

# Contracting – Medical Director and Hospice Physician Contracting: Legal Considerations

With the publication of the interim Final Rule addressing physician self-referrals, many hospices again are asking about the role of physicians within hospice and specifically about self-referral prohibitions. A recent question to the Hospice Compliance Network queried:

"If a hospice had a contract with a physician to provide services and this physician was also contracted with the nursing home as the medical director, would it be a violation of the self-referral rule if he referred his nursing home patients to the hospice with which he had a contract?"

It is important to note that the Stark Self-Referral Rule does not apply to hospices. Stark only applies to "designated health services," which includes home health, but not hospice. However, the question is very appropriate, since the anti-kickback prohibitions may well come into play with regard to physician contracting.

As the roles of hospice medical director and hospice physician change, and as medical directors and other hospice physicians incorporate many more clinical functions into their roles, it is important to revisit the federal anti-kickback provisions in light of physician contracts.

The anti-kickback statute, section 11.28B(b) of the Social Security Act, makes it a criminal offense knowingly and willfully to offer, pay, solicit or receive any remuneration (*i.e.*, anything of value) to induce referrals of items or services reimbursable by a federal health care program. There are also civil monetary penalties for violation of this statute.

While not required for regulatory compliance, the federal safe harbor for management and services contracts provides an important safety net, both for hospices and the physicians contracting with them. The safe harbor requires:

- A written, signed agreement specifying all of the services to be provided for the term of the agreement;
- For services that are "periodic," "sporadic" or "part time," the schedule of

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intervals, the precise length and the exact charge must be specified;

- A term of at least one year;
- Compensation set in advance, at fair market value, in an arms length transaction;
- The compensation may not take into account the volume or value of referrals or business otherwise generated for which government payment is made.
- The agreement may not include any activity that violates any state or federal law;
- The aggregate services shall not exceed those necessary to accomplish the business purpose for which the contract was entered into.

As with any agreement, it is recommended that the hospice consult with its own legal counsel with regard to the terms of the agreement.

In the question above, facts and circumstances will impact on the analysis as to whether there is an anti-kickback prohibition. For example, if the hospice-contracted physician is also the medical director of a contracted nursing home, this relationship is not per se impermissible. If the contract between the hospice and the physician meets the safe harbor test, there may be nothing inappropriate in this relationship. However, if the hospice physician is compensated based on length of stay or number of referrals into the hospice, this could pose a significant risk area for the hospice. The physician, as medical director of the nursing home, might have significant authority to make referrals to the hospice. If the physician is compensated by the hospice and is incented to make referrals into the hospice, this could lead to allegations of an impermissible inducement to refer. It is important to remember that both the entity making the inducement and the person receiving it are at risk of anti-kickback violations.

In entering into a contract with a medical director or other hospice physician, it is important to keep the following contracting considerations in mind:

1. Is the physician contract in writing?
2. Does the physician have clearly delineated duties?
3. Does the contract set forth an hourly rate based on fair market value or has an hourly commitment been established when establishing the salary?

4. Are there record-keeping requirements regarding duties performed and hours worked?
5. Does the agreement contain questionable incentives?
6. Does the physician refer patients to the hospice? If so, have anti-kickback prohibitions been reviewed? Does the contract fall within the safe harbor?
7. Can the hospice terminate the agreement without cause?
8. What are the termination provisions "for cause?"
9. Has the hospice evaluated the appropriateness of its employed physicians' Medicare and Medicaid billings?

This article is intended to provide general information regarding hospice physician contracting. It is not legal advice nor should it be considered a substitute for legal advice. The area of physician contracting is a significant risk area for the hospice that should be considered in light of its overall corporate compliance plan.

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