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8-17-07

Hiring Multiple Hospice Medical Directors and Other Hospice Physicians: Legal Considerations

An experienced and engaged hospice medical director is an integral part of any successful hospice. The Medicare Hospice Conditions of Participation require the hospice medical director to be either a doctor of medicine or osteopathy. The medical director's responsibilities include oversight of the medical component of the hospice's patient care programs and certifying and recertifying that hospice patients are terminally ill and therefore eligible to receive hospice care.

Because of these regulatory requirements, and the ever-increasing complexities of the hospice medical director position, it is important for every hospice to have physicians who can provide back-up for the hospice medical director, such as taking calls and covering for the medical director while he or she is on vacation. Hospices typically call these individuals associate medical directors or hospice physicians. However, to reduce confusion, we will refer to each of these individuals collectively as "hospice medical directors" for the remainder of this article, although we recognize that only one physician should be considered to be the hospice medical director to whom the other hospice physicians report.

While an essential relationship for every hospice, a medical director's compensation arrangement has the potential to be abusive from a fraud perspective, especially if the physician's practice area (*e.g.*, oncology) or outside relationships (*e.g.*, a medical director of a local nursing home) make the physician a valuable source of patient referrals to the hospice. The fact that a physician is a valuable referral source does not make the medical director arrangement per se illegal. However, the government could view the arrangement as suspect, depending on the facts and circumstances.

An arrangement might be considered a "sham" if the hospice compensates a medical director above "fair market value" or for services that are never provided, and the medical director in turn refers patients to the hospice. Even if not explicitly stated in any written documents related to the arrangement, such an arrangement might be viewed by the government as an arrangement in which the medical director is being compensated for referrals, and both the hospice and physician could be penalized under the federal anti-kickback statute.

The anti-kickback statute is a federal law that makes it a criminal offense to knowingly and willfully offer, pay, solicit or receive remuneration (*i.e.*, anything of value) to induce referrals of items or services for which payment may be made under a federally-funded health care program. Civil monetary penalties may be imposed for violations of the anti-kickback statute. Recognizing the potential breadth of this statute, a series of "safe harbors" were created in order to describe arrangements that would not be prosecuted under the anti-kickback statute. The failure to fit precisely within a safe harbor does not necessarily mean that the arrangement is in violation of the anti-kickback statute. However, it is certainly advisable to fit all physician compensation arrangements within a safe harbor.

Two safe harbors are potentially available to a medical director agreement or other physician compensation arrangement. One is the personal services and management contracts safe harbor, which says that payments made by a principal (hospice) to an agent (physician) will not be considered to be remuneration under the anti-kickback statute so long as:

- the agreement is set out in writing, specifies the services covered by the agreement and provides that the services are being provided for the term of the agreement;
- the agreement specifies the schedule, length and exact charge for intervals of services, if not full-time services;
- the term of the agreement is not less than one year;
- the compensation paid under the agreement is set in advance, consistent with fair market value in an arm's length transaction, and does not take into account the volume or value of referrals or other business generated between the parties for which payment may be made in whole or in part by Medicare or Medicaid;
- the services performed under the agreement do not involve the promotion of business arrangements or other activities that violate any state or federal law; and
- the aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially reasonable business purpose of the services.

This safe harbor is applicable when a physician is under contract with, and not employed by, the hospice.

A second safe harbor is available to cover "bona fide" employment relationships between the hospice and a medical director. The employment safe harbor simply states that any amount paid by an employer to an employee who has a bona fide employment relationship with the employer would not be considered "remuneration" under the anti-kickback statute.

Medical director arrangements between a physician and a hospice that fit precisely within one of these exceptions are immune from prosecution under the federal anti-kickback statute. Documenting the fair market value for physician services, and then paying the physician at such market value, is particularly important in the context of health care fraud and abuse laws.

The following are two hypothetical situations that examine different fact scenarios, and analyze risk factors for each under the federal anti-kickback statute.

Scenario One: A hospice has contracted with four part-time physicians to provide medical director services for the hospice, each working approximately half-time as independent contractors (not employees) of the hospice. The four physicians serve as the medical directors at all four of the local nursing homes, and have no experience in palliative medicine. The hospice is relatively small, and has only needed one part-time medical director in the past. However, the hospice hopes to lock up a stream of referrals by contracting with the medical directors at each of the local nursing homes, and projects that the hospice's resulting growth will eventually justify two FTE medical directors.

Potential Risk Factors:

1. The Physicians Might be Valuable Referral Sources Because of Their Position as Nursing Home Medical Directors.

The first risk factor in this arrangement is the fact that each of the medical directors also serves as medical director for each of the local nursing homes in the area. The hospice would likely have to overcome the inference that these arrangements are somehow designed to reward patient referrals. While this fact does not by itself render the

arrangement illegal, as the government still must prove the arrangement violates the anti-kickback statute, it draws attention to the arrangement and may cause the government to closely scrutinize the arrangement.

2. Aggregate Services Contracted For May Not Be Commercially Reasonable.

As discussed above, one element of the safe harbor for personal services and management contracts requires that "the aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the commercially reasonable business purpose of the services." Depending upon how the hospice is going to use the medical directors, the aggregate services contracted for may not be commercially reasonable. For this analysis, it does not matter that future projections may justify two FTE medical directors at some later date. However, if the hospice is adding another FTE physician because it wants to improve patient service, promote the hospice concept in the community, or for some other legitimate reason, the hospice might be able to argue that this is a commercially reasonable arrangement.

3. Compensation May Not Be Fair Market Value.

Given that the hospice's patient census may only justify one part-time medical director, the arrangement might not meet the safe harbor component that requires compensation paid under the arrangement to be consistent with fair market value and not take into account the volume or value of referrals or other business generated between the parties. For example, if the hospice pays a medical director a flat fee or hourly rate that is based on 20 hours per week, but the physician only performs an average of 10 hours of work per week because of over-staffing, the compensation arrangement is unlikely to be at fair market value. A natural question for a regulator to ask is why would a hospice pay a physician for 20 hours of work when only 10 hours are performed? Regulators examining this arrangement could certainly infer that the medical directors are being paid for the value of the referrals they are generating due to their positions at local nursing homes. Given this reasonable inference, the hospice now has a heavy burden to convince the regulators that this is a legitimate business arrangement and not an attempt to funnel payments for referrals.

4. One of the Hospice's Stated Goals in this Arrangement is to "Lock Up a Stream of Referrals."

This is a significant risk factor, because it could show intent on behalf of the hospice to compensate physicians in exchange for patient referrals. One of the difficulties the government often has in prosecuting an anti-kickback violation is proving that a party intended to give or receive compensation in exchange for referrals. However, courts have decided that if one purpose of a compensation arrangement was to reward or induce referrals, the arrangement violates the anti-kickback statute. If a stated goal of an arrangement with a medical director is to "lock up" or otherwise increase a stream of referrals from a particular entity (such as a nursing home), the government might be able to make a relatively convincing case that the hospice had the necessary intent to violate the anti-kickback statute.

5. Contracted Physicians Are Not Experienced in Palliative Medicine.

The fact that none of the contracted physicians is experienced in palliative medicine is another risk factor, because it might tend to strengthen the government's case that the hospice chose these physicians based on their ability to refer patients, rather than any specific expertise they offer the hospice.

Analysis:

An arrangement that does not precisely fit an anti-kickback statute safe harbor will be analyzed by the government on a case-by-case basis, taking into account all of the facts and circumstances of the arrangement. As discussed above, this arrangement may not fit within an anti-kickback safe harbor, depending upon the specific facts. If the arrangement does not precisely meet a safe harbor, regulators might conclude that the hospice had the intent to pay remuneration to these physicians to induce referrals. Therefore, this arrangement could be found to violate the anti-kickback statute, bringing significant legal risk to both the hospice and the physicians. The facts in this particular scenario are not strong for the hospice or medical directors.

Scenario Two: A hospice is seeking to replace one of its full-time medical directors, who is retiring. The hospice has an ongoing arrangement with another medical director, who is board certified in internal medicine, certified in the subspecialty of geriatrics, and is the medical director at a local nursing home. However, the hospice will need to replace the retiring medical director to provide back-up to the existing medical director. The hospice has had discussions with two area physicians who are board certified in palliative medicine and work as oncologists with very active private practices. The hospice would like to contract with both physicians as independent contractors on a part-time basis to replace the retiring full-time medical director.

Potential Risk Factor:

1. The Physicians Might be Valuable Referral Sources Because of Their Private Practice.

As in the first scenario, the contracted physicians are both likely to be valuable referral sources because of their active oncology practices. In addition, the remaining medical director is also the medical director at a local nursing home, another potentially valuable referral source. However, so long as the hospice's arrangements with these physicians are at fair market value for services actually rendered, these arrangements are likely to be viewed as legitimate arrangements for medical director services for several reasons. First, each of the new physicians is board certified in palliative medicine, meaning they bring valuable palliative care expertise to the hospice. Second, as physicians who regularly treat patients with cancer, the new physicians can be expected to have significant experience with the special challenges that a terminal cancer diagnosis places on patients and their families. Finally, the remaining medical director brings valuable experience to the hospice as a physician specializing in geriatric medicine. When taken together, this team of hospice medical directors has the experience necessary to provide excellent care to hospice patients, notwithstanding their potential to be referral sources to the hospice.

Analysis:

This proposed arrangement could likely be structured to meet the anti-kickback safe harbor for personal services and management contracts. To comply with the safe harbor, the written medical director agreements should precisely set forth the services provided to the hospice and the compensation paid (at fair market rates) in exchange for these services. The hospice should also insist on complete documentation on the part of the medical director as to the services provided for the hospice, to ensure it can show the payments correspond to actual work performed. The remaining requirements of the safe harbor should be relatively easy to meet, meaning that this arrangement would likely be protected from prosecution under the anti-kickback statute.

As a result, even though each physician is in a position to generate patient referrals to the hospice, this arrangement could be structured to qualify for safe harbor protection.

Conclusion

Hospices and physicians need to proceed with caution when entering into arrangements for medical director services. When structured properly, hospices can contract with multiple hospice physicians to provide medical director services, even if these physicians are in a position to generate significant patient referrals to the hospice. However, each party should work with their legal counsel to ensure that such an arrangement is structured to comply with the federal anti-kickback statute.

This *Headlines in Hospice and Palliative Care E-Alert* provides general information about hospice and palliative care issues. It should not be construed as legal advice or a legal opinion. Readers should seek legal counsel concerning specific factual situations confronting them.