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Lawyer: Stark Provision on Personally Performed Services Is Misunderstood

It has become something close to conventional wisdom that hospitals and other providers risk violating the Stark Law unless their productivity compensation for employed physicians is based only on their personally performed services, but that's a myth—and it's skewing compensation arrangements and influencing enforcement actions and settlements, one attorney says.

"There is much confusion about whether a physician-employee may be compensated for services performed by another physician or a mid-level practitioner," says Gadi Weinreich, a senior partner with Dentons US LLP in Washington, D.C. He gets why people are confused; for one thing, the way that CMS structured Stark's exception for employment arrangements makes it seem like the provision on productivity bonuses is an independent condition of complying with the exception, he says. That may be wreaking havoc on the interpretation of the Stark Law and regulation, which is already challenging, Weinreich says.

"It's a beast of a statute," he contends. "Everyone struggles with Stark, no matter how long they've worked on it."

The Stark Law prohibits Medicare payments to entities (e.g., hospitals) for designated health services (DHS), such as inpatient and outpatient services, that are referred by physicians who have a financial relationship with the DHS entity, unless an exception applies. There's a statutory and regulatory exception for "bona fide" employment relationships, and it has taken center stage as hospitals snap up physician practices to advance health reform/value-based arrangements and for other reasons.

The regulatory employment exception states that "any amount paid by an employer to a physician (or immediate family member) who has a bona fide employment relationship with the employer for the provision of services" will not constitute remuneration if the following conditions are met:

1. "The employment is for identifiable services.
2. The amount of the remuneration under the employment is -
   (i) Consistent with the fair market value of the services; and

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(ii) Except as provided in paragraph (c)(4) of this section, is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician.

3. The remuneration is provided under an arrangement that would be commercially reasonable even if no referrals were made to the employer.
4. Paragraph (c)(2)(ii) of this section does not prohibit payment of remuneration in the form of a productivity bonus based on services performed personally by the physician (or immediate family member of the physician)."

Subparagraph four is where things have gone awry, Weinreich contends. "The so-called fourth condition of the regulatory exception is actually not a condition. It's a clarification," he explains. Congress and CMS are essentially saying, "Just to be clear, the decision of an employer to pay a physician-employee a productivity bonus based on her personally performed services will not offend the prohibition against 'taking into account the volume or value of referrals' set forth in condition (c)(2)(ii)," such as paying an employed physician $10 for each new patient encounter or $40 for each personally worked relative value unit (wRVU) in excess of 5,000 wRVUs per year, he says.

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That clarification is useful, if redundant, because the Stark Law's definition of the term "referral" excludes personally performed services, Weinreich says. "Subparagraph (c)(4) states the obvious. It gives the industry one example of a compensation methodology that does not violate (c)(2)(ii). It's not exhaustive, however, because there are many ways to bonus a physician-employee without triggering the volume-or-value prohibition," he notes.

Volume or Value of Referrals Is What Counts

He worries the industry, however, is hewing to a narrower interpretation of the exception than necessary, partly fueled by whistleblower lawsuits, government arguments and court rulings. Many people seem to think the law is saying, "if you want to pay an employed physician a productivity bonus, it has to be based on his or her personally performed services," and that anything else violates Stark, he says. But that's not the case. "The concern articulated in the exception isn't about paying for services that are not personally performed, such as incident-to services in a physician office or clinic," he contends. "The actual concern is paying for services if doing so takes into account, directly or indirectly, the volume or value of referrals." By definition, "referral" means "ordering or performing services that are DHS paid for by Medicare," so he says "the correct inquiry turns on whether the non-personally performed services at issue constitute DHS."

Suppose a hospital employs a physician who has practiced in the community for decades. The hospital is considering the addition of a physician to the practice because the older physician wants to slow down and patient wait times are long. To help integrate the new physician, the hospital contemplates giving the established physician an annual bonus for every patient she refers to the new physician or for every wRVU the new physician works beyond preset wRVU targets. The conventional wisdom: no way, because the bonus wouldn't be based on the older physician's personally performed services. In reality, Weinreich says, the proposed bonus would be lawful (1) assuming the established physician's arrangement is commercially reasonable and her total compensation is fair market value; and (2) depending on whether any of the new physician's services are DHS.

"Even though the established physician is incentivized to direct patients to the new physician, this conduct will not involve referrals within the meaning of the Stark Law and its employment exception if none of the new physician's services are DHS and the established physician's bonus remains unaffected by the new physician's subsequent medical decision to order or not to order DHS," Weinreich says.

Misinterpretations of the physician employment exception are being perpetuated in the enforcement world, he contends. It happened in a ruling in the Stark-based False Claims Act case against Halifax Health in Florida, which ultimately settled for $84 million. "Ultimately, and among other issues, the district court judge ruled against the defendants, holding that they could not rely on the employment exception to the Stark Law because the physician-employee bonus at issue was not based on each physician's personally performed services," Weinreich says. But he says that wasn't the "correct inquiry." The court should have turned its attention to whether any part of the physicians' compensation took into account the volume or value of their referrals—"a query that should have been answered with the aid of the Stark Law's special rules on unit-based compensation at section 354(d) of the regulations."

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