

PROVIDER CONTRACTS: TIPS FROM THE TRENCHES



Kim C. Stanger

**Colorado Rural
Health Center**

(11/19)

This presentation is similar to any other legal education materials designed to provide general information on pertinent legal topics. The statements made as part of the presentation are provided for educational purposes only. They do not constitute legal advice nor do they necessarily reflect the views of Holland & Hart LLP or any of its attorneys other than the speaker. This presentation is not intended to create an attorney-client relationship between you and Holland & Hart LLP. If you have specific questions as to the application of law to your activities, you should seek the advice of your legal counsel.

OVERVIEW

Relevant statutes

- Anti-Kickback Statute
- Ethics in Patient Referrals Act (“Stark”)
- Ethics in Patient Referrals Act
- Civil Monetary Penalties Law
- Tax-exempt status
- State laws

Application

- Types of Agreements
 - Employment
 - Independent contractors
 - Recruitment agreements
 - Leases and timeshares
- Common or recommended terms to consider based on my experience

PRELIMINARIES

- “One size does not fit all.”
 - Consider specific circumstances and needs.
 - Check applicable laws and regulations.
 - Parties may have personal preferences.
- Draft the agreement so there is no misunderstanding.
 - Just because you know what you mean does not mean that others will, including:
 - Other party
 - Court
 - Regulatory agencies
- My comments generally favor the employer.
 - Providers may opt for the opposite.
- Terms will vary between
 - Employment or
 - Independent contractor

EMPLOYEE V. CONTRACTOR

Employment

- Right of control
- Employer must withhold taxes
- Employer vicariously liable
- Employment laws apply, e.g., discrimination, wage/hour, etc.
- Easier to comply with regulations such as Stark and the Anti-Kickback Statute.

Independent Contractor

- No right of control
 - See IRS test
- Employer does not withhold taxes; contractor must pay
 - Unless IRS disagrees with classification
- Employer not vicariously liable
 - Beware actual or apparent agency
- Not subject to employment laws
- *May be liable for employment taxes if misclassify a contractor.*



<https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>

The screenshot shows a web browser window displaying the IRS website. The browser's address bar shows the URL <https://www.irs.gov/newsroom/understanding-employee-vs-contractor-designation>. The page header features the IRS logo on the left, a search bar, and navigation links for 'Help', 'News', and 'Language'. Two prominent buttons, 'Charities & Nonprofits' and 'Tax Pros', are visible. Below the header is a horizontal menu with categories: 'File', 'Pay', 'Refunds', 'Credits & Deductions', and 'Forms & Instructions'. The main content area has a breadcrumb trail: 'Home > News > Fact Sheets > Understanding Employee vs. Contractor Designation'. The title of the page is 'Understanding Employee vs. Contractor Designation'. On the right side of the page, there are language options for 'English' and 'Español'. On the left side, there is a sidebar with sections: 'What's Hot', 'News Releases', 'Multimedia Center', 'Tax Relief in Disaster Situations', and 'Tax Reform'. The main text area contains a fact sheet dated 'FS-2017-09, July 20, 2017'. The text states: 'The Internal Revenue Service reminds small businesses of the importance of understanding and correctly applying the rules for [classifying](#) a worker as an employee or an independent contractor. For federal employment tax purposes, a business must examine the relationship between it and the worker. The IRS Small Business and Self-Employed [Tax Center](#) on the IRS website offers helpful resources.' Below this, it says: '[Worker classification](#) is important because it determines if an employer must withhold income taxes and pay Social Security, Medicare taxes and unemployment tax on wages paid to an [employee](#). Businesses normally do not have to withhold or pay any taxes on [payments](#) to [independent contractors](#). The earnings of a person working as an independent contractor are subject to [self-employment tax](#).' At the bottom of the visible text, it begins: 'The [general rule](#) is that an individual is an independent contractor if the payer has the right to control or direct only the result of'. The Windows taskbar at the bottom shows the time as 7:02 PM on 9/18/2019.

IRS FACTORS FOR DETERMINING EMPLOYEE V. CONTRACTOR

- Behavioral
 - Type and degree of instruction given
 - Evaluate how work performed or just end result
 - Instruction as to how work is performed
- Financial
 - Wage/salary or payment of flat fee for job
 - Investment in equipment used
 - Unreimbursed expenses
 - Opportunity for profit or loss
 - Worker may perform services elsewhere in the market
- Type of Relationship
 - Terms of written contract
 - Payment of employee benefits
 - Services provided as key activity of the business
 - Permanency of relationship

**Right
of
Control**

APPLICABLE LAWS

Healthcare Specific

- Anti-Kickback Statute
- Eliminating Kickbacks in Recovery Act (“EKRA”)
- Ethics in Patient Referrals Act (“Stark”)
 - Applies to physicians
- Colorado Mini-Stark Law
- Civil Monetary Penalties Law
 - Applies to physicians
- IRS tax exempt rules for 501(c)(3)’s

General Employment Laws

- Wage and hour
- Employee benefits/ERISA
- Discrimination
- Workplace safety
- Workers compensation
- Restrictive covenants
- Employee drug testing
- National Labor Relations Act
- Others

ANTI-KICKBACK STATUTE

- Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services covered by government program unless transaction fits within a regulatory safe harbor.

(42 USC 1320a-7b(b); 42 CFR 1003.300(d))

- “One purpose” test

(*US v. Greber*, 760 F.2d 68 (1985))

Penalties

- 10 years in prison
- \$100,000 criminal fine
- \$100,000 civil penalty
- 3x damages
- Exclusion from Medicare/Medicaid

(42 USC 1320a-7b(b); 42 CFR 1003.310; 45 CFR 102.3)

- Automatic False Claims Act violation

(42 USC 1320a-7a(a)(7))



US V. ANDERSON (10TH CIR. 2000)

Facts

- Baptist Medical Center contracted with Drs. LaHue as Co-Directors of Gerontology Services and paid them \$75,000 per year.
- Physicians referred nursing home patients to Baptist.
- But...
 - Minimal services performed.
 - Services not really needed.
 - “I don’t look good in stripes...”

Holding

- Physician 1: 6 years + \$75,000 fine + \$142,000 restitution
- Physician 2: 3 years + \$25,000 fine
- Hospital CEO: 4 years + \$75,000 fine
- Hospital COO: acquittal reversed.
- Hospital attorney: acquitted.

ELIMINATING KICKBACK IN RECOVERY ACT (“EKRA”)

- Cannot solicit, receive, pay or offer any remuneration in return for referring a patient to a laboratory, recovery homes or clinical treatment facility unless arrangement fits within regulatory exception.

(18 USC 220(a))

- Applies to referrals paid by private or public payers.

Penalties

- \$200,000 criminal fine
 - 10 years in prison
- (18 USC 220(a))

ETHICS IN PATIENT REFERRALS ACT (“STARK”)

- If physician (or family member) has financial relationship with entity:
 - Physician may not refer patients to entity for designated health services (“DHS”), and
 - Entity may not bill Medicare or Medicaid for such DHS

unless arrangement fits within a regulatory exception.

(42 USC 1395nn; 42 CFR 411.353 and 1003.300)

Penalties

- No payment for services provided per improper referral.
 - Repayment w/in 60 days.
 - Civil penalties.
 - \$24,748 per claim submitted
 - \$164,992 per scheme
- (42 CFR 411.353, 1003.310; 45 CFR 102.3)
- Likely False Claims Act violation
 - Likely Anti-Kickback Statute violation



THE UNITED STATES
DEPARTMENT of JUSTICE

ABOUT

OUR AGENCY

PRIORITIES

NEWS

Home » Office of Public Affairs » News

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Friday, October 16, 2015

United States Resolves \$237 Million False Claims Act Judgment against South Carolina Hospital that Made Illegal Payments to Referring Physicians

The Department of Justice announced today that it has resolved a \$237 million judgment against Tuomey Healthcare System for illegally billing the Medicare program for services referred by physicians with whom the hospital had improper financial relationships. Under the terms of the settlement agreement, the United States will receive \$72.4 million and Tuomey, based in Sumter, South Carolina, will be sold to Palmetto Health, a multi-hospital healthcare system based in Columbia, South Carolina.

“Secret sweetheart deals between hospitals and physicians, like the ones in this case, undermine patient confidence and drive up healthcare costs for everybody, including the Medicare program and its beneficiaries,” said Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department’s Civil Division. “This case demonstrates the United States’ commitment to ensuring that doctors who refer Medicare beneficiaries to hospitals for procedures, tests and other health services do so only because they believe the service is in the patient’s best interest, and not because the

US v. Tuomey Healthcare Sys.
Hospital entered long-term, part-time employment contracts with physicians to keep them from opening competing surgery centers.

Held: Stark and AKS violations;
\$237 million verdict
\$72.4 million settlement



THE UNITED STATES
DEPARTMENT of JUSTICE

en ESPAÑOL



HOME ABOUT AGENCIES BUSINESS

Home » Office of Public Affairs

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, September 27, 2016

Former Chief Executive of South Carolina Hospital Pays \$1 Million and Agrees to Exclusion to Settle Claims Related to Illegal Payments to Referring Physicians

The Department of Justice announced today that it has reached a \$1 million settlement with Ralph J. Cox III, the former chief executive officer of Sumter, South Carolina-based Tuomey Healthcare System, for his involvement in the hospital's illegal Medicare and Medicaid billings for services referred by physicians with whom the hospital had improper financial relationships.

Under the terms of the settlement agreement, Cox will also be excluded for four years from participating in federal health care programs, including providing management or administrative services paid for by federal health care programs. The illegal physician arrangements resulted in a \$237.4 million judgment against Tuomey following a jury verdict. On Oct. 16, 2015, the United States resolved its judgment against Tuomey for payments totaling \$72.4 million, and the hospital was sold to Palmetto Health, a multi-hospital healthcare system based in Columbia, South Carolina.

"Sweetheart deals between hospitals and referring physicians distort medical decision making and drive up the cost of healthcare for patients and insurers alike," said Principal Deputy Assistant Attorney General Benjamin C. Mizer, head of the Justice Department's Civil Division. "Patients have a right to be confident that a physician who orders a procedure or test does so because that service is in the patient's best interest, and not because the physician stands to gain financially from the referral. Today's settlement demonstrates that the Justice Department and its law enforcement partners will hold individual decision makers accountable for their involvement in causing the economic and facilities programs to engage in unlawful

Tuomey CEO

- Paid \$1 million
- Excluded from Medicare/Medicaid for 4 years.



DEPARTMENT of JUSTICE
ACTION CENTER

[Report a Crime](#)

[Get a Job](#)

COLORADO MEDICAL ASSISTANCE ACT (“MINI-STARK”)

- Prohibits physicians from making a referral to an entity with which the physician or family member has a financial relationship for DHS payable by Medicaid unless fit within federal Stark exception.

(CRS 25.5-4-414)

Penalties

- Cannot bill for services.
- Refund amounts paid per improper referral.
- Medicaid fraud.
- Terminate participation in Medicaid.

CIVIL MONETARY PENALTIES LAW

- Hospital or CAH cannot knowingly make a payment, directly or indirectly, to a physician as an inducement to reduce or limit medically necessary services provided to Medicare or Medicaid beneficiaries who are under the direct care of the physician.

(42 USC 1320a-7a(b))

Penalties

- \$5,000 per violation.
- Exclusion from Medicare and Medicaid

(42 CFR 1003.1010(a); 45 CFR 102.3)

- Beware gainsharing arrangements!

501(C)(3) TAX EXEMPT STATUS: PRIVATE INUREMENT

- To qualify for tax exemption, no part of an organization's net earnings shall inure in whole or part to the benefit of private individuals.
 - Applies to “insiders”, i.e., those with power exercise control or influence over the organization.
 - May extend to physicians employed by organization.

Penalties

- Loss of tax exempt status
- Intermediate sanctions

APPLYING THE LAWS

EMPLOYMENT

Stark (Physicians)

- Compensation must be:
 - Consistent with fair market value (“FMV”) of services.
 - Does not take into account the volume or value of referrals for DHS
 - Does not apply to services personally performed by referring physician.
 - Commercially reasonable even if no referrals made.

(42 CFR 411.357(c))

Anti-Kickback Statute

- Compensation paid to bona fide employees for furnishing items or services payable by Medicare/Medicaid.
- Safe harbor may not apply to excess payments for referrals instead of “furnishing items or services”.

(42 CFR 1001.952(i))

(OIG Letter dated 12/22/92 fn.2)

INDEPENDENT CONTRACTORS

Stark (Physicians)

- Writing specifies compensation.
- Compensation formula is:
 - Set in advance.
 - Consistent with FMV.
 - Does not take into account the volume or value of services or other business generated by the physician.
- Arrangement is commercially reasonable and furthers legitimate business purpose.
- Compensation may not be changed within 1 year.

(42 CFR 411.357(d) or (l))

Anti-Kickback Statute

- Writing signed by parties.
- Aggregate compensation is:
 - Set in advance.
 - Consistent with FMV.
 - Does not take into account the volume or value of referrals for federal program business.
- Aggregate services do not exceed reasonably necessary to accomplish commercially reasonable business purpose.

(42 CFR 1001.952(d))

GROUP PRACTICES

Under Stark:

- Group practices can compensate physicians differently than hospitals, e.g.,
 - Groups may pay share of profits subject to certain limits.
 - Groups may pay physicians for services performed “incident to” the physician services.
(42 CFR 411.352 and .355)
- Contracts between the hospital and group may create additional issues, particularly for the group, e.g.,
 - “Under arrangement” contracts may prevent the group from relying on the group practice exceptions.

SERVICES

- Person or entity providing services
 - If group*, approve person providing services
- Employment v. independent contractor
- Commencement date
- Confirm services
 - Clinical
 - Administrative
 - Call
 - Supervision
 - Others?
- Schedule (fulltime, part-time, PRN)
- Qualifications
- * Group services raise additional issues under Stark.

QUALIFICATIONS

Condition contract on satisfaction of qualifications:

- Successfully pass pre-employment screening.
- Licensure without restriction.
- DEA and state board of pharmacy authorization.
- Able to participate in Medicare, Medicaid, and other payer programs.
- Medical staff membership and privileges without restriction.
- Insurable under hospital's policies.
- Board certification or board eligible.
- Able to perform services.

PERFORMANCE STANDARDS

- Comply with laws and regulations; standard of care; hospital bylaws, and policies; payer requirements; third party contracts.
- Act in professional, cooperative, non-disruptive manner.
- Timely complete records per hospital policy.
- Promote service line.
- Support quality assurance, compliance and other programs.
- Attend required meetings and participate in assigned committees.
- Immediately notify hospital of circumstances giving rise to potential claims.
- Adhere to such other performance standards as reasonably established by employer.

EXCLUSIVITY

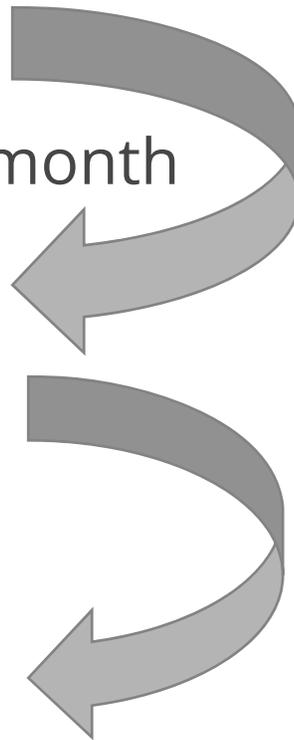
- If contract is not intended to be exclusive:
 - Confirm same.
 - Require cooperation with other providers.
- If contract is intended to be exclusive:
 - Define scope of exclusivity carefully.
 - Allow for appropriate exceptions.
 - Condition contract and privileges on continuance of exclusive arrangement.
 - Terminate contract and privileges if provider is no longer a part of the group that has the exclusive arrangement.

OUTSIDE ACTIVITIES

- Limit performance of professional services outside agreement during the term without employer's consent.
 - May specify permissible services, e.g., teaching, writing, performing expert testimony, etc.
 - Reserve right to revoke consent at anytime.
- Ownership of fees generated from outside activities.
- Obligation to secure insurance coverage.
- Coordinate with non-compete.
- Prohibit outside activities that:
 - Interfere with performance of services per agreement.
 - Compete with employer's services.
 - Increase employer's liability.

COMPENSATION

- Set salary
- Time-based
 - Per hour, shift, day, or month
- Productivity-based
 - wRVUs
 - Net charges
 - Net collections
 - Net income
- Value-based



Many/most entities have moved to production-based compensation to avoid losses.

Many entities will need to move toward value-based compensation to align with changing payer arrangements.

COMPENSATION

- Base salary, per hour, per day, per month, per shift, per service
 - Define what you are paying for, e.g.,
 - Clinical v. administrative services
 - Adjustment for partial shifts, partial years, etc.
 - APPs: consider wage/hour laws.
- Productivity = personally performed services.
 - wRVUs + appropriate modifiers for multiple procedures, surgical assists, contractual adjustments, no bills, no assigned wRVU, etc.
 - Billing or collections.
 - Include example of calculation to avoid misunderstanding.
 - Consider advance + true up at end of period with necessary repayment.
 - NOT share of overall profits, services performed by others (including “incident to”), ancillaries, cost savings, etc.



THE UNITED STATES
DEPARTMENT OF JUSTICE

ABOUT

OUR AGENCY

Home » Office of Public Affairs » News

JUSTICE NEWS

US v. Halifax Hospital

- 15% of operating margin for Oncology Program put in incentive compensation pool. Employed oncologists paid based on their personal performed services.
- Qui tam suit by Director of Physician Services
- Stark violation; hospital pays \$85 million

FOR IMMEDIATE RELEASE

Tuesday, March 11, 2014

Florida Hospital System Agrees to Pay the Government \$85 Million to Settle Allegations of Improper Financial Relationships with Referring Physicians

Halifax Hospital Medical Center and Halifax Staffing Inc. (Halifax), a hospital system based in the Daytona Beach, Fla., area, have agreed to pay \$85 million to resolve allegations that they violated the False Claims Act by submitting claims to the Medicare program that violated the Physician Self-Referral Law, commonly known as the Stark Law, the Justice Department announced today.

The Stark Law forbids a hospital from billing Medicare for certain services referred by physicians who have a financial relationship with the hospital. In this case, the government alleged that Halifax knowingly violated the Stark Law by executing contracts with six medical oncologists that provided an incentive bonus that improperly included the value of

COMPENSATION

- Value-Based Compensation
 - The future of provider compensation...
 - “Nothing in [Stark] bars payments based on quality measures, as long as the overall compensation is fair market value and not based directly or indirectly on the volume or value of DHS referrals, and the other conditions of the exception are satisfied. For example, nothing in [Stark] would prohibit payments based on achieving certain benchmarks related to the provision of appropriate preventative health care services or patient satisfaction.”

(69 FR 16088)

COMPENSATION

- Value-based compensation
 - Patient management compensation
 - 5%-20% of compensation based on achieving quality metrics, e.g.,
 - Clinical quality/patient safety/outcomes (e.g., patients with diabetes achieved certain standards)
 - Patient satisfaction
 - Access to care
 - Efficiency
 - Use of health IT
 - Citizenship (e.g., participation in committees, meetings, etc.)
- * Beware “take back” or “penalty” provisions.

May use existing metrics, e.g.,

- Healthcare Effectiveness Data and Information Set (HEDIS)
- Physician Quality Reporting System (PQRS)

COMPENSATION

Additional compensation

- Supervision of others
 - Actual time spent
- Signing bonus
- Retention bonus
- Relocation assistance
- Student loan repayment
- Deferred compensation
 - Check with tax advisor
- Malpractice tail insurance from prior employer
- Others?

- ✓ Include when calculating FMV.
- ✓ Must remain through entire bonus period to get bonus.
- ✓ Consider repayment if provider leaves within certain period of time.
 - Repay all
 - Prorate over time
- ✓ Payments as forgivable loans.
 - Promissory note + security interest
- ✓ Beware tax ramifications.
 - Withholdings
 - Provider liability

BENEFITS

- Health and dental insurance
- Life insurance
- Disability insurance
- Workers compensation
- Retirement
- Time off
- CME or professional education
- Licensure, professional fees, and costs
- Reimbursement of business expenses
- Others

- ✓ Consider simply referring to existing employee benefit plans.
 - Allows modification
 - Avoids complex contracts
- ✓ Confirm benefits are subject to existing plans and may be changed at anytime.
- ✓ Beware discrimination in favor of highly paid employees.
- ✓ Consider whether benefits payable to part-time or PRN.
- ✓ Beware paying to contractor.



COMPENSATION

- Beware stacking compensation:

Base salary
+ Production bonus
+ Quality bonus
+ Call coverage
+ Medical directorship
+ Midlevel supervision
+ Resident supervision
Total compensation

Cumulative compensation may exceed FMV, especially when provider is paid for separate services performed at same time, or cumulative time exceeds reasonably available hours (e.g., physician who is paid for 40 hours of clinical services should only receive additional compensation for services in excess of 40 hours).

- To mitigate, ensure that separate compensation is for separate services and distinct time requirements.
- Consider cap on compensation.

CALL COVERAGE

- OIG has approved paying for call coverage if, e.g.,
 - Lack of specialty services otherwise available, and/or
 - Physicians won't take call w/out pay because of practice demands, time commitment, or uncompensated care.

(See, e.g., OIG Adv. Op. 12-15)
- Ensure payments satisfy applicable safe harbor, e.g.,
 - Written arrangement, if independent contractor
 - Fair market value
 - Commercially reasonable
- Document need for call coverage and services provided.

CALL COVERAGE

Common methods

- Daily or hourly rate, with or without right to bill.
- Paying lower hourly/daily, but higher rate if provider is called in.
- Paying for excess call over certain number of shifts per month.
- Paying for professional fees for uninsured patients, perhaps based on Medicare rates.
- Income guarantee for services performed while on call coverage.
- Paying physician's malpractice insurance for call.
- Joint arrangement with other hospitals to share call coverage and payment for same.
 - Consider antitrust implications.
- Deferred compensation plan.

PENALTIES

- “Penalty” or adjustment provisions
 - Failure to timely complete records
 - Failure to comply with billing rules
 - Contractual adjustments
- Many states prohibit imposing monetary “penalty” on employee wages.
 - Pay as bonus for compliance
 - Include factors in determination of bonus amount
 - Reserve right to recover damages
 - Include indemnification provision

REQUIRING REFERRALS

Under Stark, may condition compensation on referrals to provider if:

- *Bona fide* employment or personal services arrangement;
- Compensation is set in advance for term of arrangement;
- Referral requirement is set out in writing and signed by parties;
- Referral requirement does not apply if:
 - Patient prefers another provider,
 - Insurer determines provider, or
 - Physician believes referral is not in patient's best medical interest;
- Required referrals relate solely to physician's services covered by scope of employment or personal services arrangement; and
- Referral requirement reasonably necessary to effectuate legitimate business purpose of the compensation arrangement.

(42 CFR 411.354(d)(4))

TERM

- Set term.
 - Contractors: must be for at least 1 year.
 - May terminate early.
 - Cannot change terms or enter new agreement for 1 year.
 - Theoretically requires new agreement at end of term.
 - Practically parties may extend contract by continued performance so long as do not change terms.
- Auto-renewal.
 - e.g., for x years but renews unless prior notice is given or contract is terminated per agreement.
 - Avoids unintended expiration.
 - Less important now that Stark allows for holdover agreements.
- Continue until terminated per agreement.

TERMINATION

- Termination without cause on 90 days.
 - Consider immediate termination if pay comp.
 - Damages if provider fails to give required notice.
- Termination with cause on x days notice + chance to cure.
- Immediate termination for certain conduct.
 - Failure to satisfy qualifications.
 - Violation of law or regulation.
 - Substance abuse.
 - Repeated violation of performance standards.
 - Performance subjects hospital to liability.
 - Others?

POST-TERMINATION OBLIGATIONS

- Terminates right to receive compensation.
 - Ensure consistent with compensation formula.
- Return all property, keys, documents, etc.
- Complete records before or within x days of termination.
 - Consider damages or penalties
- Cooperate in transferring care and duties.
- Cooperate in responding to investigations or claims.
- Surrender of medical staff membership and privileges unless waived by hospital.

NON-COMPETES

- Non-compete provisions in a physician agreement that restrict the physician's right to practice medicine is unenforceable.
- May require payment of damage reasonably related to injury suffered because of competition.
- Cannot prohibit physicians from practicing or disclosing continuing practice to patient with rare disorder.

(CRS 8-2-113)

NON-SOLICITATION

- Soliciting, inducing, diverting, contracting with, or interfering with patients, employees, contractors, key vendors, contract partners, etc.
- Limitation may be subject to reasonable limits.
 - Time
 - Scope of services
 - Geography

CONFIDENTIALITY

- Require provider to maintain confidentiality of certain records, “including but not limited to”:
 - Patient info, including patient lists
 - Personnel info
 - Business plans and strategies
 - Pricing and financial info
 - Risk management, credentialing, and quality assurance
 - Litigation
 - Trade secrets or competitively sensitive info
 - Agreement
- Remedies
 - Liquidated damages
 - Injunction with fees and without bond.

HIPAA COMPLIANCE

- Not necessary because providers already have obligation to comply with applicable laws and regulations.
- Business associate agreements (“BAA”)
 - Employees
 - No BAA needed for members of workforce.
 - Independent contractors
 - Probably not required because—
 - Providers are not business associates while providing treatment.
 - Provider may be member of workforce.
 - Provider is part of organized healthcare arrangement.
 - May be required if perform administrative services (e.g., medical director services) outside organized healthcare arrangement.

INDEMNIFICATION

- May not be necessary under common law rules.
 - May generally sue for breach of contract or tort damages.
- Unilateral v. mutual.
 - Including clause may prompt demand for mutuality.
- Indemnification for:
 - Breaches of agreement.
 - Violations of law, regulations, or policies.
 - Intentional, grossly negligent, or negligent acts or omissions, e.g., malpractice, billing errors, misrepresentations, etc.
- Coordinate with available insurance.
 - Limit to extent not covered by insurance.
 - Ensure it does not nullify insurance.

ADDITIONAL TERMS TO CONSIDER

- Liability insurance
 - Consider tail insurance
- Use of hospital resources for personal business.
- Intellectual property rights.
- Ownership and access to records.
 - Contractors: include Medicare access clause.
- Notice.
- Governing law and venue.
- Alternative dispute resolution.
- Assignment.
- Integration, i.e., confirm it is entire agreement.
- Coordinate with other agreements and bylaws.
- Survival of terms.
- Interpretation and construction.

RECRUITING PROVIDERS

- May compensate recruited provider under:

- Employee safe harbor
- Independent contractor safe harbor
- Group practice safe harbor
- Recruitment safe harbor

Limited
to FMV

- Allows hospital or FQHC to pay physician or midlevel to relocate to service area.
- Compensation not limited to FMV.
- Subject to many conditions.

(42 CFR 411.357(e) and (x); 1001.952(n))

RECRUITMENT AGREEMENT

Stark (Physicians)

- Payments by hospital to recruit.
- Written agreement signed by parties.
- Physician relocates from at least 25 miles into hospital's service area.
- Not conditioned on referrals.
- If recruit into existing group:
 - Cannot subsidize group.
 - Hospital payments must be:
 - Directly passed on to recruited physician.
 - Reimburse group for recruitment expenses.
 - Income guaranty limited to additional incremental expenses attributable to adding physician.

- See other conditions

(42 CFR 411.357(e))

- See separate safe harbor for APPs.

Anti-Kickback Statute

- Payment to induce practitioner to relocate to HPSA.
- Written agreement signed by parties.
- 75% of revenues from new practice.
- Benefits provided < 3 years.
- Terms not renegotiated during the 3 years.
- No required referrals.
- Amount of benefits not based on referrals.
- No restriction on staff privileges elsewhere.
- Cannot discriminate against federal program beneficiaries.
- Cannot benefit any entity in a position to generate referrals.

(42 CFR 1001.952(n))

RETENTION AGREEMENT

Stark (Physicians)

- Hospital or FQHC payments to retain physician in HPSA or MUA.
- Physician has either:
 - Bona fide offer elsewhere, or
 - Certifies in writing s/he has bona fide opportunity elsewhere.
- Retention payment submit to limits.
- 75% of patients in MUA or MUP.
- Only one retention agreement per 5 years.
- Terms not altered based on referrals.
- Arrangement does not violate Anti-Kickback Statute.
- See additional requirements.

(42 CFR 411.357(t))

USE OF SPACE, EQUIPMENT OR PERSONNEL

- Use of space, equipment, supplies or personnel
 - Medical staff members
 - Visiting specialists
 - Full or part-time lease
 - Professional courtesy
 - Etc., etc., etc.
- ✓ Stark
- ✓ Anti-Kickback Statute
- ✓ 501(c) tax issues
- ✓ Impermissible sharing of hospital space
 - See recent proposed guidance on sharing of hospital space
- ✓ Provider-based rules
 - Must be held out to public as the hospital-owned
- ✓ Others?

LEASE SPACE OR EQUIPMENT

Stark (Physicians)

- Written lease signed by parties.
- Specifies space, equipment, etc.
- No changes within 1 year.
- Legitimate need, no more than necessary, and commercially reasonable.
- Exclusive use by lessee.
- Rent is
 - Fair market value.*
 - Not based on referrals.
 - Not % of revenue.
 - Not per unit of service referred by lessor.
- Holdover okay if based on same terms.

(42 CFR 411.357(a)-(b))

Anti-Kickback Statute

- Written lease signed by parties.
- Specifies space, equipment, etc.
- Specifies schedule of use.
- Term < 1 year.
- Aggregate rent is:
 - Fair market value.*
 - Not based on referrals.
- Reasonably necessary to accomplish commercially reasonable business purpose.

(42 CFR 1001.952(b))

TIMESHARE

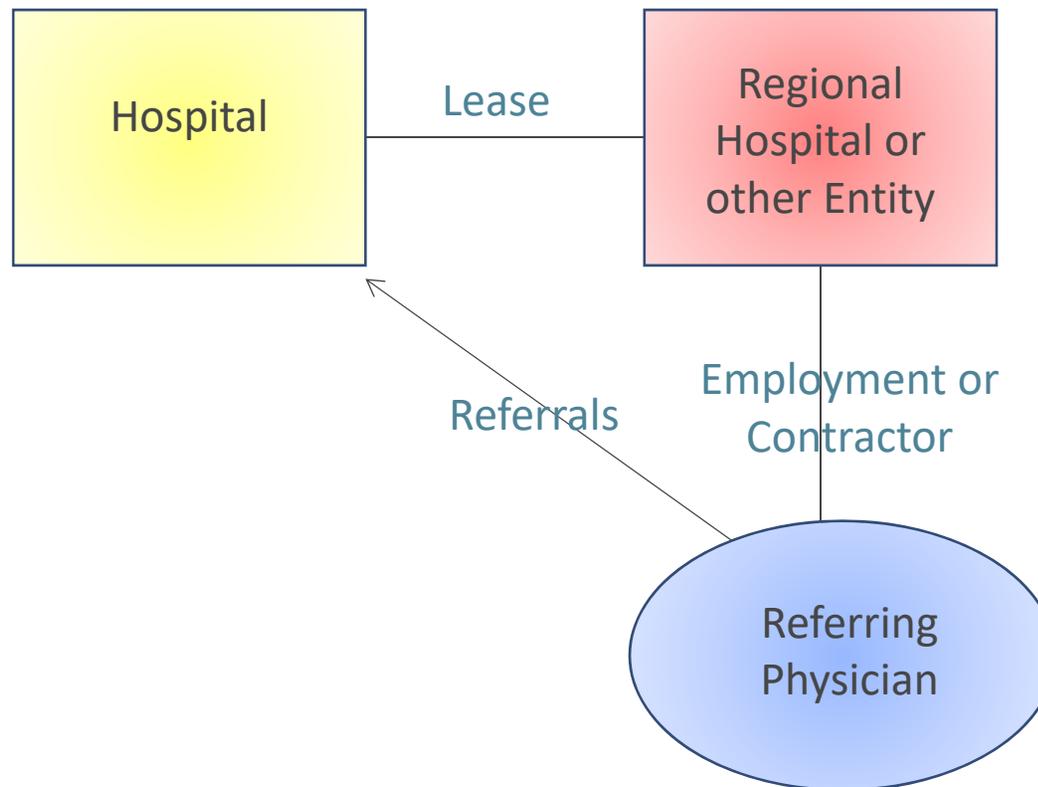
Stark (Physicians)

- Between physician/group and hospital.
 - Written agreement signed by parties specifying space, equipment, personnel, etc.
 - Used predominantly for evaluation and management (“E&M”)
 - Not conditioned on referrals.
 - Does not violate Anti-Kickback Statute.
 - Does not convey leasehold.
- Compensation is
 - Set in advance
 - Fair market value
 - Not based on:
 - % of revenue
 - Per unit of service referred by licensor
 - Commercially reasonable.
 - See other conditions.
(42 CFR 411.357(y))

INDIRECT FINANCIAL RELATIONSHIPS

- Under Stark, no “financial relationship” exists if closest compensation relationship with physician does not vary with volume or value of referrals.
- Beware physician owners who “stand in the shoes” of their group.

(42 CFR 411.354(c))



INDIRECT FINANCIAL RELATIONSHIP

Stark (Physicians)

- Indirect compensation arrangement.
- Compensation is
 - Fair market value for services provided, and
 - Not determined based on referrals.
 - Additional rules for leases.
- Compensation arrangement:
 - Set out in written agreement signed by parties (except employment agreement);
 - For identifiable services; and
 - Commercially reasonable.
 - Does not violate Anti-Kickback Statute or other law governing billing submissions.

(42 CFR 411.357(p))

USE OF SPACE/EQUIPMENT

- CMS recently indicated no “remuneration” if:
 - Physician bills professional fees.
 - Hospital/clinic bill technical/facility fees.
 - Neither bill globally.

(80 FR 71321-22)

- Make sure physician is using appropriate site of service modifier.
- May potentially be AKS issues.

<https://oig.hhs.gov/compliance/compliance-resource-portal/>

The screenshot shows a web browser window displaying the Compliance Resource Portal. The browser's address bar shows the URL <https://oig.hhs.gov/compliance/compliance-resource-portal/>. The page header includes the U.S. Department of Health and Human Services logo and the text "Office of Inspector General". A search bar and a "Submit a Complaint" button are visible. The main navigation menu includes "About OIG", "Reports", "Fraud", "Compliance", "Exclusions", "Newsroom", and "Careers". The main content area features a large heading "Compliance Resource Portal" and a list of links: "Compliance", "Compliance Resource Portal", "Accountable Care Organizations", "Advisory Opinions", "Compliance Guidance", "Corporate Integrity Agreements", "Open Letters", and "RAT-STATS". A sidebar on the right lists "Toolkits", "Provider Compliance Resources and Training", "Advisory Opinions", and "Voluntary Compliance and Exclusions Resources". A callout box on the right encourages users to email suggestions for new compliance resources. The Windows taskbar at the bottom shows the date and time as 10:07 AM on 6/22/2019.

Compliance Resource Portal | Off x +

<https://oig.hhs.gov/compliance/compliance-resource-portal/>

An official website of the United States government [Here's how you know](#)

U.S. Department of Health and Human Services
Office of Inspector General

Search Submit a Complaint

About OIG Reports Fraud Compliance Exclusions Newsroom Careers

Compliance
Compliance Resource Portal
Accountable Care Organizations
Advisory Opinions
Compliance Guidance
Corporate Integrity Agreements
Open Letters
RAT-STATS
Safe Harbor Regulations

Compliance Resource Portal

[Highlights from Principal Deputy IG Joanne Chiedi's 2019 HCCA Compliance Institute Remarks](#)

Toolkits +

Provider Compliance Resources and Training +

Advisory Opinions +

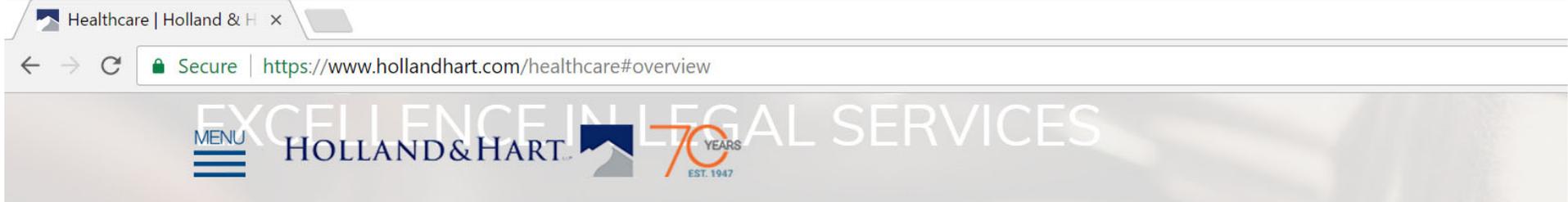
Voluntary Compliance and Exclusions Resources +

Email your suggestions for new OIG compliance resources

This is not intended to be a formal agency solicitation. OIG welcomes ideas for new compliance resources that would be helpful to the health care community and that are consistent with OIG's mission, in any format. The receipt of a suggestion does not obligate OIG to take action, including responding to the suggestion, making suggestions public, or issuing public guidance. Members of the public are

10:07 AM
6/22/2019

https://www.hollandhart.com/healthcare#overview



OVERVIEW ▶

PRACTICES/INDUSTRIES

NEWS & INSIGHTS

CONTACTS



Kim Stanger
Partner
Boise



Blaine Benard
Partner
Salt Lake City

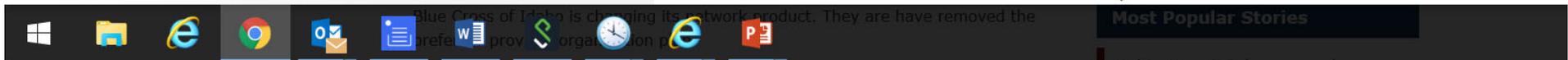


The Healthcare Industry is poised to continue its rapid evolution. With this sector now making up close to 20 percent of GDP, our lawyers stand ready to help as changes unfold.

Issues such as rising healthcare costs, healthcare reform, data and privacy security, and innovations in healthcare delivery, device and pharmaceutical designs are forefront in the minds of many of our clients. We are here to guide our clients through the challenges and opportunities that arise in this dynamic industry.

Clients We Serve

- Hospitals
- Individual medical providers
- Medical groups
- Managed care organizations (MCOs)
- Third-party administrators (TPAs)
- Health information exchanges (HIEs)
- Practice managers and administrators
- Veterinary service providers and facilities
- Independent Practice Associations (IPAs)
- Imaging centers
- Ambulatory surgery centers
- Medical device and life science companies



QUESTIONS?

Kim C. Stanger

office 208-383-3913

cell 208-409-7907

kcstanger@hollandhart.com