

**Ancillary Services:
A Practical Approach to Navigating
Through Stark Law Requirements
and the Medicare Billing Rules
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HYPOTHETICAL

Two physicians (Dr. Bones and Dr. Treatall) are owners of a multi specialty group practice (the “Group”). Dr. Bones is board certified in orthopaedic surgery and Dr. Treatall is board certified in internal medicine. There is another internist (Dr. Workhorse) who is a full-time employee of the Group.

HYPOTHETICAL

The Group currently practices in three locations:

Location 1: All three physicians provide the full range of services

Location 2: Only Dr. Bones provides services (orthopedic)

Location 3: Only Dr. Treatall and Dr. Workhorse provide services (internal medicine)

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HYPOTHETICAL

The Group is seeing a reduction in reimbursement and is interested in adding two new services:

- 1. Magnetic Resonance Imaging (MRI) – a diagnostic service**
- 2. Physical Therapy (PT) – a therapeutic service**
 - Both MRI and PT are Designated Health Services (DHS) under Stark**
 - MRI as a diagnostic test is also subject to the Anti-Markup Rule**

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LAWS / RULES TO BE CONSIDERED

- **The Stark Law**
- **Anti-Kickback Law**
- **Medicare Billing Rules**
 - **Supervision requirements**
 - **Billing limitations**
- **State Law**
 - **Third party payor issue**

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THE STARK LAW

Because MRI and PT are DHS, the provision of such services must meet an applicable exception

In-Office Ancillary Services Exception

- **MRI (TC)**
- **PT**

Physician Services Exception

- **MRI (PC)**

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IN-OFFICE ANCILLARY SERVICES

3 Questions:

- **Who may perform and/or supervise the service?**
- **Where is the service being performed?**
- **How is the service being billed?**

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IN-OFFICE ANCILLARY SERVICES

Performance and Supervision Requirements

DHS must be performed by either:

- **the referring physician;**
- **another member physician; or**
- **an individual properly supervised by either (a) the referring physician or (b) another physician in the group.**

Does the Group qualify as a “group practice”?

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IN-OFFICE ANCILLARY SERVICES

- **Single Legal Entity Test**
- **Two Physician Test**
- **Full Range of Care Test**
- **Substantially All Services Test**
- **Distribution of Income and Expenses Test**
- **Unified Business Test**
- **Patient Encounters Test**
- **Compensation Test**

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IN-OFFICE ANCILLARY SERVICES

Performance and Supervision Requirements

The level of supervision required for Stark is the same level required for Medicare billing purposes.

- **Drs. Bones, Treatall and Workhorse could all supervise the PT or MRI.**

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IN-OFFICE ANCILLARY SERVICES

Performance and Supervision Requirements

- If the Group were to hire a radiologist (Dr. Read) to interpret the MRIs, may he or she supervise the technical component of the test?
 - Effect on Group
 - W-2 vs. 1099
 - Anti-Markup issue

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IN-OFFICE ANCILLARY SERVICES

Location Requirement:

**Same Building
or
Centralized Building**



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SAME BUILDING

Requires that the physician making the referral (or any other physicians who are members of the group) provide a certain amount of physician services unrelated to the provision of DHS in the same building where the DHS is furnished.

- **35 hour rule**
- **Two different 8 hour tests**

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CENTRALIZED BUILDING

- **24/7 control**
- **No shared use**
 - **By definition, a block lease does not qualify**

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CENTRALIZED BUILDING

What if the Group practice placed the MRI machine in the basement of a building in which multiple physician practices are located?

Could the Group share use of (and thus billing for) the MRI with the other medical groups and still qualify?

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IN-OFFICE ANCILLARY SERVICES

Billing Requirement:

- By physician performing or supervising the services;
- By a group practice of which such physician is a member, employee or independent contractor under billing number assigned to the group practice;
- By an entity that is wholly owned by such physician or such group practice; or
- By an independent 3rd party acting as a billing agent



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IN OFFICE ANCILLARY SERVICES

Distribution of DHS Profits

Does it matter how the physicians are paid for Stark Law purposes?

- Physicians can be paid a share of “overall profits” of the group, provided that the share is not determined in a manner that is “directly” related to the volume or value of referrals for DHS
 - “Group of 5 Rule”
 - Per capita distributions
 - Distributions based on non-DHS revenue
 - In any manner if the group’s DHS revenue is < 5% of the group’s total revenue and the allocated portion to each physician in the group constitutes 5% or less of his or her total compensation
 - Productivity bonuses based on personally performed services

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PHYSICIAN SERVICES EXCEPTION

Enables a physician within a group practice to make referrals to other physicians in the group practice for physician services that constitute DHS.

To be allowed under Stark, DHS must be performed:

- personally by the referring physician;
- by a physician who is “a member of the same group practice”; or
- by individuals who are “directly supervised” by the physician or by another physician “in the group”.

No site-of-service requirement.

Independent contractors meet the definition of “another physician in the group practice” and therefore can conduct the relevant supervision.

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PHYSICIAN SERVICES EXCEPTION

If the Group hires Dr. Read to interpret the MRIs, what must be considered?

- **On-site v. off-site reads**
 - Medicare reassignment rules
 - Stark Law requirements
 - Medicare billing rules (Anti-Markup Rule)
 - Third party payor issues
- **May the Group pay the radiologist on a per-click basis?**

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MEDICARE BILLING RULES

Varies depending on the service being provided

- **Supervision Rules**
 - General Medicare Rules
 - Incident-to Rules
- **Billing Limitations**
 - Anti-Markup Rules

These are required in addition to complying with the Stark Law requirements

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MEDICARE BILLING RULES

Supervision Levels

- The level of supervision is determined by the physician supervision requirements for individual tests as listed in the Medicare physician fee schedule
 - General
 - Direct
 - Personal

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MEDICARE BILLING RULES

Incident-to Billing Rules

The incident-to rules permit a physician to bill for the services of certain non-physician providers and auxiliary personnel as if the physician performed those services him or herself.

Requirements:

- An integral, although incidental, part of the physician's professional service.
- Commonly rendered without charge or included in the physician's bill.
- Of a type that are commonly furnished in physician offices or clinics.
- Furnished by the physician or by auxiliary personnel under the physician's direct supervision.

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MEDICARE BILLING RULES

Incident-to Billing Rules

- **Direct Supervision:**
 - **Physician must be present and on the premises of the location and immediately available to furnish assistance and direction throughout the performance of the procedure.**
 - **It does not mean that the physician must be present in the room when the procedure is performed.**

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MEDICARE BILLING RULES

Incident-to Supervision Requirements Do Not Apply When PT is Performed by a Physical Therapist

- **Physical therapy is its own benefit category in the Social Security Act and therefore can also be provided by, and billed by, a physical therapist. In such cases, no physician supervision is required.**
- **If the services are being provided by a physical therapist assistant, Medicare requires general supervision by the physical therapist unless State Law requires differently.**

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MEDICARE BILLING RULES

Medicare Billing Limitations

▪ Anti-Markup Rule:

- Limits a billing provider's ability to markup certain diagnostic tests provided to Medicare beneficiaries
- Applies to both the technical and professional components
- Applies only when the billing physician/physician group or supplier also ordered the test unless certain requirements are satisfied

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MEDICARE BILLING RULES

Medicare Billing Limitations:

Anti-Markup Rule:

- "*Substantially All*" Test. The Performing Physician (physician that supervises the technical component of a test or performs the professional component of a test) must perform "substantially all" (at least 75 percent) of his or her professional services for the billing physician or other supplier.
- "*Site-of-Service*" Test. This test requires that the Performing Physician (1) be an employee or independent contractor of the billing physician or supplier; and (2) conduct or supervise the TC or perform the PC in the "office of the billing physician or other supplier".

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MEDICARE BILLING RULES

Medicare Billing Limitations:

Anti-Markup Rule:

- If the Anti-Markup Rule applies, the physician who orders and bills for the test cannot profit from the test.
- Medicare will pay the billing physician or physician group only the lesser of:
 - the Performing Physician's net charge to the billing physician or other supplier;
 - the billing physician or group's actual charge; or
 - the Medicare fee schedule amount for the test that would be allowed if the Performing Physician billed directly.

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ANTI-KICKBACK LAW

Makes it illegal for any individual or entity to “knowingly and willfully” offer or pay “remuneration” -- directly or indirectly, overtly or covertly, in cash or in kind -- to “induce” another individual or entity to:

- Refer an individual to a person for the furnishing (or arranging for the furnishing) of any item or service for which payment may be made under a federal health care program (“covered item or service”);
- Purchase or order any covered item or service;
- Arrange for the purchase or order of any covered item or service; or
- Recommend the purchase or order of any covered item or service

It also is illegal under the Anti-Kickback Law to solicit or receive remuneration for such purposes

CONCERNS . . .

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State Law Considerations

QUESTIONS??

