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Key Terms for Provider Contracts

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A good contract with an employed or contracted physician or other practitioner may help you avoid regulatory violations and future disputes. Here is a brief summary of some terms or issues that you should consider in your provider agreements.

Regulatory Compliance. If the practitioner 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 Anti-Kickback Statute ("AKS"), 42 CFR 1001.952(d) or (i). If the contract involves a physician, the contract must be structured to satisfy the Ethics in Patient Referrals Act ("Stark"), 42 CFR 411.355 or 411.357(c), (d) or (l). For information concerning these 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 medically necessary services payable by government programs. (42 USC 1320a-7a(b)(1)). If the employer is 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 terms, 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 practitioner'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 practitioner will be providing services as an employee or as an independent contractor. If an independent contractor, the contract should confirm that the practitioner 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 IRS criteria. If so, the employer may be liable for taxes that were not paid by the practitioner. You may want to include a provision that requires the independent contractor to indemnify you if the practitioner is deemed to be an employee.

Services. The contract should adequately identify the services to be provided, including clinical, administrative, call coverage, and other significant services. You may want to reserve the right to assign other duties as you may reasonably require. Depending on the circumstances, you may want to confirm whether the services are provided on an exclusive or non-exclusive basis.

Schedule. The contract should generally describe whether the services are full-time, part-time, or as-needed. If the services are provided “as-needed”, you may want to specify that the agreement does not guarantee a minimum number of hours or shifts. 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 your right to establish or modify the schedule.

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

Independence. It is common to confirm that the practitioner—especially a physician—retains the right to exercise independent professional judgment in the care of patients. This is often inserted to help protect against alleged violations of the corporate practice of medicine doctrine in those states in which the doctrine is recognized. In other states, such a provision is less important.

Intellectual Property. Intellectual property rights are an increasingly important issue. As a general rule, you should ensure that you retain the rights to any intellectual property generated by the practitioner while acting within the course and scope of his or her employment, or with the use of your property, personnel or resources.

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

Outside Activities. Confirm whether the practitioner 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 practitioner's obligations under your agreement. You may want to confirm that the practitioner is responsible for securing insurance to cover their outside activities, thereby reducing the risk that you will be named as a party to a lawsuit to secure another source of recovery.

Qualifications. Condition the contract on the practitioner's satisfaction and

maintenance of essential 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; successful completion of pre-employment screening; insurability; and the ability and competence to provide the required services. For advance practice professionals, require that they maintain a supervising physician or satisfy other requirements imposed by applicable law. Require the practitioner to immediately notify you if he or she fails to satisfy the qualifications.

Representations and Warranties. Consider requiring the practitioner to make certain continuing representations and warranties, *e.g.*, that he or she satisfies the qualifications; has disclosed prior claims against them and other items relevant to your credentialing process; is 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 or other regulatory requirements. Again, require the practitioner to immediately notify you if they fail to comply with the representations and warranties.

Performance Standards. Include appropriate performance standards with which the practitioner 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 or group obligations; participation in relevant payer programs; cooperation in collections and investigations; etc. Confirm that repeated violations of the performance standards may constitute cause for termination.

Medical Records. Timely completion of medical records is a common problem. Require the practitioner to complete records in a timely manner consistent with your policies. Upon termination of the agreement, require the practitioner to complete records by the effective date of termination or within a specific number of days thereafter. Some employers include a monetary penalty if the practitioner fails to complete records on time, but such a provision may violate state wage laws; check those laws before enforcing such a provision. As an alternative, you may withhold a certain amount from the compensation and pay it as a bonus if the practitioner satisfies certain medical record standards. Or you may specify that the failure to complete records constitutes a breach, thereby giving rise to a claim for damages you suffer because of the late records. 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 practitioner to access such records consistent with applicable law, but beware any obligation to provide the practitioner with copies of the records; such obligations may violate HIPAA. 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. (*See* 42 CFR § 420.300 *et seq.*).

Employer Obligations. Many contracts require the employer to provide adequate space, equipment, supplies, or personnel for the practitioner. I generally do not include such provisions because that requirement is usually assumed; including express terms may give the practitioner a basis for arguing breach of contract if support is not provided per the practitioner'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 practitioner 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 which items, services, or support personnel are appropriate, 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 practitioner based on services the practitioner 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. For more information concerning Stark requirements for physician contracts, see our articles here and here.

Bonuses. If you are paying relocation expenses, a signing bonus, student loan payments, or other similar items, consider requiring some form of repayment if the practitioner 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 practitioner's employment commences mid-compensation year, consider whether compensation or bonuses should be prorated. If you pay a bonus, consider requiring the practitioner 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 practitioner to continued payments post-termination (*e.g.*, payments based on collections). Reserve the right to offset any amounts the practitioner may owe you against any compensation that you may owe the practitioner.

Benefits. You may want to identify any additional benefits you intend to provide the physician, *e.g.*, paid time off, continuing medical education (“CME”) allowances, insurance, retirement, or equipment; etc. Rather than listing the benefits in the contract, it may be better simply to refer to your applicable employee benefit plans and policies; reserve the right to amend

your benefit plans at any time; and confirm that such amendments shall apply to the practitioner. That will allow you to modify your benefits without having to amend the contract. 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 whether the practitioner is an exempt employee for purposes of the Fair Labor Standards Act and state wage and hour laws. Physicians are generally exempt. Advanced practice professionals are exempt if paid a salary, but not if they are paid hourly.

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)). For more information on the referral requirement, see our article here.

Assignment of Fees. If you intend to bill patients and payers for the practitioner's services and retain collections, the contract should reassign to you the right to do so. Require the practitioner 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 practitioner to obtain and maintain their own liability insurance, you should specify 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 practitioner to acquire tail insurance if the practitioner terminates the contract within a certain period of time. If the practitioner is allowed to perform medical services for third parties, you may want to require that the practitioner maintain insurance for such outside activities.

Workers Compensation Insurance. If the practitioner will be an independent contractor, or if you are contracting with a separate corporate entity, require the practitioner and/or corporate entity to maintain workers compensation insurance to the extent required by applicable law. State that the practitioner or corporate entity must indemnify you if they fail 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 the benefits outweigh the risks if the indemnification provision is mutual. I

sometimes require the provider to indemnify the employer for damages resulting from certain forms of misconduct, such as regulatory violations, billing and coding errors, or gross negligence.

Term. Employment contracts may be for any length of time. To comply with applicable Stark and AKS safe harbors for 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, but if it terminates within a twelve-month period, the parties may not execute a new agreement for substantially the same services with different compensation. It is common to include automatic renewal provisions to avoid the unintentional lapse of the agreement, although such a requirement is less important now that Stark allows for holdover agreements so long as the terms did not change during the holdover period. (*See* 42 CFR § 411.357(d)(vii)).

Termination. Appropriate termination provisions are your safety valve: they will allow you to get out of a bad contract or terminate the employment of a bad practitioner. 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 practitioner 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, *e.g.*, require that the practitioner 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 practitioner's services. Consider confirming that termination of the agreement automatically terminates the practitioner's medical staff membership or hospital privileges; that may avoid disputes if a problem practitioner 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 practitioner. Require the practitioner 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.

HIPAA Compliance. Employees are workforce members and are not required to sign a HIPAA business associate agreement (“BAA”). If an independent contractor is performing non-clinical, administrative services, you may need to execute a separate 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.

Non-competition. In those states that allow restrictive covenants against practitioners, 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 practitioner only to have the practitioner set up a competing practice across the street.

Non-solicitation. In addition to, or even if you do not include, a noncompetition clause, include an appropriate non-solicitation clause that prohibits the practitioner from stealing 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, and/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 practitioner 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 practitioner'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).

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, the parties should ensure ongoing compliance to satisfy relevant regulations. 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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