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Physician Contract Checklist

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A good contract with an employed or contracted physician may help you avoid regulatory violations and future disputes. The following is a brief overview of some terms that you may want to consider in your personal services agreements with physicians and other practitioners.

Regulatory Compliance. If the physician will be performing or referring items or services payable by government healthcare programs, you should generally structure the contract to satisfy applicable safe harbors under the federal Ethics in Patient Referrals Act ("Stark"), 42 CFR 411.355 or 411.357(c), (d) or (l), and the Anti-Kickback Statute ("AKS"), 42 CFR 1001.952(d) or (i). For information concerning those regulatory requirements, see our Client Alert, *Stark Requirement for Physician Contracts*. In addition, the federal Civil Monetary Penalties Law generally prohibits hospitals from offering inducements to physicians to limit services payable by government programs. (42 USC 1320a-7a(b)(1); 42 CFR 1003.102). If you are a tax-exempt entity, you will also want to ensure the compensation reflects fair market value to avoid 501(c)(3) tax issues. If your state recognizes the corporate practice of medicine doctrine, you may need to structure your arrangement to fulfill any unique requirements applicable to your state.

Written Agreement. Stark and AKS safe harbors generally require current written contracts for independent contractors. Although written contracts are not required for the employee safe harbors, it is usually a good idea to document the arrangement to avoid disputes, especially if there are special compensation requirements, employment is other than "at-will", or you wish to include a restrictive covenant.

Parties. The contract should specify the parties. If the contract is with the physician's corporate entity, you should identify the person(s) who will perform the services and/or reserve your right to approve such persons, and confirm that such persons are obligated to comply with relevant terms of the agreement. Physician groups that contract with hospitals or other facilities to provide services "under arrangement" must ensure that any referrals within the group satisfy Stark requirements. To satisfy Stark's "group practice" safe harbors, a physician group that wishes to contract with a physician on an independent contractor basis must contract directly with the physician, not a group.

Nature of Relationship. The contract should specify whether the physician will be providing services as an employee or as an independent contractor. If an independent contractor, the contract should confirm that the physician is not acting as your agent and is not entitled to employee benefits. Regardless of how you characterize the relationship, the IRS may conclude that a nominative contractor should be treated and taxed as an employee based on its 20-factor test. If so, the employer may be liable for

taxes that were not paid by the physician.

Services. The contract should adequately identify the services to be provided, including clinical, administrative, and call coverage services. You may want to reserve the right to assign other duties as you may reasonably require. You may also want to confirm that the services are provided on a non-exclusive basis if that is the intent.

Schedule. The contract should generally describe whether the services are full-time, part-time, or as-needed. To the extent that you specify a schedule or expectation of hours, consider whether the stated schedule includes administrative or call obligations in addition to scheduled clinical services. Again, you may want to reserve the right to establish a reasonable schedule to provide flexibility.

Location. You may want to specify the location(s) where the services will be provided, and reserve the right to assign the physician to such other locations as reasonably required.

Independence. Confirm that the physician retains the right to exercise independent professional judgment in the care of patients. This may help protect against alleged violations of the corporate practice of medicine doctrine in those states in which the doctrine is recognized.

Intellectual Property. Ensure that you retain the rights to any intellectual property generated by the physician while acting within the course and scope of his or her employment, or with the use of your property or personnel.

Use of Information. Obtain authorization to use the physician's name and professional information in your operations, including marketing, and public relations.

Outside Services. Confirm whether the physician will be allowed to moonlight or perform professional services for third parties outside the contract. For employees, you should generally prohibit such outside activities unless you approve the activities, and the outside services do not otherwise adversely affect the physician's obligations under your agreement.

Qualifications. Condition the contract on the physician's satisfaction and maintenance of certain qualifications, e.g.: unrestricted state licensure; DEA registration; medical staff membership and relevant privileges; participation in government and private payer programs; board certification or eligibility; insurability; and the ability and competence to provide the required services. Require the physician to immediately notify you if he or she fails to satisfy the qualifications.

Representations and Warranties. You may require the physician to make certain representations and warranties, e.g., that they: satisfy and will continue to satisfy the qualifications; have disclosed prior claims against them and other items relevant to your credentialing process; are not bound by any regulatory or contractual limitation that would inhibit their ability to

perform the services; and will disclose all conflicts of interest or financial relationships that may implicate Stark. Again, require the physician to immediately notify you if they fail to comply with the representations and warranties.

Performance Standards. Include appropriate performance standards with which the physician must comply, e.g.: compliance with applicable laws, the relevant standard of care, payer requirements, and your bylaws, rules and policies; provision of services in a professional, non-disruptive manner; participation in committees and fulfillment of medical staff obligations; participation in your payer programs; cooperation in collections and investigations; use of your personnel and property to perform services solely for your benefit, rather than that of the physician or any third parties.

Medical Records. Timely completion of medical records is a common problem. Require the physician to complete records, in a timely manner, that are consistent with your policies. Upon termination of the agreement, require the physician to complete records by the effective date of termination or within a specific number of days thereafter. Some providers include a monetary penalty if the physician fails to complete records on time, but such a provision may violate state wage laws; check those laws before enforcing such a provision. State that you own all medical records and other records created or maintained in the performance of the agreement, and require that all such records be returned upon termination of the agreement. You may allow the physician to access such records consistent with applicable law, but beware any obligation to provide the physician with copies of the records. For independent contractors, the Social Security Act requires that you include a provision in your contract that requires the contractor to maintain records relevant to their services for four years and to make the records available to the U.S. Department of Health and Human Services (HHS) upon request.

Employer Obligations. Many contracts require the provider/employer to provide adequate space, equipment, supplies, or personnel for the physician. I generally do not include such provisions because that requirement is usually assumed; including express terms may give the physician a basis for arguing breach of contract if support is not provided per the physician's demands. That said, it may be appropriate to specify the parties' respective obligations to provide equipment, supplies, or support personnel in independent contractor arrangements in which the physician is expected to provide his or her own equipment, supplies, or personnel. If you do include such provisions, ensure that you reserve the ultimate right to determine the required support items or services, and confirm ownership of your equipment and your ultimate authority to make all personnel decisions for your employees.

Compensation. To satisfy federal regulations, you generally must ensure that the compensation (including benefits, signing bonuses, relocation benefits, loan repayments, and everything else you are providing to the physician) represents fair market value and does not vary with the volume or value of referrals. You may generally pay the physician based on services the physician personally performs (e.g., per wRVU or similar methodology). If you are a physician group under Stark, you have greater

flexibility in the way you compensate group members, e.g., you may also compensate the physician based on “incident to” services, or sharing of profits. However, you generally cannot compensate the physician based on ancillary services the physician may order. For independent contractors, ensure your compensation formula is set in advance; do not change the compensation retroactively or provide extra-contractual compensation not covered in the contract.

If you are paying relocation expenses, a signing bonus, student loan payments, or other similar items, consider requiring some form of repayment if the physician leaves within a certain period of time. Many non-public providers structure such payments as forgivable loans to facilitate repayment. If so, you may want to address the tax ramifications, and secure the repayment obligation by a note or other security instrument. If the physician's employment commences mid-compensation year, consider whether compensation or bonuses should be prorated. If you pay a bonus, consider requiring the physician to remain employed through the end of the bonus period to be eligible for the bonus. If you are paying based on productivity, consider whether the compensation should be subject to periodic draws or reconciliation, and how the payments will be calculated upon termination. Beware compensation structures that would entitle the physician to continued payments post-termination (e.g., payments based on collections). Reserve the right to offset any compensation you may owe the physician against any amounts the physician may owe you.

Benefits. You may want to identify any additional benefits you intend to provide the physician, e.g., paid time off, CME allowances, insurance, retirement, or equipment; etc. For employees, you may simply want to refer to your applicable employee benefit plans; reserve the right to amend your benefit plans at any time; and confirm that such amendments shall apply to the physician. Beware providing benefits to independent contractors; the IRS may claim that doing so suggests that they are an employee and should be taxed accordingly.

Exempt Status. Confirm that the physician is an exempt employee for purposes of the Fair Labor Standards Act and state wage and hour laws.

Referrals. Although most providers do not realize it, Stark allows you to condition compensation under employment or contractor agreements on referrals to your organization so long as the referrals relate to the services provided under the agreement. The condition must be contained in the contract, and may not require referrals if: the patient decides to go elsewhere, the patient's insurer determines where the patient may receive services, or the physician determines that a referral elsewhere is in the patient's best interest. (See 42 CFR 411.354(d)(4)).

Assignment of Fees. If you intend to bill patients and payers for the physician's services and retain collections, the contract should reassign to you the right to do so. You may want to require the physician to execute any additional documents necessary to accomplish the reassignment and cooperate with your billing and collection efforts.

Liability Insurance. If you are requiring the physician to obtain and maintain their own liability insurance, you should specify the general requirements such as policy limits. If the insurance is claims-made, you may want to address the parties' respective obligations to provide tail insurance. For example, you may want to provide tail insurance if you terminate without cause, but require the physician to acquire tail insurance if the physician terminates the contract within a certain period of time. If the physician is allowed to perform medical services for third parties, you may want to require that the physician maintain insurance for such outside activities.

Workers Compensation Insurance. If the physician will be an independent contractor, or if you are contracting with a separate corporate entity, require the physician and/or corporate entity to maintain workers compensation insurance to the extent required by applicable law. You may want to require the physician or corporate entity to indemnify you if he or she fails to do so.

Indemnification. Many contracts will require the parties to indemnify each other for claims or losses resulting from the indemnifying party's misconduct. Such provisions often raise concern during negotiations. Most employers will not seek indemnification from their employees. Also, in many states, there is a common law indemnification right which makes express contract terms unnecessary. Ultimately, you should consider whether an indemnification clause is worth the fight, or whether its benefits outweigh the risks if the indemnification provision is mutual.

Term. Employment contracts may be for any length of time. To comply with applicable Stark and AKS safe harbors applicable to independent contractor arrangements, compensation-related terms may not change within one year from the original date of the contract. The contract may be for less than one year; however, if it terminates within a 12-month period, the parties may not execute a new agreement for substantially the same services with different compensation. Within independent contractor arrangements, it is typically a good idea to provide for automatic renewal to avoid the unintentional lapse of a written agreement and corresponding Stark and/or AKS liability. Stark does allow a 6-month hold-over grace period, but it is safer to simply allow for automatic renewal.

Termination. Appropriate termination provisions are your safety valve; they will allow you to get out of a bad contract. Your agreements should have appropriate termination provisions, which typically include: termination without cause upon prior notice; termination with cause subject to prior notice and an appropriate opportunity to cure; and immediate termination for specified causes, e.g., exclusion from federal programs, failure to satisfy qualifications, or criminal misconduct. If you allow termination without cause upon prior notice, you may want to reserve the right to terminate the physician immediately or suspend their services so long as you pay any and all compensation that would otherwise be due under the unexpired notice period.

Post-Termination Obligations. You may want to address certain issues that may arise post-termination; for example: require that the physician

complete records within a certain period of time; participate in the provision of a joint notice to practice patients; and cooperate in any investigation or action relevant to the physician's services. Consider confirming that termination of the agreement automatically terminates the physician's medical staff membership or hospital privileges; that may avoid disputes if a problem physician wants to continue providing services at the facility post-termination, or if you have an exclusive contract with a group that would preclude such conflicting privileges.

Confidentiality. An appropriate confidentiality agreement may help protect you from unfair competition by the physician. Require the physician to maintain the confidentiality of confidential information, including patient information, employee information, peer review and risk management activities, business practices and strategies, and trade secrets. If an independent contractor is performing non-clinical, administrative services, you may need to execute a separate HIPAA business associate agreement ("BAA"); however, no BAA is required to the extent the physician is acting as either a member of your workforce (i.e., you have the right to control them), or as a member of an organized health care arrangement as defined by HIPAA.

Noncompetition. In those states that allow restrictive covenants against physicians, include an appropriate noncompetition provision that is reasonable in time, subject matter, and geographic scope. The provision should apply during the agreement and for a reasonable time thereafter. You can always waive it if you want, but having it in the agreement may help avoid a situation in which you invest in the physician only to have the physician set up a competing practice across the street.

Nonsolicitation. In addition to, or even if you do not include a noncompetition clause, include an appropriate nonsolicitation clause that prohibits the physician from soliciting away your staff, contractors, and patients, to the extent allowed by law.

Penalties for Violation. Consider including a provision setting forth penalties for violations of the confidentiality, noncompetition, or non-solicitation provisions. To the extent allowed by law, the provision may authorize injunctive relief without bond, liquidated damages, nor attorney's fees. Courts may enforce a liquidated damages clause even in those states that may not enjoin a physician from practicing in violation of a noncompetition agreement. To be enforceable, however, a liquidated damages clause must represent a fair estimate of actual damages, not an unreasonable penalty.

Notice. Contracts usually contain provisions establishing the requirements for providing notice under the agreement, e.g., notice of breaches or notice of termination. Ensure the provisions are reasonable and workable. In addition to regular or certified mail, consider allowing for notice in person, by fax, and/or by e-mail upon proof of delivery.

Assignment. Prohibit the physician or contractor from assigning their rights or duties without your approval. You should retain the right to assign your rights or duties to your successors, provided that such assignment

does not abrogate the physician's rights.

Governing Law and Venue. Confirm that your state law applies to the contract, and that any dispute must be resolved in courts or by arbitration within your specific jurisdiction.

Alternative Dispute Resolution. Consider including an appropriate alternate dispute resolution procedure, e.g., mediation or binding arbitration. Be sure to address the costs of such process. Typically, parties share the cost of mediation, but the arbitrator is given authority to award costs and fees to the prevailing party.

Entire Agreement. Confirm that the contract represents the entire agreement between the parties for those issues within its scope, and that there are no other collateral or outside agreements. If this contract is replacing a prior contract, ensure that the two agreements are coordinated so that any obligations under the prior agreement that are intended to continue do so (e.g., repayment obligations).

Meaningful Use Assignment. If available, and to the extent allowed by law, consider obtaining an assignment of the physician's meaningful use dollars.

Construction. Confirm that both parties were involved in drafting the agreement, and that it should not be construed more favorably toward one party over the other.

No Third Party Beneficiaries. Confirm that nothing in the contract confers any rights on third parties.

Survival of Terms. Ensure that those contract provisions that are intended to survive termination of the agreement survive, e.g., repayment obligations, noncompete provision, confidentiality, cooperation in investigations, and alternative dispute resolution.

Regulatory Compliance. It is typically a good idea to include a broad provision confirming that: the parties intend the agreement to comply with relevant regulations; the contract will be interpreted so as to ensure compliance; and either party may terminate upon notice if one party determines the contract may expose it to governmental action and the parties are unable to amend the agreement to ensure compliance. Authorization. Confirm that the parties executing the agreement have the requisite authority to do so.

Of course, the foregoing outline provides only general suggestions; other terms may be relevant to a specific transaction. Once an appropriate contract is signed, it is important that the parties comply with its terms to ensure regulatory compliance. Paying for services not performed, or paying outside the contract may potentially give rise to Stark and AKS violations. You should periodically review the contract terms and performance to ensure continued compliance.

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