

HALL RENDER'S PRACTICALHEALTH™



DEVELOPMENTS IN
PHYSICIAN EMPLOYMENT
PAGES 1-2

FEDERAL REGULATORY
DEFINITIONS OF FAIR
MARKET AND COMMERCIAL
REASONABLENESS
PAGE 2

NON-MONETARY COMPENSATION
TO PHYSICIANS STAYS THE SAME
FOR 2010
PAGES 3-4

Developments in Physician Employment

Enforcement actions warrant
diligent action.

The current competitive marketplace in the health care industry combined with developments in the legal framework governing hospital-physician relationships have produced strong incentives for hospitals and physicians to more strongly consider physician employment as a necessary tool to ensure long term viability. Physicians' incomes are stagnant or decreasing and malpractice insurance costs are on the rise. Reimbursement for certain specialties is being cut. In fact, such cuts sparked a recent lawsuit by the American College of Cardiology over reimbursement rates for cardiology services in the 2010 Medicare Physician Fee Schedule. Access to ancillary services and information technology needs are placing additional stress on physician offices. Hospitals and physicians have begun to consider a variety of compensation arrangements in order to align their interests. While there are still several viable options for such alignment, ultimately employment often prevails as the best option for the parties.

Both the Stark law and the Anti-Kickback Statute include provisions to address employment arrangements from a regulatory standpoint. The physician employment exception to the Stark Law requires that compensation: (i) is fair market value, (ii) does not take into account the volume or value of referrals by the physician, and (iii) is commercially reasonable. Under the Anti-Kickback Safe Harbor for bona fide employment arrangements, there is protection for amounts paid by an employer to an employee (who has a bona fide employment relationship with such employer) in the provision of covered items or services.

While there has been government fraud and abuse enforcement actions relating to non-employed physicians, such actions in the employment realm have been relatively rare. Hospitals, physicians, and their legal counsel have considered employment to be a low risk arrangement from a fraud and abuse perspective. Recently, however, the Department of Justice (DOJ) showed its willingness to pursue employment relationships. CONTINUED ON PAGE 2





FEDERAL REGULATORY DEFINITIONS OF FAIR MARKET VALUE AND COMMERCIAL REASONABLENESS

FAIR MARKET VALUE.

The federal Stark Law regulations define the term “fair market value” as the value in arm’s-length transactions, consistent with the general market value. “General market value” means the price that an asset would bring, as the result of *bona fide* bargaining between well-informed buyers and sellers who are not otherwise in a position to generate business for the other party, or the compensation that would be included in a service agreement as the result of *bona fide* bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party, on the date of acquisition of the asset or at the time of the service agreement.

COMMERCIALLY REASONABLE

From CMS commentary to the final Stark regulations, an arrangement will be considered “commercially reasonable” in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician (or family member or group practice) of similar scope and specialty, even if there were no potential for referrals.



Physician Employment (Continued)

These enforcement actions are significant as they indicate increased risk associated with physician employment relationships and are among the first government enforcement actions to focus exclusively on the fair market value and commercial reasonableness of compensation paid to physicians employed by hospitals and health systems.

In August 2009, the DOJ settled with Covenant Medical Center (“Covenant”) in Iowa for \$4.5 million in response to alleged violations of the Stark Law and the False Claims Act. The DOJ alleged that Covenant violated the Stark Law by paying commercially unreasonable compensation and above fair market value, to five employed physicians who referred patients to Covenant. The DOJ alleged that these Covenant physicians were reportedly among the highest-paid physicians in the entire U.S., earning as much as \$2.1 million, despite Covenant’s non-profit status. These salaries were alleged to have been as much as three times greater than the compensation paid to other physicians who referred patients to Covenant.

Shortly thereafter, on September 30, 2009, the University of Medicine and Dentistry of New Jersey (“UMDNJ”) entered into an \$8.3 million settlement agreement with the DOJ regarding allegations under the False Claims Act, the Stark Law and the Anti-Kickback Statute. The DOJ alleged that UMDNJ administrators focused on certain community cardiologists in an effort to generate more referrals for cardiac procedures by entering into part-time employment agreements with cardiologists in private practice that were allegedly an inducement to refer cardiac procedures to UMDNJ. While the part-time employment contracts did require the physicians to provide services (e.g., teaching, call coverage, lecturing and research), and the compensation in the contracts ranged from approximately \$50,000 to \$180,000, according to DOJ, the services were rarely, if ever, performed. The government alleged that UMDNJ did not expect the cardiologists to provide the services, but rather the part-time employment arrangements were a mechanism through which the physicians were paid to refer patients to University Hospital. Notably, the contracts at issue required the physicians to complete forms to document that the services were provided.

These settlements highlight the importance of implementing a comprehensive physician contract review process. This contract review process should include documentation of legal review and independent assessment of the fair market



value of physician compensation. Independent assessments should refer to the applicable health care definition of fair market value and commercial reasonableness. As a general rule, productivity should be benchmarked. For example, if a hospital compensates a physician at the 80th percentile for the specialty, the physician's productivity should also be verified at the 80th percentile absent other demonstrable services or circumstances.

Finally, tax-exempt hospitals should consider placing a cap on total incentive compensation or a board approval process to demonstrate a rebuttable presumption of reasonable compensation. This is particularly important where certain physician-employees' salaries will be reported on the hospital's Form 990.

According to the DOJ, we can expect cases similar to the one against Covenant in the

future. U.S. Attorneys have indicated that they will continue to "aggressively pursue all types of fraud in order to protect federal health care dollars." Physicians and hospitals should be mindful of these settlements and consider the above recommendations to ensure compliance with the law and to avoid significant penalties. n

Non-Monetary Compensation to Physicians Stays the Same for 2010

SUMMARY.

Under the Federal Stark Law, for calendar year 2010 hospitals may provide non-monetary compensation to physicians up to an aggregate amount of \$355. In addition, "medical staff incidental benefits" (e.g., meals, parking, other items or incidental services that are used on the hospital's campus) are limited in 2010 to less than \$30 per occurrence. These amounts are unchanged from 2009 due to a decrease in the CPI-U index. Other requirements of the Stark Law's exception for non-monetary compensation and medical staff incidental benefits also need to be met. Hospitals should take inventory of such non-monetary compensation and benefits and confirm they are meeting the law's requirements.

ANALYSIS.

Under the Federal Stark Law, if a hospital has a financial relationship with a physician, the physician may not refer to the hospital for the provision of "designated health

services" (including inpatient and outpatient hospital services), and the hospital may not bill for such services, unless an exception is met. A "financial relationship" under Stark is construed very broadly, which means all remuneration from a hospital to a physician must be considered, including in-kind compensation.

Pursuant to the Stark regulations at 42 C.F.R. § 411.357, there are exceptions for Non-Monetary Compensation and Medical Staff Incidental Benefits. Generally, the Non-Monetary Compensation exception may be used to protect items or services provided to a physician such as entertainment, meals, and other non-cash equivalent benefits. The exception for Medical Staff Incidental Benefits applies only to non-cash items and services provided while the physicians are on campus. These exceptions are outlined below. Hospitals should review and ensure they are meeting these exceptions.

NON-MONETARY COMPENSATION UP TO \$355.

(1) *Compensation from an entity in the form of items or services (not including cash or cash equivalents) that does not exceed an aggregate of \$355 per year, if all of the following conditions are satisfied:*

- (i) *The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician.*
- (ii) *The compensation may not be solicited by the physician or the physician's practice (including employees and staff members).*
- (iii) *The compensation arrangement does not violate the Anti-Kickback Statute or any Federal or State law or regulation governing billing or claims submission.*

(2) (i) *Where an entity has inadvertently provided non-monetary compensation to a physician in excess of the \$355 limit, such compensation is deemed to be within the \$355 limit if:*

- (A) *The value of the excess non-monetary compensation is no more than 50 percent of the \$355 limit (i.e., \$532.50); and*
- CONTINUED ON PAGE 4

ABOUT HALL RENDER

With more than 140 attorneys, Hall Render partners with clients to direct them through the ever-changing business landscape of today's health care industry. Health care is our business.



Non-Monetary Compensation (Continued)

- (B) *The physician returns to the entity the excess non-monetary compensation (or an amount equal to the value of the excess non-monetary compensation) by the end of the calendar year in which the excess non-monetary compensation was received or within 180 consecutive calendar days following the date the excess non-monetary compensation was received by the physician, whichever is earlier.*
- (iii) *This "return" option may be used by an entity only once every three years with respect to the same referring physician.*
- (3) *In addition to non-monetary compensation up to the \$355 limit described in this provision, an entity that has a formal medical staff may provide one local medical staff appreciation event per year for the entire medical staff. Importantly, any gifts or gratuities provided in connection with the medical staff appreciation event are subject to the \$355 limit.*
- MEDICAL STAFF INCIDENTAL BENEFITS**
Compensation in the form of items or services (not including cash or cash equivalents) from a hospital to
- a member of its medical staff when the item or service is used on the hospital's campus, if all of the following conditions are met:*
- (1) *The compensation is offered to all members of the medical staff practicing in the same specialty (but not necessarily accepted by every member to whom it is offered) without regard to the volume or value of referrals or other business generated between the parties.*
- (2) *Except with respect to identification of medical staff on a hospital web site or in hospital advertising, the compensation is provided only during periods when the medical staff members are making rounds or are engaged in other services or activities that benefit the hospital or its patients.*
- (3) *The compensation is provided by the hospital and used by the medical staff members only on the hospital's campus. Compensation, including, but not limited to, internet access, pagers, or two-way radios, used away from the campus only to access hospital medical records or information or to access patients or personnel who are on the hospital campus, as well as the identification of the medical staff on a hospital web site or in hospital advertising, meets this "on campus" requirement.*
- (4) *The compensation is reasonably related to the provision of, or designed to facilitate directly or indirectly the delivery of, medical services at the hospital.*
- (5) *The compensation is of low value (that is, less than \$30) with respect to each occurrence of the benefit (for example, each meal given to a physician while he or she is serving patients who are hospitalized must be of low value).*
- (6) *The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties.*
- (7) *The compensation arrangement does not violate the Anti-Kickback Statute or any Federal or State law or regulation governing billing or claims submission.*
- (8) *Other facilities and health care clinics (including, but not limited to, federally qualified health centers) that have bona fide medical staffs may provide compensation under this exception on the same terms and conditions applied to hospitals under this exception. n*

CONTRIBUTING AUTHORS

ATTORNEY ERIN DRUMMY counsels clients regarding hospital and physician issues, medical record issues, joint venture and other collaborative efforts; preparation and review of hospital, physician and other provider contracts; physician recruitment; Stark Law/Fraud and Abuse opinions; board of director/trustee organization; corporate compliance issues; medical staff and peer review; accreditation matters; and Medicare reimbursement issues. Erin graduated cum laude from Indiana University School of Law-Indianapolis in 2005.

ATTORNEY GREGG WALLANDER has made national and regional presentations on the Stark Law/Fraud and Abuse for the American Health Lawyers Association, Indiana Hospital and Health Association, Kentucky Hospital Association, Healthcare Financial Management Association, and Indiana State Medical Association. Gregg graduated magna cum laude from Indiana University School of Law-Indianapolis in 1993.

LAW CLERK LAUREN HULLS also contributing.