

Legal Issues with Practitioner Contracting



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Program Outline

- Challenges facing CAHs
- Overview of Practitioner Arrangements
- Overview of Federal Statutes
- Risk Points in Provider Agreements
- Legal updates impacting provider arrangements

Challenges Facing CAHs

- Recruitment
- Retention
- Adequate Coverage for Services
- Expanding Services

Types of Provider Contracts

- Employment Agreement
 - Provider is employed by hospital
 - Typically a longer-term arrangement
 - Exclusivity

Types of Provider Contracts

- Most important terms in Employment Agreement
 - Term (how long are you guaranteeing employment)
 - Compensation
 - Base Salary
 - Bonuses – productivity, quality, retention, signing
 - Medical Directorship
 - Non-Compete
 - Termination language (for cause? With notice?)

Types of Provider Contracts

- Professional Service Agreement (PSA)
 - Arrangement with another hospital, clinic, provider, group in which the entity provides physicians to provide services at your hospital
 - Longer-term arrangements
 - Compensation arrangements vary – hospital may bill for the services, or the group could bill for the services.

Types of Provider Contracts

- Locum Tenens
 - Shorter duration
 - Typically to provide gaps in coverage
 - Provider is not an employee of locum tenens company – usually has contract with locums company

Federal Statutes

Stark Law

- Imposes civil penalties
- Only applies to physician agreements
- Prohibits physicians from referring patients to receive "designated health services" payable by Medicare or Medicaid from entities with which the physician or an immediate family member has a financial relationship, unless an exception applies. Financial relationships include both ownership/investment interests and compensation arrangements.
- Designated health services includes hospital services, lab services, imaging, prescription drugs, therapy, etc.
- DON'T HAVE TO PROVE INTENT

Federal Statutes

Anti-Kickback Statute (AKS)

- Imposes criminal penalties
- Applies to all provider contracts (MD, NP, PA)
- The AKS is a criminal law that prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs (e.g., drugs, supplies, or health care services for Medicare or Medicaid patients)
- Unlike Stark, do have to prove intent to violate the law (knowing and willful)
- Examples of remuneration referred to in this law could include anything from cash payments and paying for expensive hotels and meals to excessive compensation for medical directorships

Federal Statutes

- Both of these statutes are designed to control problematic financial incentives
- Bottom line: is illegal/impermissible for hospitals to pay physicians in return for the referral of a Medicare and Medicaid patient

Federal Statutes

What's at stake??

- Civil penalties of the AKS include False Claims Act liability, civil monetary penalties (CMP) and program exclusion, up to \$50,000 CMP per violation, and civil assessment of up to three times the amount of kickback. If the AKS is addressing criminal penalties, the consequences include fines up to \$25,000 per violation and up to a five-year prison term per violation.
- Civil penalties for the Stark Law include overpayment/refund obligation, False Claims Act liability, civil monetary penalties and program exclusion for violations where there was an intent, up to \$15,000 CMP for each service, and a civil assessment of up to three times the amount claimed.

Federal Statutes

In order to have a financial relationship with a physician, it must fit into an exception or “safe harbor”

- Compensation exception
- Professional services agreement
- Agreement must be in writing
- Covers all the services provided in advance
- Term of the agreement has to be at least one year
- Methodology for determining compensation has to be fair market value, and cannot take into account volume of referrals
- Cannot limit the physician’s ability to make decisions in the best interest of patients
- Commercially reasonable

Federal Statutes

Fair Market Value/Commercially Reasonable

- What are the MD's qualifications
- Compensating MD for services actually performed. In other words, you can't pay a physician at the 90th percentile if they are only producing at 25th percentile, or pay them a full-time salary if they are only working part-time
- Pay attention to the market
- Get a FMV opinion if you are concerned about compensation
- Keep in mind that "compensation" includes base salary, bonuses, benefits, medical director payments
- Consider benchmark data, like MGMA – organization that provides benchmark data for various specialties in a particular region
- More of a chance for scrutiny if you are paying over a certain percentile. It used to be 75%, but now it is moving closer to 60th percentile

Risk Points in Provider Contracts

- Medical Director Agreements
 - Has to be in writing
 - Timesheets are recommended
 - Duties have to be in addition to any clinical duties (no “double dipping”)
 - May be a good idea to set annual compensation cap
- Call Coverage Agreements
 - Benchmark data recommended
- Compensation – be careful when looking at “total cash compensation” – consider all sources
 - Base
 - Bonus
 - Benefits
 - Medical Director Agreement

Risk Points in Provider Contracts

Remember what we talked about earlier???

- Issues with recruiting and retention make it tempting to bump up compensation
- Providers are savvy at shopping offers around

Risk Points in Provider Contracts

- Make sure agreement is in writing
- If services change, get amendment executed **BEFORE** the services change

Legal Update

- New exceptions under Stark and AKS for value-based arrangements (VBAs)

Legal Update

- Illinois' Freedom to Work Act was amended to provide additional limitations on non-compete agreements (aka "restrictive covenants")
- Salary threshold: \$75,000 per year. This amount shall increase to \$80,000 per year beginning on January 1, 2027, \$85,000 per year beginning on January 1, 2032, and \$90,000 per year beginning on January 1, 2037.

Practice Tips

- Develop standards and procedures to address arrangements with other healthcare providers and suppliers
- Implementing written policies, procedures and standards of conduct.
- Physician practices should also consider implementing measures to avoid offering inappropriate inducements to patients. The following are examples of such inducements:
 - Routinely waiving coinsurance or deductible amounts without a good faith determination that the patient is in financial need
 - Failing to make reasonable efforts to collect the cost-sharing amount from the patient

Questions????



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