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Physician Recruitment: Ensuring Stark Compliance

Avoiding Fraud and Abuse Pitfalls In Crafting and Evaluating Recruitment Policies and Agreements

A Live 90-Minute Teleconference/Webinar with Interactive Q&A

Today's panel features:

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**Physician Recruitment: Ensuring Stark Compliance, Avoiding Fraud and Abuse
Pitfalls When Crafting and Evaluating Recruitment Policies and Agreements
January 14, 2010**

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Today's Presentation

- Physician recruitment under the Stark law
- Comparison to anti-kickback statute
- Practice tips for structuring recruitment arrangements and drafting agreements
- Hypothetical recruitment problems and solutions
- Q&A

Physician Recruitment Exception

- Physician may establish a solo practice (recruitment payment made directly to the physician)
- Physician may join an existing physician practice (recruitment payment may “pass through” the physician practice)
- Recruitment payments permitted from
 - Hospitals
 - Federally qualified health centers
 - Rural health clinics

Physician Recruitment Exception

- Requirements for recruitment payment *directly* or *indirectly* to a physician (whether or not the physician joins a physician practice):
 - Recruited physician relocates medical practice from outside the geographic area served by hospital (GSA) to inside the GSA
 - Move medical practice at least 25 miles; or
 - New medical practice derives 75 percent of revenues from professional services furnished to new patients
 - Reasonable expectation of meeting test sufficient during initial “start up” year
 - Not applied to residents, physicians in practice 1 year or less, and certain other physicians

Physician Recruitment Exception

- Requirements for recruitment payment *directly* or *indirectly* to a physician (cont'd):
 - Arrangement set out in writing and signed by parties
 - Arrangement not conditioned on physician's referral of patients to the hospital
 - Recruitment payment not determined (directly or indirectly) based on the volume or value of actual or anticipated referrals
 - Recruited physician allowed to establish staff privileges at any other hospital and to refer business to any other entities (except as otherwise permitted under *bona fide* employment arrangement, personal service arrangement, or potentially economic credentialing)
- No fair market value requirement

Physician Recruitment Exception

- Additional requirements for recruitment payment when the physician joins an existing physician practice:
 - Written agreement signed by the hospital, the physician, and the physician practice (Phase III)
 - Remuneration must be passed directly to and remain with the recruited physician, except for the actual costs incurred by physician or practice
 - For income guarantee, costs allocated to the recruited physician are limited to actual additional incremental costs attributable to the recruited physician (exception for practices located in rural area or HPSA)

Physician Recruitment Exception

- Physician Recruitment -- Additional requirements for recruitment payment when the physician joins an existing physician practice (cont'd):
 - Records of actual costs and passed through amounts retained for at least 5 years
 - Remuneration may not take into account the volume or value of referrals by the recruited physician, physician practice, or any physician in the practice
 - Physician or physician practice may not impose additional practice restrictions that unreasonably restrict the recruited physician's ability to practice medicine in the hospital's GSA (reasonable non-competes okay)
 - Arrangement does not violate the anti-kickback statute
 - Arrangement does not violate any federal or state law or regulation governing billing or claims submission

Physician Recruitment Exception

■ Special Rules

- Deceased, departing, or retiring physician replacement (physician practice located in a rural area or HPSA)
- Determining the GSA (hospitals located in rural areas ONLY)

Physician Recruitment Exception

- CMS Advisory Opinion Guidance
 - CMS-AO-2007-01
 - Recruitment agreement contained an excess receipts provision
 - Parties wanted to amend the agreement to delete the excess receipts provision
 - CMS said that, although there was no requirement for the provision, once it was included in the agreement, the arrangement could not be modified to eliminate it and still remain compliant

Physician Recruitment Exception

- CMS Advisory Opinion Guidance
 - CMS-AO-2006-01
 - Recruited physician would spend 80–90% of time in recruiting hospital's service area, and 10–20% of her time in an office outside of recruiting hospital's service area
 - CMS said that there is no explicit requirement in the recruitment exception that the recruited physician spend 100% of medical practice time in hospital's service area
 - CMS also stated that it could reach a different conclusion if the time spent by the recruited physician outside of the geographic service area would be more substantial than under the proposed arrangement

Other Exceptions?

- Retention
- Indirect compensation
- FMV
- Employment

Anti-kickback Statute

- Practitioner Recruitment safe harbor difficult to meet
- Unlike Stark law, failure to meet safe harbor is not *per se* illegal
- Meeting Stark exception does not provide protection against violations of the anti-kickback statute
- Applies only to physicians practicing in one of certain primary care specialties
- At least 75% of the revenues of the new practice must be generated from patients residing in a Health Professional Shortage Area (HPSA) or a Medically Underserved Area (MUA) or who are part of a Medically Underserved Population (MUP)

Anti-Kickback Statute

- At least 75% of revenues must be generated from new patients not previously seen by the practitioner at his or her former practice
 - Stark exception specifically requires looking at the preceding 3 years
 - Under safe harbor, “any reasonable method” may be used for complying with this requirement, provided consistently same principles
 - Stark exception also permits relocations of at least 25 miles regardless of existing revenue stream
 - Concerned about abuse by experienced practitioners who may “relocate” their offices short distances to underserved areas to receive recruitment payments (64 FR 63544)

Anti-kickback Statute

- The practitioner agrees to treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.
- The practitioner is not restricted from establishing staff privileges at or referring to any other entity.
 - Employment or personal services agreements/Economic credentialing
- There is no requirement that the practitioner make referrals to, be in a position to make or influence referrals to, or otherwise generate business for the entity.
 - Permissible to require staff privileges at entity and conditions intended to ensure quality of patient care (*e.g.*, performing minimum number of procedures).

Anti-kickback Statute

- The benefits are provided for a period not in excess of 3 years.
 - “Generally, the period begins on the earlier of the first payment or transfer of anything of value to the recruited practitioner or the date that the practitioner begins his or her new practice in, or relocates his or her practice to, the area.” OIG AO 01-04
 - For income guarantees, combine period of income and forgiveness.
- The terms of the agreement are not renegotiated during this 3-year period in any substantial aspect (in any manner that materially affects the payments and benefits under the written agreement.)

Anti-kickback Statute

- The payment or exchange of anything of value may not directly or indirectly benefit any referral source (other than recruit)
- OIG declined to expressly protect joint recruitment: “We are not persuaded that a safe harbor can be crafted that would protect legitimate joint recruiting arrangements ... without sweeping in sham arrangements that are actually disguised payments for referrals.” (64 FR 63544)
 - “On the one hand, these arrangements can be efficient and cost effective means of recruiting needed practitioners....”
“On the other hand, these arrangements can be used to disguise payments for referrals....”
 - However, OIG clarified joint recruitment arrangements “are not necessarily illegal and must be evaluated on a case-by-case basis.”

Anti-kickback Statute

- No physician retention safe harbor similar to Stark exception
- In considering future safe harbor, the OIG has warned that payments for retention purposes require closer scrutiny because of the increased risk of kickbacks
- Note that the Stark law exception requires that the arrangement not violate the anti-kickback statute.

Anti-kickback Statute

- **OIG Guidance**—The OIG has cautioned that recruitment is an area that is subject to abusive practices.
 - Is there documented evidence of an objective need for the practitioner's services?
 - Does the practitioner have an existing stream of referrals within the recruiting entity's service area?
 - Is the benefit narrowly tailored so that it does not exceed that which is reasonably necessary to recruit a practitioner?
 - Does the remuneration directly or indirectly benefit other referral sources?

Recruitment Checklist

Recruitment Checklist

- 1. Determine need for the physician:
 - Each year, the board should conduct bona fide community needs analysis to determine objective need
 - Factors to consider:
 - Demographic statistics describing the service area (including population shifts and changes in disease incidence rate)
 - Shortage of physicians for the particular service
 - Actual number of existing physicians practicing in specialty within service area (including anticipated reduction due to retirement or relocation)
 - Independent third party studies indicating that the population to physician ratio in the community is deficient in the specialty

Recruitment Checklist

- Documented lack of physicians serving indigent or Medicaid patients or patients with specific needs (e.g., language barriers)
- Community demand for particular medical service coupled with documented lack of availability
- Documented long waiting periods for service
- Demonstrated reluctance of physicians to relocate to the community due to its location (e.g., rural or economically disadvantaged urban areas)
- Documented interviews of medical staff members regarding need in service area
- Consider reviewing Board's annual plan prior to each recruitment and receiving board approval on case-by-case if there is no annual plan or recruitment falls outside of plan.

Recruitment Checklist

- 2. Identify Service Area: Identify the geographical area served by the hospital by determining the lowest number of *contiguous* zip codes from which the hospital draws at least 75% of its inpatients.
 - Maintain, and continue to update as necessary, a map and/or the list of zip codes that comprise the Service Area.
 - Phase III Clarification:
 - Can draw from different zip codes to define services area, as long as each set meets 75% test. Allows hospital to recruit to different locations and still meet test.
 - zip codes with no patients not counted.

Recruitment Checklist

- Determine if (1) physician is primary care and (2) area is HPSA or MUA:
 - <http://bhpr.hrsa.gov/shortage>.
 - Significant for Anti-Kickback safe harbor protection
 - Although hospital not required under safe harbor to also be located in HPSA or MUA, hospital must also comply with Stark geographical area served by hospital requirement.
 - HPSA designation is significant to permit payments to retain existing medical staff members who do not meet the Stark relocation test or are otherwise ineligible for recruitment payments (but, consider risk under Anti-Kickback Statute for retention payments).

Recruitment Checklist

- 3. Perform Stark Relocation Test:
 - Resident or physician in practice 1 year or less
 - 75% practice revenue test
 - For start up year, test satisfied if there is “reasonable expectation” to meet requirement for year
 - Consider requiring physician attestation
 - Relocating medical practice at least 25 miles.
 - Consider risk under Anti-Kickback Statute and OIG concern regarding physicians with existing referral streams who relocate short distances.
- Consider retention exception if physician is already on the hospital’s medical staff or does not meet relocation test.

Recruitment Checklist

- 4. If physician will join an existing practice:
 - Practice must pass remuneration directly to the recruited physician, except for actual costs incurred by the practice in recruiting the physician.
 - Practice must maintain records of the actual costs and the passed through amounts for at least 5 years and make available to the Secretary and hospital.
 - Practice may not impose additional and unreasonable practice restrictions:
 - Moonlighting
 - Solicitation of patients and employees
 - Confidential and proprietary information
 - Unreasonable non-competes
 - Reasonable liquidated damages if recruit leaves practice, including repayment of losses incurred by practice in excess of any hospital payments

Recruitment Checklist

- 5. Determine the incentives that are necessary to induce the physician to relocate:
 - Incentives should be narrowly tailored and reasonably necessary to recruit the physician
 - The amount of the overall package must be reasonable:
 - relocation
 - sign-on bonus
 - Support loan/income guaranty
 - medical malpractice tail coverage
 - recruitment expense reimbursement
 - Medical school repayment assistance
- “Whether the value or duration of a benefit is indicative of abusive practices varies based upon a number of factors including, for example, whether there is a reasonable and documented basis for the benefit's value and duration.” OIG Advisory Opinion 01-04.

Recruitment Checklist

- 6. If Support Loan (income guaranty): Calculate reasonable amount of the support Loan and determine the duration of the loan/forgiveness period.
 - The duration of benefits (includes forgiveness period), should last no more than 3 years.
 - Hospital should be consistent in use of support/forgiveness feature for similar specialties and recruitments.
 - Consider requiring promissory note signed at time of agreement.
 - Consider tax implications.

Recruitment Checklist

- To calculate salary component of income guarantee, consider:
 - Objective data from recognized industry sources (MGMA)
 - Recruiting firm compensation studies
 - Amounts recently paid by hospital to other recruits
- Calculating expense component depends on whether the physician will join an existing practice:
 - For solo physicians, consider tax deductible operating expenses normally and reasonably associated with physician's specialty and actual anticipated expenses.
 - For physicians who will join an existing practice, support loan based on group's actual additional incremental costs only that are attributable to the physician.

Recruitment Checklist

- 7. Obligations during Support loan Period:
 - Procedure to submit monthly statements
 - Fixed v. varying monthly payments/Net v. Gross
 - Maximum caps for gross cash receipts and advances
 - Events that terminate hospital's obligation
- 8. Obligations at end of Support loan Period
 - When to perform accounting (e.g., no later than the 30th day following the end of the support loan period)
 - Procedure if loan advances exceed maximum caps
 - If the recruitment is with practice, when practice must provide accounting of the actual additional incremental costs
 - Procedure if total loan advances exceed actual incremental expenses.

Recruitment Checklist

- 9. Background Investigation: consider investigating physician's background to identify quality candidates likely to fulfill recruitment obligations.
 - Sanctions check
 - NPDB as part of application for privileges
 - Criminal background
 - Financial background
- 10. Conditions Precedent to the Agreement. Consider requiring following prior to the start date:
 - Obtain valid licensure in the state;
 - Complete Hospital's background investigation;
 - Obtain privileges at Hospital;
 - Submit all necessary application/enrollment forms to obtain provider numbers from the Medicare and Medicaid programs and all third party insurance providers.

Recruitment Checklist

- 11. No Private Understandings.
 - The complete agreement between the parties should be encompassed by the final recruiting agreement. Side agreements or letter agreements that create obligations for the parties are ill-advised.
 - Recruiting agreements should not be tied expressly, by implication or by “private understanding,” to facility utilization.
 - Exercise caution when describing community need to avoid promise or warranty of revenue.
- 12. No renegotiations. The terms of the agreement cannot be renegotiated in any “substantial aspect” (in any manner that materially affects the payments and benefits).
 - Change of law
 - Change of circumstance

Enforcement

- Repayment of Support Loan.
 - Failing to pursue physician/practice may appear to be an illegal remuneration depending on the circumstances.
 - Filing lawsuit
 - Forum for Dispute Resolution: arbitration v. litigation
 - Disputes between physician and practice
 - Settling legitimate disputes:
 - Contractual claims
 - Fraudulent inducement Claims - claim fraudulently induced into recruitment agreement because hospital overstated community need/patient base. *See John v. Marshall Health Services, Inc. at al.*, 91 S.W.3d 446 (Tex. App.—Texarkana 2002).
 - When does Stark Law violation end?

Hypotheticals

Hypo #1

Dr. Martha Wellbee, a board-certified neurosurgeon, has entered into a recruitment arrangement with Holy Roller Hospital, which contains an income guaranty loan of \$250,000 plus expenses (for one year) with a forgiveness clause. To have the loan completely forgiven, Dr. Wellbee must stay in the community for 3 years after the additional income guaranty period. For every year following the income guaranty period that she stays in the community, HRH will forgive 1/3 of the loan. Dr. Wellbee's receipts are lower than expected, and her expenses are higher than expected, and at the end of the income guaranty period she owes HRH \$200,000.

Issues for Hypo #1

- Has there been a breach of the recruitment agreement, and if so, what is the effect on HRH's right to bill Medicare for past, present and future DHS referred by Dr. Wellbee?
- Can recruitment agreements be extended to employees?
- Can HRH enter into a second recruitment arrangement with Dr. Wellbee?
- If HRH hires Dr. Wellbee as an employee, is there FMV consideration for forgiving loan?
- Recruitment exception --> employment exception issues
- What Stark and/or AKS implications are there if HRH forgives loan (without hiring her)?

Hypo 1 Cont'd

Dr. Wellbee closes her practice in violation of the recruitment agreement and decides to move away to accept a new job out of HRH's area. Before she can, however, she becomes ill, and while she is recovering the new job offer is rescinded. She then approaches HRH and requests that she become an employee of the hospital, and that for every year she stays in the area, 1/3 of her loan amount be forgiven. HRH is amenable in principle to the idea, or alternatively, not hiring her and just forgetting about the loan repayment, but does not want to run afoul of Stark and/or AKS.

Hypo #2

Same facts as #1 but after she closes her practice, Dr. Wellbee receives a very attractive oral offer from another hospital, including a \$200,000 sign-on bonus, to set up practice in the hospital's service area. She approaches HRH about a retention agreement. HRH is located in a HPSA.

Issues for Hypo #2

- Is Dr. Wellbee on medical staff of HRH?
- Does purported sign-on bonus of \$200,000 mean that HRH can match the sign on bonus through a retention payment (or through hiring her as an employee and extending her the same sign on bonus)?
- What Stark and/or AKS implications are there because of lack of written employment offer combined with large sign-on bonus

Hypo #3

Same facts as #1, but Dr. Wellbee does move away, out of the hospital's geographic service area, and later wants to come back as an employee of HRH or alternatively to establish a private practice again in HRH's service area and sign another recruitment agreement. HRH is in desperate need for a neurosurgeon due to Dr. Wellbee's earlier departure.

Issue for Hypo #3

- Can a hospital enter into more than one recruitment agreement with the same physician?
- Does it matter how long Dr. Wellbee has been out of HRH's service area?
- If Dr. Wellbee breached the first recruitment agreement, does that matter?
- Should there be concerns of a collusive agreement?

Hypo #4

- HRH has given up on Wellbee and wishes to recruit Dr. Slacker, who is also a board-certified neurosurgeon. Dr. Slacker has a very lucrative practice in an affluent community 40 miles from HRH, but is willing to establish a practice in HRH's service area and spend approximately 70% percent of his time in the new office. HRH wants to know whether it can do the deal, and if so whether it is limited to giving him an income guarantee loan in the amount of 70% of what it would otherwise pay a recruited physician, and what the forgiveness period should be (e.g., can it make the forgiveness period 70% of what it would normally require).

Issues for Hypo #4

- Can hospitals enter into a recruitment agreement with a physician who will be in the hospital's service area only part-time, and if so, what is the minimum percentage of time must the physician spend in the hospital's area?
- How does part-time status affect the amount of an income guaranty and the repayment period?

Hypo 5

- After accepting a recruitment offer from HRH, Dr. Slacker end up spending considerably less than 70 percent of his time in HRH's area as promised, and informs HRH that he is closing his practice in HRH's area. He owes a significant amount of money on his income guaranty loan, and when HRH sues to collect, Dr. Slacker defends on the basis that the agreement was "illegal under Stark" because he was in HRH's area only part time, and because the agreement forbade him from joining the medical staff of St. Elsewhere.

Issues for Hypo 5

- Does the agreement conflict with Stark, and if so, why?
- Is the agreement “illegal under Stark”
- Is the agreement illegal under some other basis?

Hypo 6

- Hospital desires to recruit orthopedist, and in particular would like to entice Dr. Porter to move to its area. Eventually, Hospital enters into agreement with Group, which brings Dr. Porter into Group as an employee. Under agreement between Hospital and Group (which is signed by them only), Hospital pays to Group the practice expenses of Dr. Porter, which Group estimates to be \$7,000 per month. Under the terms of her agreement with Group, Dr. Porter is not responsible for paying any office expenses. Does this comply with the recruitment exception, and if not, does it matter?

Issues for Hypo 6

- Does the lack of signed written agreement between Hospital and Dr. Porter mean recruitment exception is not met?
- Is there any comp arrangement between Hospital and Dr. Porter (indirect or direct)?
- Does Group have a financial relationship with Hospital and if so does it comply with an exception? If it does not comply with an exception whose referrals are at risk?
- Can Hospital, through the payment of the expenses, have a financial relationship with both Group and Dr. Porter or just one or the other?