



Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

Recruiting Physicians: Beware Stark, Anti-Kickback Statutes, and IRS Rules

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Hospitals and other entities that offer incentives to recruit physicians must ensure their arrangements comply with federal and state laws governing financial relationships with physicians, including the Ethics in Patient Referrals Act (“Stark”), Anti-Kickback Statute (“AKS”), and the IRS’s 501(c)(3) requirements. Recruitment arrangements usually need to fit within one of the following safe harbors:

1. Employment Arrangements. If you are going to hire the physician as an employee and pay him or her no more than fair market value, you can structure the deal to fit within Stark’s bona fide employment safe harbor, which requires the following:

- The employment must be for identifiable services.
- The compensation (including benefits, housing, relocation reimbursement, stipends, and anything else of value given to the physician) must be consistent with fair market value.
- The compensation may not take into account the volume or value of referrals. For example, you may not compensate the physician based on, or give the physician a percentage of, services performed by other persons or ancillary tests ordered by the physician. You may, however, compensate the physician based on services the physician personally performs.

(42 CFR 411.357(c)). Under the employment safe harbor, you are not required to have a written agreement or establish the compensation formula in advance, but it is generally a good idea to do so to avoid misunderstandings. Complying with the foregoing Stark parameters should also satisfy the AKS and 501(c)(3) rules. (See 42 CFR 1001.952(i); *IRS Healthcare Provider Reference Guide*, 2004 EO CPE Text at p.18). If you need to pay more than fair market value or provide additional incentives to recruit the physician, you will likely need to structure the deal to satisfy the Stark recruitment safe harbor described below.

2. Independent Contractors. If you are going to contract with the physician as an independent contractor (not an employee) and pay fair market value, you may structure the deal to fit within Stark’s personal services or fair market value safe harbor, which generally require the following:

- There must be a written contract signed by the parties.
- The written contract must specify all the services to be performed

by the physician.

- The contract must specify the term of the arrangement, which can be for any period of time and contain a termination clause, provided that the parties enter into only one arrangement for the same items or services during a year. An arrangement made for less than one (1) year may be renewed if the terms of the arrangement and the compensation for the same items or services do not change.
- The written contract must specify the compensation formula, which must be set in advance (i.e., no retroactive adjustments to compensation), and the compensation formula may not change within the first year of the agreement.
- The compensation and anything else provided to the physician must be consistent with fair market value.
- The compensation may not take into account the volume or value of referrals or other business generated by the physician. For example, as with employment agreements, you may not compensate the physician based on, or give the physician a percentage of, services performed by other persons or ancillary tests ordered by the physician. You may, however, compensate the physician based on services the physician personally performs.
- The arrangement must be commercially reasonable even if there were no referrals by the physician, and must further the legitimate business purposes of the parties.

(42 CFR 411.357(l); see also *id.* at 411.357(d)). Complying with the foregoing Stark parameters will usually satisfy AKS and 501(c)(3) concerns, although there are some additional conditions if you want to fit squarely within the applicable AKS safe harbor. (See 42 CFR 1001.952(d)). If you need to pay more than fair market value or provide additional free or discounted items to recruit the physician, you will need to structure the deal to satisfy the Stark recruitment safe harbor described below.

3. Recruitment Arrangements. The laws allow hospitals and certain other entities to pay more than fair market value or provide additional benefits to recruit physicians (whether or not the physician is an employee or contractor of the hospital) if certain standards are satisfied. In general, Stark requires the following:

- The physician must not already be a member of the hospital's medical staff.
- With limited exceptions, the physician must relocate his or her practice from more than 25 miles away and into the hospital's service area.
- The arrangement must be set out in writing and signed by all parties prior to the physician's relocation.
- The arrangement may not be conditioned on the physician's referral of patients to the hospital.
- The hospital may not base any payments to the physician on the volume or value of referrals or other business generated by the

referring physician.

- The hospital may not prohibit the physician from establishing staff privileges at other hospitals or referring business to other entities except as referrals may be restricted under an employment contract that complies with certain terms. This may preclude noncompete clauses in recruitment contracts directly with the physician, but may not apply if the physician joins an existing group.

(42 CFR 411.357(e)). If the physician is going to join an existing physician practice, the recruitment arrangement must also satisfy the following additional terms:

- The existing physician practice must also sign the recruitment agreement.
- The remuneration paid by the hospital must be passed directly through to or remain with the recruited physician except for actual costs incurred by the physician practice to recruit the physician.
- If the hospital provides an income guarantee, the costs allocated by the physician practice to the recruited physician may not exceed the actual additional incremental costs attributable to the recruited physician (i.e., the hospital cannot subsidize the other physicians in the existing physician practice).
- The physician and/or practice must maintain records of the actual costs and passed-through amounts for at least five (5) years.
- The remuneration paid to the physician or practice cannot be determined by or take into account the volume or value of referrals by either the physician or the practice.
- The physician practice may not impose practice restrictions that unreasonably restrict the recruited physician's ability to practice in the hospital's service area. CMS commentary suggests that a physician practice may impose reasonable noncompete clauses, but they should not be overly broad and must comply with local law affecting restrictive covenants. In contrast, the Stark safe harbor appears to prohibit noncompete clauses if the physician is not joining an existing practice.

(42 CFR 411.357(e)). The AKS contains a separate recruitment safe harbor with additional requirements, e.g., it only applies to recruitment into a HPSA, and does not apply to recruitment into groups. (See 42 CFR 1001.952(n)). Because of the additional requirements, it is difficult to satisfy the AKS recruitment safe harbor. It is therefore very important to document that **not** “one purpose” of a recruitment arrangement is to generate referrals from the recruited physician or existing physician practice. To that end, it is critical to document a legitimate community need for the recruited physician. That will also be an important factor in ensuring compliance with 501(c)(3) rules.

Post-Recruitment Changes. In addition to complying with the foregoing rules before the physician arrives, the parties to a recruitment agreement generally cannot change the terms after the physician arrives. In CMS

Advisory Opinion No. CMS-AO-2007-01, CMS confirmed that material post-arrival modifications will likely cause the recruitment agreement to fall out of compliance with Stark requirements.

Recruiting Non-Physicians. The foregoing rules apply to recruiting physicians, not necessarily midlevel practitioners or other non-physician providers. CMS declined to extend Stark's recruitment safe harbor to midlevels. (72 FR 51049). That may create Stark problems if the midlevel will be joining an independent physician group because recruitment incentives may benefit the group, resulting in potential Stark and AKS violations. (*Id.*; see also OIG Supplemental Compliance Program Guidance for Hospitals, 70 FR 4858, 4868).

Other State Laws. Many states have laws that parallel federal fraud and abuse statutes. In addition, state laws may limit public hospitals and similar entities from offering certain incentives or loaning money to private individuals, including recruited physicians. Accordingly, you should confirm whether your state law limits your ability to provide recruitment incentives.

Conclusion. The foregoing provides a brief checklist of the more relevant recruitment rules. Before entering such arrangements, it is prudent to review the actual regulations to ensure compliance or consult with a qualified healthcare attorney.

For questions regarding this update, please contact

Kim C. Stanger

Holland & Hart, U.S. Bank Plaza, 800 W Main Street, Suite 1750, Boise, ID 83702

email: kcstanger@hollandhart.com, phone: 208-383-3913

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