

PHYSICIAN RECRUITMENT TO EXISTING GROUPS: NAVIGATING THE LEGAL LANDMINES

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San Francisco, California
October 8, 2004

Overview of Legal Issues

- Stark Law -- Stark II Phase II Regulations!
- Federal Anti-Kickback Law and Safe Harbor
- Tax-Exempt Law Considerations
- State Laws

Stark II Phase II Physician Recruitment Exception

- Effective July 26, 2004
- Fair Market Value exception not applicable because recruitment arrangements do not involve “services rendered”
- Extended to permit FQHCs to recruit
- Payments by hospital to physician to induce physician to relocate to geographic area served by hospital ok if:
 - Referrals not required
 - Amount of payment not referral influenced
 - Written, signed agreement
 - Physician not precluded from establishing privileges elsewhere

Stark II Phase II Physician Recruitment Exception

- Hospital's geographic area defined as the lowest number of contiguous postal zip codes from which hospital draws 75% of inpatients
 - Can calculate using admissions or discharges
 - Do not calculate differently based on specialty of recruit
 - May only recruit within this area, not outside it
- Relocation defined as moving practice at least 25 miles or 75% of revenues in new practice derived from new patients
- Extended to residents and physicians practicing in specialty less than one year (*i.e.*, new to specialty in any location, not just in Hospital's community)

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Stark II Phase II Physician Recruitment Exception

- Limited exception for recruitment to group if:
 - Written agreement between hospital and group if payment made to group
 - Remuneration not related to referrals from physician or group
 - Group cannot impose practice restrictions on recruited physician (*e.g.*, non-compete, patient nonsolicitation provisions)
 - No violation of Anti-Kickback Law or laws addressing claims submission

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Stark II Phase II Physician Recruitment Exception

- Remuneration passed through to recruited physician except for actual costs of group
- Costs allocated under income guarantee may not exceed actual additional incremental costs
- Group must keep record of actual costs for 5 years
- Record available to Secretary of HHS upon request

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Stark II Phase II Physician Recruitment Exception

- Use of Indirect Compensation Arrangement Analysis for Recruitment Agreements
 - Nothing in Preamble or Regulations that specifically precludes use of this exception (unlike specific reference to unavailability of FMV exception)
 - Specific language in definition of an indirect compensation arrangement and the indirect compensation exception suggests difficulty in using this analysis

Existing Agreements in Light of Stark II Phase II

- CMS July 14, 2004, Notice Confirmed That Existing Agreements Must Comply as of July 26th Effective Date
- Temporary NonCompliance Exception
 - 90 days of Noncompliance Permitted if Arrangement Has Previously Been in Compliance and Falls Out of Compliance for a Reason Beyond Control of Health Care Entity, and Entity Promptly Takes Steps to Rectify the Noncompliance
 - Allows Noncompliance Until October 24, 2004

Existing Agreements in Light of Stark II Phase II

- Is Agreement with Group or Physician?
 - Privity of Contract Issues if Contract is Only with the Physician but Group Needs to Agree to Take Certain Actions
- Amend Existing Agreements
 - Modify Expense Component of Income Guaranty
 - Require Group to Remove or Agree Not to Enforce Noncompetition/Nonsolicitation Provisions in Employment Agreement

Existing Agreements in Light of Stark II Phase II

- If Amendment Not Acceptable to Physician or Group–
 - Evaluate Circumstances Under Which Agreement Can be Terminated
 - Interpretation/Impact of Typical “Change of Law” Provision in Agreement
 - Potential Actions
 - Accelerate Forgiveness
 - Tax-Exempt Issues
 - Require Cash Payment of Amount Yet to be Forgiven

Existing Agreements in Light of Stark II Phase II

- Memorialize any Cash Repayment Obligations in a Promissory Note
 - Stark Law Isolated Transaction Exception permits a one-time transaction, but, if payments are on an installment basis, they must be secured by a promissory note or other security (e.g., guaranty by Group)
- Obtain Physician’s Contractual Obligation to Remain in Community
 - Stark Law Isolated Transaction Exception

Practitioner Recruitment Safe Harbor

- A regulatory anti-kickback safe harbor for practitioner recruitment was published in November 1999.
- Protection under the Practitioner Recruitment Safe Harbor is limited to arrangements with practitioners who are either –
 - (1) initially establishing a practice (within one year of completing a residency) in a health professional shortage area (“HPSA”); or (2) relocating a practice to a HPSA.

Practitioner Recruitment Safe Harbor

- HPSAs are determined according to certain procedures are designed to designate geographic regions within which an inadequate number of practitioners in certain specialties practice
 - The database to determine if a particular geographic area is a designated HPSA for each specialty is available at: www.bphc.hrsa.gov/dsd.
- HPSAs currently recognize only three types of specialties (primary care, dentistry and mental health)
 - Primary care physicians include doctors of medicine and doctors of osteopathy practicing in the areas of general and family practice, general internal medicine, pediatrics, and obstetrics and gynecology.

Practitioner Recruitment Safe Harbor

- Nine standards must be met to qualify for the safe harbor:
 - The arrangement is set forth in a written agreement
 - If a practitioner is leaving an established practice, at least seventy-five percent (75%) of the revenues of the new practice must be generated from new patients not previously seen by the practitioner at his or her former practice.
 - The benefits are provided by the entity for a period not in excess of three (3) years.
 - There is no requirement of referrals

Practitioner Recruitment Safe Harbor

- The payment or exchange of anything of value may not directly or indirectly benefit any person (other than the practitioner being recruited) or entity in a position to make or influence referrals to the entity
- At least seventy-five percent (75%) of the revenues of the new practice must be generated from patients residing in a HPSA or a Medically Underserved Area (“MUA”) or who are part of a Medically Underserved Population (“MUP”).

Practitioner Recruitment Safe Harbor

- The practitioner is not restricted from establishing staff privileges at or referring to any other entity of his or her choosing.
- The amount or value of the benefits provided by the entity do not vary (and are not adjusted or renegotiated) in any manner based on the volume or value of any expected referrals
- The practitioner agrees to treat patients receiving medical benefits or assistance under the Medicare and Medicaid programs.

Key Recruiting Agreement Considerations

- Contract with Group or Recruited Physician?
- Income Guaranty Expense Computation
- Repayment Obligations – Whose Liable?
- Other Considerations

Contract with Group or Recruited Physician?

- Contract with Group if Group is to be Liable for All Financial Obligations under the Agreement
- Contract with Physician if Group is Not to be Liable for All Financial Obligations; have Group Execute Supplemental Addendum Agreement with Group Obligations

Group Addendum Agreement

- Practice represents and warrants:
 - All financial information it has provided or will provide to Physician and Hospital concerning Practice expenses is true and correct.
 - The costs allocated to Physician by the Practice and included as Office Expenses under the Physician Recruitment Agreement do not exceed Practice’s actual additional incremental costs attributable to Physician during the Guarantee Period.

Group Addendum Agreement

- Group agrees that, except for the Office Expenses, any amounts paid by the Hospital to Physician under the Physician Recruitment Agreement, will be passed directly through to or remain with the Physician, as applicable.
- Group hereby agrees to be jointly and severally liable with Physician for the payment to Hospital of any repayment excess.
- In the event that Physician’s employment or affiliation with Group terminates at any time, for any reason, during the Guarantee Period, for purposes of Group’s final monthly statement to Hospital, Group shall include in Physician’s collections: (a) all collections received during such month, and (b) Group’s accounts receivable and fees for unbilled Physician Professional Services, reduced to reflect Group’s historical adjustments for contractual allowances and bad debts.

Group Addendum Agreement

- Group agrees to provide Hospital with the monthly statement of Physician’s collections and expenses. Hospital has the right to review and audit the Group’s books and records as they pertain to Physician.
- Group agrees to maintain, for a period of five (5) years following the termination of the Guarantee Period, records of its actual costs attributable to Physician during the Guarantee Period and any amounts passed through to Physician during the Guarantee Period. Group agrees to make such records available upon the request of the Secretary of the Health and Human Services or his or her designee. In the event of any such request, Group agrees to notify Hospital within ten (10) business days of receipt of such request .

Group Addendum Agreement

- Group agrees that it will not impose any noncompetition or similar practice restrictions on Physician during the Guaranty or Repayment Periods
- Noncompete Alternatives/Issues –
 - Liquidated damages only if Physician competes
 - Liquidated damages only if agreement terminates due to Physician breach or voluntary termination
 - “Springing” restrictive covenants that become effective when the income guaranty and forgiveness period ends

Income Guaranty Methodology

- *Net Guaranty* -- guarantee that recruited physician’s collections will equal an amount necessary to pay recruit’s salary, benefits, and Group’s actual incremental expenses
 - Group reports collections and expenses monthly to hospital
 - Require documentation of expenses
 - Expenses can change during guarantee period (e.g., Group adds a nurse for the recruited physician in month four)

Income Guaranty Methodology

- *Gross Guaranty (also referred to as a Collections Guaranty)* -- guarantee that recruit’s collections will equal an agreed upon amount; salary, benefits, and incremental expenses are built into a gross guaranteed amount
 - This approach compromises ability to ensure that Group only receives actual incremental expenses
 - Would require periodic, at least at end of guarantee period, reconciliation of amounts paid to actual costs

Compensation and Benefits

- Recruiting Firm Compensation Studies
- Amounts Recently Paid by Hospital or Group to Other Recruited Physicians in Same Specialty
- Review Physician Employment Agreement to Confirm Salary and Benefits

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Determining Collections To Be Reported

- Amounts for Ancillary Revenues (e.g., lab, x-ray)
- Post-Income Guarantee Period Collections
 - A/R existing as of the close of the period
 - Value of unbilled services as of the close of the period
 - Reduction for historical bad debt of Group
- If Agreement is with Physician, Require Group to Share with Recruited Physician Information About the Collections Reported to the Hospital and the Amounts Paid by the Hospital

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Determining Allowable Expenses

- This has become significantly less complicated with the Stark II Phase II Regulations
- Can only pay actual additional incremental expenses
 - If expenses would have been reduced (e.g., due to a retiring physician), expenses can be included
 - Can include recruit's pro rata share of expense of new nurse or equipment
- Limit to expenses that are tax deductible to Group
- Limit to expenses that would be typical to a new solo practitioner

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Repayment Obligations - Whose Liable?

- Collections in Excess of Guarantee During Guarantee Period
 - Physician and Group Jointly Liable to Repay Hospital
 - Group Pays Back Amounts Collected in Cash that Exceed Guarantee Amount, Up to Amounts Previously Received by Group
 - No Forgiveness of Cash Repayment Obligations
- Amounts Due Upon Physician Breach (*e.g.*, physician leaves the community before completion of forgiveness period) – Is this a Physician-Only Obligation?

Other Considerations

- Require group to obtain provider numbers and managed care approvals for physician prior to physician's arrival
- Require group to bill and collect on a timely basis
- Require group to allocate patients to new physician on an equitable basis
- Require group to bill in physician's name for call coverage services furnished to patients of other physicians in group

Other Considerations

- Amending Agreements in Mid-Term
 - Since Stark II permits payment of compensation to induce physician to relocate to geographic area served by hospital, changes would arguably not meet this definition
 - Anti-kickback law issues if change is to the benefit of the physician who now has an established practice in the community

Financial Support Alternatives

- Practice Support Loans
 - Limit Draws on Loan to Only Actual Additional Incremental Expenses
 - Include Note Condition that Restricts Imposition of Noncompetition Provision on Recruited Physician
 - Repayment of Note Through Forgiveness Based on Physician Remaining in Community for Period of Time
- Coverage Agreements
 - Hospitalist Services, Emergency On-Call Services
 - Collections Guaranties, Daily Fees
 - Ensure Financial Support Ties to Services Being Furnished

Financial Support Alternatives

- Sign-On Bonuses
 - Pay Amount Directly to Recruited Physician
 - If No Repayment Obligation, May Not Trigger Stark Exception for Recruiting to an Existing Group, but Could Have Tax-Exempt Issues
- Hospital Pays Only Recruiting Fee Directly to Agency
 - Should not Trigger Stark Exception for Recruiting to an Existing Group

Financial Support Alternatives

- Office Sharing Arrangements
 - Bona Fide arrangements should not trigger Stark Physician Recruitment Exception to Existing Group
 - Has group historically functioned under office sharing, rather than employment arrangements, with new physicians?
 - Is office sharing arrangement anticipated to continue indefinitely or is it intent that recruit will join group at some point in the future?
 - Does group want to put call coverage obligations in a written agreement?
 - Does group want to impose a noncompete in the office sharing arrangement?
 - CAUTION: office sharing arrangements should not be viewed as an alternative to traditional recruiting as a mechanism to avoid Stark rules – Stark Law prohibits Circumvention Schemes
