Drafting Physician Recruitment and Employment Agreements
Complying With Stark Law and Anti-Kickback Laws, Addressing Restrictive Covenant Issues, and Anticipating Other Legal Pitfalls

TUESDAY, OCTOBER 16, 2012
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Drafting Physician Recruitment and Employment Agreements

October 16, 2012
Daniel F. Murphy
Pre-drafting considerations

• Before drafting, make sure that the proposed recruiting package will not violate the Stark Law or Anti-Kickback Statute

• Stark and the Anti-Kickback Statute impose specific parameters on recruitment arrangements that must be incorporated into the written recruitment agreement

• Key questions before drafting include:
  – Who may recruit the physician?
  – What type of physician may be recruited?
  – What types of benefits can and cannot be offered?
  – Is the recruited physician relocating an existing practice or just finishing training?
Who may recruit?

*Stark Law Exception*

- Hospitals
- Federally Qualified Health Centers
- Rural Health Clinics

*AKS Safe Harbor*

- Any “entity”
- Includes hospitals and any other type of provider
- Includes non-providers (e.g. ACOs, HMOs)
- More expansive AKS safe harbor is useful if recruiting entity does not furnish DHS and Stark is not otherwise implicated
Who may be recruited?

*Stark Law Exception*

“Physicians” as defined in 42 C.F.R. § 411.351

- Medical doctor
- Osteopath
- Doctor of Dental Surgery
- Podiatrist
- Optometrist
- Chiropractor
Who may be recruited?

**AKS Safe Harbor**

- Any type of “practitioner”, including non-physician practitioners
- Practitioners must primarily serve patients in a
  - Health Professional Shortage Area
  - Medically Underserved Area
  - Medically Underserved Population
- HPSAs are only designated for
  - primary care
  - dentistry
  - mental health
- Recruitment of specialists does not enjoy safe harbor protection (see OIG Advisory Opinion 01-04)
What benefits can be offered?

_Stark Law Exception_

- Remuneration that is:
  - Paid directly to a physician
  - Intended to induce the physician to relocate to the hospital’s service area
  - Not based on the volume or value of actual or anticipated physician referrals or other business generated between the parties
- Actual costs incurred by a physician practice to recruit the physician
- Actual additional incremental costs incurred by a physician practice to add the recruited physician
What benefits can be offered?

**AKS Safe Harbor**

- Any payment made to induce a practitioner to locate his or her primary practice location in a HPSA served by the recruiting entity
- Benefits limited to a maximum of 3 year period
- Benefits may not vary (or be renegotiated or adjusted) based on the volume or value of expected referrals or business generated by the practitioner
- Payments may not directly or indirectly benefit a third party in a position to make or influence referrals to the recruiting entity
What benefits CANNOT be offered?

• Benefits lasting more than 3 years (AKS)
• Reimbursement to a physician practice for allocated overhead, unless (Stark)
  – the recruit is replacing a physician in a rural area or HPSA who has retired, relocated or died,
  – in which case the costs reimbursed to a practice can be the lower of 20% of the practice’s aggregate costs or a per capita allocation
Is the physician relocating or completing training?

• A recruited physician must either be
  – relocating from an existing practice outside of the recruiting entity’s service area
  – or establishing a new practice after completing training

• *Stark Exception*
  – Relocation requirement satisfied if physician moves at least 25 miles, or
  – 75% of revenues at new practice derive from new patients
  – Relocation does not apply if physician coming from practice at federal or state bureaus of prisons, Department of Defense or V.A., or Indian Health Services

• *AKS Safe Harbor*
  – Relocation measured based on revenue derived from patients not seen at prior practice (75% from new patients)
Drafting the Recruitment Agreement

- **Magic language provisions from the Stark Exception and AKS Safe Harbor**
  - Include a statement that physicians are not required to make referrals to the recruiting hospital / entity
  - Grant express permission for physician to obtain medical staff privileges at other hospitals
  - If practice restrictions are included, include an acknowledgement that those restrictions do not “unreasonably restrict the recruited physician’s ability to practice medicine” in the hospital’s service area
  - Include a requirement that the physician treat patients insured by federal health care programs in a non-discriminatory manner
Drafting the Recruitment Agreement

• Recruitment Benefits
  – Income guarantee
    • Based on monthly submission of statement of physician collections by practice, or
    • Stipend/credit line, subject to monthly and overall maximums, on which the physician can draw each month/periodically
  – Moving expenses
    • Either a set stipend or
    • A maximum amount reimbursed upon submission of receipts
  – Signing / commencement bonus
    • Payment upon execution, or
    • Commencement of practice, or
    • Completion of licensure/credentialing, or
    • Portions of total bonus paid for milestones above
Drafting the Recruitment Agreement

• Recruitment Benefits
  – Student loan repayment
    • One time repayment or paid over time
    • Include provision clarifying no obligation of hospital to make a payment if the total debt has been satisfied
    • Include provision expressly stating that hospital is not guaranteeing payment of student loans
  – Check that the sum of all recruitment benefits provided to the physician in a given year is not excessive
    • Depends partly on consistency of employment agreement compensation with FMV
Drafting the Recruitment Agreement

- Repayment Provisions
  - Recruitment benefits typically treated as a forgivable loan to the physician
    - Loan forgiven over a period of time if physician remains in service area and otherwise complies with terms of agreement
    - Forgiveness period typically between 2 to 4 years
    - Loan and forgiveness are NOT regulatory requirements, but rather the prevailing practice
    - Determine whether to amortize / forgive the loan in monthly amounts or whether entire years of service required for forgiveness
  - Consider waiving repayment obligations if the physician dies or is permanently disabled
Drafting the Recruitment Agreement

• Repayment Provisions
  – Helpful to include spreadsheet / example calculation showing benefits paid over time and forgiveness
    • Particularly if benefits are paid at the same time the loan is being forgiven
  – Loan repayment triggered by
    • Physician leaving service area before expiration of commitment period
    • Defined events of default, such as loss of license, Medicare/Medicaid exclusion, felony conviction, etc.
  – Evidence loan by promissory note
  – Secure loan with a security agreement
  – Include the physician practice as a security interest grantor because it will have control/title to the physician’s accounts receivable
  – File UCC statements
Drafting the Recruitment Agreement

- **Practice Restrictions**
  - Cannot prevent physician from joining other hospitals’ medical staffs
  - Cannot impose unreasonable practice restrictions on the physician’s ability to practice medicine in the geographic area served by the hospital
  - What is unreasonable?
    - No bright line guidance
    - Stark Phase III regulations opened the door to reasonable practice restrictions
  - CMS Advisory Opinion 2011-01
    - approved 25 mile / 1 year tail non-compete
    - that complied with state non-compete law
  - Consider having the practice restrictions not apply during the term of the agreement, but trigger only upon termination/breach
Drafting the Recruitment Agreement

• Reps, Warranties and Covenants
  – Full time practice in hospital’s service area
  – Unrestricted medical staff membership at recruiting hospital
  – State medical license, DEA registration in good standing
  – Medicare and Medicaid participation
  – Not excluded in OIG/GSA/LEIE databases
  – Participating provider with key payors
  – Board certification or eligibility
  – Maintenance of malpractice insurance
Drafting the Recruitment Agreement

- **Other Drafting Points**
  - Precisely define hospital service area
  - Define full time practice
  - Include blue pencil provision for any practice restrictions
  - Attach employment agreement as exhibit to recruitment agreement
Sample Provisions

- **Non-Discrimination:** “Physician shall see and treat in Physician's medical practice patients receiving benefits or assistance under any federal or state health care program, including, without limitation, the Medicare and Medicaid programs, and shall treat such patients in a non-discriminatory manner.”

- **Practice Restrictions:** “The parties hereto intend that this Agreement shall comply with all applicable governmental rules and regulations and agree that there is no requirement that Physician or any physician member of the Group Practice make any referrals to or otherwise generate business for Hospital or the Hospital, and that Physician is not restricted from establishing medical staff membership or clinical privileges at or referring patients to any other entity.”
Sample Provisions

• **Practice Restrictions:**
  “The parties expressly acknowledge and agree that nothing in this Agreement shall be interpreted as unreasonably limiting or restricting the right of Physician to engage in the practice of medicine, subject to appropriate laws, regulations and reasonable policies and procedures of Hospital. Hospital will not impose additional practice restrictions, *[except as provided in Section X, if restrictions are included]* on Physician other than conditions related to quality of care as required by Hospital and Hospital’s Medical Staff Bylaws.”

• **Service Area:**
  “Hospital is committed to preserving and promoting the availability of medical care in the community represented by the following *[zip codes]* or *[counties]*: (the “Service Area”).”
Sample Provisions

- **Loan forgiveness:**

  “Beginning one month after the Commencement Date, for each month during the Service Period: either (x) Physician shall repay that portion of the Loan then outstanding, plus Accumulated Interest, resulting from the Formula (defined below); or (y) if Physician has continuously maintained an active medical practice in the Service Area and no Event of Default has occurred during the preceding month, then Hospital shall forgive that portion of the Loan then outstanding, plus Accumulated Interest, resulting from the Formula:

  
  \[
  \text{Formula} = \left(\text{Sum of all recruitment benefits provided to date under Section X-Y, plus Accumulated Interest}\right) - \left(\text{Sum of all amounts forgiven during all preceding months}\right) \times \left[1 / (36 - \text{number of months since commencement date})\right]
  \]

  (the “Formula”).”
Relationship Between Recruitment and Employment Agreements

• Ensure that there is no inconsistency in the following provisions:
  – Term
  – Malpractice Insurance
  – Salary / Income Guarantee
  – Practice Restrictions
  – Representations, Warranties and Covenants
• Include restrictive covenants in employment agreement
• Negotiate and execute employment and recruitment agreements simultaneously
DRAFTING PHYSICIAN RECRUITMENT AND EMPLOYMENT AGREEMENTS

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October 16, 2012
PRECONDITIONS TO EMPLOYMENT

- Licensure in state
- DEA Registration (state and federal)
- On staff at Hospitals, other facilities
- Board Eligible or Board Certified
- Enrolled with Medicare/Medicaid or particular payors
- Malpractice Insurance in place
- Not restricted by covenant
PRECONDITIONS TO EMPLOYMENT

Be aware:

Provisions that allow for termination in the event that all of the requirements are not met by the anticipated start date can be unfair. This is especially true if a physician has completed all the necessary paperwork in a timely manner and it is out of the physician’s control (staff privileges, licensure).
JOB DESCRIPTION

Duties and Responsibilities

- What is exact job description? Is it accurate?

- What is physician expected to do as part of responsibilities:
  - Attend certain meetings/administrative functions
  - Supervise allied health workers (RN, PA, APN)
  - Timely submit medical records
  - Follow (written) rules and regulations
  - Maintain good working relationship with others

- What are expected work hours?
LOCATION OF WORK

Where will work be performed?

- Is physician expected to have hospital privileges and where?
- What are the exact locations where physician will work? Can it be specified?

Special Considerations:

- Watch out for sweeping language that allows the physician to be sent “anywhere designated by the Employer”
- Consider mutual agreement for new/future locations the employer may want to send the physician
- Limit locations by mileage, if appropriate (e.g. 20 miles)
- Remember that location of services can impact covenant
CALL COVERAGE

- Specify weekend, evening and holiday call coverage, if applicable
- Call should be spelled out or should be “equal” or “equitable” among similar specialty physicians. Sometimes seniority plays a role
- Does the physician have any say in the call schedule?
- Is there pay for call?
- Differentiate between group call and call that may be required by hospital/under Recruitment Agreement (for ER coverage)
EXCLUSIVITY

- Clinical Services: Patient care/medical services
  - Is moonlighting allowed?
  - Impact on malpractice insurance?
  - Consent required?
  - Ability to retain income?
  - Carve-out from covenant may be needed

- Outside Services: Non-patient care services that use physician’s knowledge and experience
  - May include expert witness testimony, lecturing, writing, teaching, etc.
  - Is consent required?
  - Can income be retained? Shared?
  - Separate malpractice coverage?
EXCLUSIVITY

- Special Considerations:
  - If income is retained by employer, is it counted as part of physician’s income (Recruitment Agreement issue; productivity compensation)
  - Language should at least be limited to medical-related outside services. Physician’s business endeavors should not belong to employer (investments, children’s book, restaurant ownership)
  - Consider ownership/patent/trademark issues
TERM OF AGREEMENT

- Finite Period or Self-Perpetuating (Evergreen)
- Time period linked to Recruitment Agreement/Partnership
- Notice to Terminate
  - Reciprocal or Unilateral (“without cause” and “for cause”)
  - Non-cancelable during initial year?
  - Re-entering into an Agreement terminated during first year.
  - What time period? Is it the same for both parties? (Avg. 90 days)
  - For cause termination:
    - Extended Disability
      - Total disability vs. illness/injury
      - Impact on compensation/benefits
      - Disability Insurance
TERM OF AGREEMENT

- Censored or sanctioned by a professional society
- Suspension or revocation of license
- Conviction of felonius crime (Note: avoid “arrest” language)
- Bankruptcy or Assignment for the benefit of creditors (unfair?)
- Inability to obtain or maintain professional liability insurance
- Substance/alcohol abuse (program offered?)
- General neglect or professional responsibility
- Material breach of agreement; right to cure (one-time only)
TERM OF AGREEMENT

- Employer goes bankrupt/out of business
- Violation of the “canons of medical ethics”
- Failure to become Board certified by a certain date or to maintain Board eligibility
- Subjective grounds for termination: reputation, getting along with others, etc.
- Violation of rules/regulations (right to cure?)
- Issues: Peer review/hearing, reportable to NPDB
TERMINATION CONSIDERATIONS

- Accrued Wages
- Accrued Bonus
- Unused PTO
- Patient Records and Right to Notify
- Accounts Receivable ("run out" in production model)
- Forfeiture of unvested retirement benefits
- Severance (if owner)
RESTRICTIVE COVENANTS

- Generally enforceable in most states if reasonable
  - Duration
  - Geographic Scope
  - Activity Restriction
  - “Clean Hands Doctrine”

- Enforcement Provisions
  - Liquidated Damages
  - Injunctive Relief

- Impactive Case Law
RESTRICTIVE COVENANTS

Questions to Consider:

- Should covenant apply if termination without cause by employer, or for cause by physician?
- Limited or no covenant if recruitment agreement. Can covenant go into place once loaned funds paid/forgiven?
- What to do with extremely large covenant area—challenge it?
- Who should pay the legal fees for covenant enforcement?
NON-SOLICITATION

- Prevent terminated physician from soliciting referral sources, staff and patients
- Reasonable in time and duration
- Avoid language that prevents the doctor from treating a patient. Patients always have the right to choose their own physician
- Cannot generally charge more than state allows to transfer records (HIPAA)
- No charging “goodwill” to doctor when patient elects to transfer without solicitation
- Consider a “script” for patients; pay attention to State-law requirements
- General advertisements/mailing to postal codes generally OK
NON-DISPARAGEMENT

- These provisions prevent bad-mouthing of the other party following termination
- Can protect discussion of internal matters with third parties during employment as well (disputes, etc.)
ENTIRE AGREEMENT/RECRUITMENT

Entire Agreement Provision

- An “Entire Agreement” provision means that everything the parties have discussed should be in the document
- No oral discussions, e-mails, side letters, etc., will be applicable unless properly included in the document itself

Recruitment Agreement Reference

- Most Employment Agreements cross reference the loaned amounts under the Recruitment Agreement
- May require physician to indemnify group for amounts owed to hospital by physician if physician does not repay/stay in area
Physician Employment Agreements

Part II

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Factors That Influence Compensation

- Geographic Location of Practice
- Population/Demographics
- Doctor-Patient Ratio
- Size of Group
- Productivity of Group or Department of Hospital
- Fellowship Training
- Board Certification
- Type of Specialty (Electrophysiology v. Internal Medicine)
Before Negotiating Compensation:

**Do Your Homework**
- Practice Size
- Doctor Patient Ratio
- Reimbursement Rate

**Know Your Client’s Worth**
- MGMA
- AMA
- AMGA

**Productivity Bonuses**
Should be based on reasonable, objective, and identifiable factors set in advance
## Six Models of Physician Compensation

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<thead>
<tr>
<th>MODEL</th>
<th>PROS</th>
<th>CONS</th>
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<tbody>
<tr>
<td>Flat Salary</td>
<td>▪ Easy to administer</td>
<td>▪ Discourages entrepreneurial spirit</td>
</tr>
<tr>
<td>Salary + Bonus</td>
<td>▪ Fosters a sense of security</td>
<td>▪ Large percentage of income based on “subjective” standards</td>
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<td></td>
<td>▪ Allows physicians to increase income through performance</td>
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</tr>
<tr>
<td>Equal Sharing</td>
<td>▪ Simple to arrange</td>
<td>▪ Lacks productivity incentive</td>
</tr>
<tr>
<td></td>
<td>▪ Discourages overutilization</td>
<td>▪ Discourages high performers</td>
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<tr>
<td></td>
<td></td>
<td>▪ Allows marginal performers to coast</td>
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</tbody>
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### Six Models of Physician Compensation

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| Productivity (wRVUs)                       | ▪ Encourages peek performance  
▪ Rewards professional effort | ▪ Requires substantial accounting management  
▪ Encourages overutilization  
▪ Discourages activities not directly related to patient care |
| Productivity + Capitation                  | ▪ Encourages efficiency  
▪ Recognizes different revenue streams of a practice | ▪ Complicated to administer  
▪ Can create differential treatment levels based on patients’ payment stream |
| Capitation                                 | ▪ Distributes health plan payments among physicians in an equal manner or based on a formula | ▪ Requires complex data tracking  
▪ Physicians perform fewer services |

Common in HMO intensive markets (CA, MN and Northeast)
Trends in Hospital Compensation

- Income guarantee periods have increased from 2 years to 5 years
- Work Relative Value Units (wRVUs) and bonus models continue to be favored over fixed salaries
- FMV compensation for call coverage and administrative duties has become more common as physicians demand to be paid for their time
- Subspecialty and practice size continue to impact pay
Fringe Benefits

Health, Life and Disability Insurance

*Negotiate*
- Cost Sharing - % of Contribution
- Covered Individuals - Employee + Spouse, Children

Retirement Benefit

- 401 (k) Plans
- 403 (b) Plans
- Profit Sharing

Tuition, Dues, Subscriptions and CME

*Negotiate*
- Tuition Reimbursement
- CME & Travel Expenses

Miscellaneous Reimbursement

*Negotiate*
- Moving Expense or Reimbursement (Average = $15,000) (Taxable Income)
- Cellular Phone
- Automobile Allowance

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**Malpractice Insurance**

- **Occurrence Coverage** - Preferred by physicians because the purchase of extended reporting endorsement ("tail") is **not** required at the end of the policy.

- **Claims Made Coverage** - The most common type of insurance coverage offered by employers. Tail coverage is required.
Tail Coverage

- Also known as, “Extended Reporting Endorsement”

- Tail provides "seamless" coverage for alleged acts of malpractice that occurred while a claims made policy was in effect and for which coverage has expired

- Must be purchased within 60-90 days of termination, depending on the jurisdiction

- Tails is most frequently required upon:
  a. Separation from a practice due to relocation, termination, or buy-out of physician-shareholder
  b. Switching from a “claims made policy” to an “occurrence policy”

**CAUTION:** Tail typically costs between 150% to 200% of the price of a mature claims-made policy
Nose Coverage

- Also known as “retroactive coverage” or “prior acts coverage”

- Does the same thing as tail coverage, but you don't pay a separate premium for it *(Refer to specific carrier)*

- Nose coverage must be purchased at the same time “claims made” coverage is purchased from a new carrier

- Nose coverage covers alleged acts of malpractice or omissions that occurred before the beginning of the new insurance relationship, but for which no claim has been made
Negotiating Tail Coverage

- Employer pays full cost of tail if physician leaves the practice for cause (RARE)
- Physician pays full cost of tail (COMMON)
- Tail is paid by the employer if termination is without cause
- Cost of tail is divided evenly between the employer and the physician
- Employer pays full cost of tail after physician works X number of consecutive years
Paid Time Off (PTO)

PTO
- Vacation = Average 15 days 1st year, 20 days 2nd & subsequent years
- Sick Time = Average 5 days
- CME = Average 5 days

Sample Contractual Language:
Employee agrees that he/she shall not be absent from the offices of Employer for more than ten (10) consecutive working days without Employer's prior written consent. Employee agrees to coordinate with Employer his/her time off for vacation and continuing medical education and shall promptly notify Employer when he/she is sick. Written requests for time off must be given to Employer within a minimum of ten (10) days advance notice. Priority for time off will be based upon the seniority of employment of physician-employees with Employer.

Caution: Don’t get over zealous. Will be perceived as “difficult” or “high-maintenance.”
Disability

Sample Contractual Language:

If Employee is unable to perform his/her duties hereunder because of a physical, emotional, and/or psychological condition for a period of more than thirty (30) days during any twelve (12) month period, the employment of Employee shall, thereupon, terminate.

Employee shall be paid to date of such disability, plus any accrued vacation and sick leave. Employment may be reinstated at the sole discretion of the Board of Directors of Employer.

If Employee suffers a partial disability which restricts him/her from providing the same services that were provided before such disability, then in such event Employer agrees that Employee may continue to work for Employer with the understanding that the compensation shall be modified so that it is commensurate with the services provided by Employee in relation to his/her productivity and profitability.

Maternity

- Average PTO for Maternity = 4/6 weeks
- Family Medical Leave Act (FMLA) up to 12 weeks job-protected unpaid medical leave
Future Equity Interest – Buy-In Provisions

- Physicians future right to purchase an equity interest in the practice
- Time frame, conditions precedent, valuation, and payment terms should be expressly stated in the Agreement

Example of Conditions Precedent:

- Continuous Employment for 2-3 Years (Average 2.5 years)
- Satisfactory performance reviews by senior physicians
- Ability to develop and maintain a referral source of business
- Entrepreneurial interest in the Practice
Important Questions to Ask:

- How will the purchase price be computed?
- How will the buy-in be structured? (*Exact v. Inexact Buy-In*)
- What are the potential costs based on prior equity acquisitions?

Valuation Methodologies to Consider:

- Book value of tangible assets (cash, furniture, equipment, & supplies)
- Fair market value of all assets (tangible & intangible) including AR and goodwill
- Discounted present value of net revenue stream (percentage of expected future receipts)
Payment Structures

Payment in Full

*Note:* If the physician is required to pay the total purchase price up front, he or she will be personally responsible for obtaining the necessary funding through bank loans or other sources.

Installment Payments

*Note:* If the purchasing physician is permitted to make installment payments, he or she may be required to sign a *promissory note* in which the payee is the practice and the note is secured by a security interest in the equity granted to the physician. In the event that the physician fails to make the installment payments, the practice can recover the equity interest.
Will physician be treated identically to other owners following the buy-in with respect to:

**PTO**
- Vacation
- Sick Time
- CME

**Income Division**
- Net Income Equally Distributed
- 50% Equality + 50% Productivity
- % of Collections

**Call Coverage**
- Fair & Equitable
- or
- Seniority Based