own professional fees, and the hospital separately bills the facility fee. In either scenario, the patients remain hospital patients at all times, and no lease is required because the provider is only receiving compensation or reimbursement for professional services (not for facility services, which would otherwise be covered by a lease).

Because PSAs often obligate a physician to staff a clinic, a PSA may be optimal for hospital organizations with established billing and collection methods that are seeking to offer new lines of service or to expand to a certain geographic market. This arrangement is also suitable for physicians that prefer medical offices and exam rooms that are fully furnished and operational without the need to make customized improvements to the premises. However, there are regulatory requirements that can make the use of a PSA cumbersome, such as the need for a prospective, written agreement with a term of at least one year.

2. TIMESHARE LICENSE/LEASE

On the other hand, where patients are not hospital patients at all times during an episode of care, a PSA alone is not appropriate; instead, a timeshare lease or license should be utilized for the space, staff, furnishings and other services provided by the hospital to the physician.

The Stark exception for timeshare licenses allows for the use of space and other services “predominantly” for the provision of evaluation and management (“E/M”) services to patients. The benefits to using a license include that there is no minimum term or minimum occupancy period, and space may be shared among various providers at the same time. This type of arrangement is ideal for providers who are hesitant to commit to a longer-term arrangement or whose patient volume may vary from month to month. On the downside, if the E/M services do not meet the “predominant” standard set forth in the regulations, or if non-incidentally designated health services (“DHS”) are performed in the space, then the parties may no longer rely on the timeshare license exception and must use a timeshare lease.

A lease must be used in place of a license where the services performed are DHS. Moreover, a lease avoids the need to closely monitor the scope of E/M services being provided as, unlike the timeshare license exception, there is no limitation on the types of services that may be performed under the Stark exception for timeshare leases. Timeshare leasing arrangements can still help reduce the costs to a physician as compared with a full-time arrangement. However, this type of leasing arrangement requires constant monitoring of occupancy schedules to ensure exclusive use during each interval and a thorough accounting of which supplies and equipment are used by the tenant. In addition, the lease must be for a term of at least one year.

PRACTICAL TAKEAWAYS

- In order to determine which agreement is best suited for your particular arrangement:
 - Determine whether the physician(s) will be assigning all billing rights to the hospital;
 - Determine whether the hospital wishes to obligate the physician to provide coverage at certain times or whether the physician will be permitted to choose his/her own schedule;
 - Assess whether the premises will have a non-exclusive use or exclusive use during the occupancy period;

- Determine the scope of services to be provided; and
- Determine whether a term of one year or a more flexible term is preferred.
- Consider whether or not the hospital/facility is provider based. If it is, a PSA may be a better option to ensure such provider-based status is not jeopardized. CMS has not issued clear guidance on the effect of licensing provider-based space to third parties.
- If circumstances warrant a set payment to a provider regardless of the billings and collections received, a PSA that offers such set compensation rate may be optimal for the hospital and the physicians.
- If your organization is a rural health clinic, entering into a lease with a physician or physician organization may be a better fit in order to eliminate any billing risks. The timeshare license is also favorable to rural health clinics, as it may facilitate recruitment and integration into the community.

If you have any questions or would like additional information regarding timeshare leases, timeshare licenses and professional services agreements, please contact:

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