Kim Stanger

Partner
208.383.3913
Boise
kcstanger@hollandhart.com

Group Compensation Arrangements: Stark Requirements

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Physician practices must ensure that their group compensation structures comply with the federal Ethics in Patient Referrals Act ("Stark") if they intend to bill Medicare or Medicaid for services rendered or referred by the group physicians. Under Stark, if a physician[1] (or a member of the physician's family) has a financial relationship with an entity, the physician may not refer patients to the entity for certain designated health services ("DHS")[2] payable by Medicare and Medicaid unless the financial relationship is structured to fit within a regulatory safe harbor. (42 CFR § 411.353). Stark applies to DHS referrals within the group, so the physician's compensation arrangement must be structured to comply with Stark; otherwise, the group may not bill Medicare and Medicaid for DHS that were referred improperly, and, if they were improperly billed, the entity must repay amounts improperly received. Failure to report and repay within 60 days may result in additional civil penalties of $15,000 per claim as well as False Claims Act liability. Repayments may easily run into hundreds of thousands of dollars. Given the potential liability, it is critical that physician group compensation arrangements be structured to fit within one of the following regulatory safe harbors if they intend to participate in Medicare or Medicaid.

1. Group Practice Compensation. Stark's "physician services" and "in-office ancillary services" exceptions protect most intra-group referrals, but only if the group qualifies as a "group practice" as defined by Stark. (42 CFR § 411.355(a)-(b)). Among other things, to qualify as a group practice, "[n]o physician who is a member of the group practice [may] directly or indirectly receive[] compensation based on the volume or value of his or her referrals, except as provided in [42 CFR] § 411.352(i)." (42 CFR § 411.352(g)). Section 411.352(i) creates certain safe harbors for payments based on personal productivity or a share of overall profits if certain conditions are satisfied.

1. **Personal Productivity.** "A physician in the group practice may be paid a productivity bonus based on services that he or she has personally performed, or services 'incident to' such personally performed services, or both"; however, the physician may not be paid based on his or her referrals for ancillary DHS (*e.g.*, imaging, labs, therapies, etc.) or for services performed by others except for those services performed "incident to" the physician's services. (42 CFR § 411.352(i)(1)). Furthermore, productivity compensation "must be calculated in a reasonable and verifiable manner that is not directly related to the volume or value of the physician's

referrals of DHS." (*Id.*). Thus, Stark generally limits common "eat what you kill" formulas that give the referring physician credit for ancillary DHS or other services ordered by but not personally performed by the physician. Although not exclusive, the "personal productivity" safe harbor specifically authorizes the following compensation formulas:

   a. The bonus is based on the physician's total patient encounters or relative value units (RVUs)….
   b. The bonus is based on the allocation of the physician's compensation attributable to services that are not DHS payable by any Federal health care program or private payer.
   c. Revenues derived from DHS are less than 5 percent of the group practice's total revenues, and the allocated portion of those revenues to each physician in the group practice constitutes 5 percent or less of his or her total compensation from the group practice.
   (42 CFR § 411.352(i)(3)).

2. **Share of Profits.** Group members may also be paid a share of overall profits. "Overall profits means the group's entire profits derived from DHS payable by Medicare or Medicaid or the profits derived from DHS payable by Medicare or Medicaid of any component of the group practice that consists of at least five physicians." (42 CFR § 411.352(i)(2)). This provision generally prohibits groups from creating separate profit centers by which the group attributes profits from DHS (especially profits from ancillary services or DHS performed by persons other than to the referring physician) to individual physicians or any group of less than five physicians. Of course, the group may pay physicians based on their personal productivity under the "personal productivity" safe harbor. Also, groups may allocate smaller profit centers so long as the profits from DHS are not included. However, to the extent that DHS are included in the profits, "[o]verall profits should be divided in a reasonable and verifiable manner that is not directly related to the volume or value of the physician's referrals of DHS." (*Id.*). Although not exclusive, Stark approves of the following profit sharing methodologies:

   a. The group's profits are divided per capita (for example, per member of the group or per physician in the group).
   b. Revenues derived from DHS are distributed based on the distribution of the group practice's revenues attributed to services that are not DHS payable by any Federal health care program or private payer.
   c. Revenues derived from DHS constitute less than 5 percent of the group practice's total revenues, and the allocated portion of those revenues to each physician in the group practice constitutes 5 percent or less of his or her total compensation from the group.
   (42 CFR § 411.353411.352(i)(2)).

3. **Other Practice Compensation Arrangements.** The "personal

productivity" and "profit sharing" methodologies set forth above are neither mandatory nor exclusive. Groups may come up with other methodologies so long as "[n]o physician who is a member of the group practice directly or indirectly receives compensation based on the volume or value of his or her referrals" for DHS. (42 CFR § 411.352(g)).

2. Employment Arrangements. In addition to the "group practice" safe harbors, a group practice may pay its physician employees under the Stark "employment" safe harbor. To fit within the Stark safe harbor applicable to employment contracts, the employment agreement with the physician (or their family member) must satisfy all of the following:

- The employment must be for identifiable services.
- The amount of the remuneration under the employment agreement must be (i) consistent with the fair market value of the services; and (ii) not determined in a manner that takes into account, directly or indirectly, the volume or value of any referrals by the referring physician. This does not prohibit payment of remuneration in the form of a productivity bonus based on services performed personally by the physician.
- The agreement must be commercially reasonable even if no referrals were made to the employer.
- Unlike independent contractor arrangements, employment contracts are not required to be written; the compensation need not be set in advance; and the compensation may be amended at any time.

(42 CFR § 411.357(c)).

3. Independent Contractor Arrangements. If the group pays the physician as an independent contractor instead of an employee, then the agreement must satisfy either the Stark "personal services" or "fair market value" safe harbor. (42 CFR § 411.357(d) and (l)). Those safe harbors generally require the following:

- The arrangement must be in writing, signed by the parties, and cover only identifiable items or services, all of which are specified in the agreement. Unwritten or unsigned agreements generally do not comply. CMS recently clarified that the parties do not necessarily need a formal written contract; instead, the requisite writing may be established by contemporaneous, signed documents that would confirm the terms of the arrangement. (80 FR 71314-17).
- The agreement may not be modified within its first year. The agreement may be terminated at any time within the first year, but if it is terminated, the parties may not enter a similar agreement for the same services within the original one year period.
- The writing must specify the compensation that will be provided under the arrangement. The compensation must be set in advance, consistent with fair market value, and not determined in a manner that takes into account the volume or value of referrals or other business generated by the referring physician. Like the

employment safe harbor, a physician may be paid based on services he or she personally performs.

- The arrangement must be commercially reasonable, taking into account the nature and scope of the transaction, and further the legitimate business purposes of the parties.

(42 CFR § 411.357(d) and (l)). It is extremely important that entities ensure they have current, written agreements whenever they pay outside physicians (or a physician's family members) to provide items or services, including but not limited to payments for professional services, call coverage, medical directorships, or consulting.

Other Laws. Although Stark is usually the most relevant, physicians and other practitioners must ensure that group compensation structures also comply with other applicable laws. For example, the federal Anti-Kickback Statute may be implicated, especially in the case of payments to independent contractors. As with Stark, the Anti-Kickback Statute contains specific safe harbors applicable to group ownership, employment, and contractor relationships. (*See* 42 CFR § 1001.952(d), (i), and (p)).

For questions regarding this update, please contact:
Kim C. Stanger
Holland & Hart, 800 W Main Street, Suite 1750, Boise, ID 83702
email: kcstanger@hollandhart.com, phone: 208-383-3913

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[1]For purposes of Stark, a "physician" means "a doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, a doctor of podiatric medicine, a doctor of optometry, or a chiropractor." (42 CFR § 411.351).
[2]"Designated Health Services" include (i) clinical laboratory services; (ii) physical therapy, occupational therapy, and outpatient speech-language pathology services; (iii) radiology and certain other imaging services; (iv) radiation therapy services and supplies; (v) durable medical equipment and supplies; (vi) parenteral and enteral nutrients, equipment, and supplies; (vii) prosthetics, orthotics, and prosthetic devices and supplies; (viii) home health services; (ix) outpatient prescription drugs; and (x) inpatient and outpatient hospital services. (42 CFR § 411.351).
