Halifax: Employment Agreements Evoke Stark Law Exposure

On March 10, 2014, Halifax Hospital Medical Center and Halifax Staffing, Inc. (collectively, Halifax) entered into a settlement agreement and a corporate integrity agreement (CIA) to resolve allegations that Halifax violated the False Claims Act (FCA) by submitting claims to the Medicare program in violation of the Stark Law. Hospitals and health systems can take away a number of key lessons from the Halifax case. Most significantly, Halifax underscores the need to ensure compensation arrangements with employed physicians are carefully structured to meet the requirements of the Stark Law's bona fide employment exception.

Background

In 2008, Elin Baklid-Kunz, then a compliance officer at Halifax Hospital Medical Center, told Halifax Health's chief compliance officer and other Halifax executives that the hospital's payments to some of its employed physicians appeared to be illegal. After efforts to resolve the issue internally were unsuccessful, Baklid-Kunz filed a whistleblower complaint under the qui tam provisions of the FCA, alleging that Halifax violated the Stark Law when it improperly compensated six employed medical oncologists and subsequently submitted claims for designated health services referred by the oncologists. The United States Department of Justice (DOJ) intervened as to the Stark Law-related claims in October 2011 and, in November 2013, the U.S. District Court for the Middle District of Florida ruled that Halifax's compensation of the oncologists violated the Stark Law.

Specifically, the employment agreements in question included an incentive bonus that was calculated by dividing a bonus pool equal to 15 percent of the hospital's operating margin for the medical oncology program amongst individual oncologists based on his or her percentage share of the medical oncology group's total professional services revenues. The Court held that the incentive bonuses did not satisfy the Stark Law exception for productivity bonuses because the bonus pool included revenue received for claims for designated health services (*e.g.*, fees for diagnostic imaging and outpatient prescription drugs) that were referred, but not personally performed, by the oncologists. As a result, the size of the bonus pool could be increased if the oncologists made more referrals to Halifax and, therefore, the oncologists were financially incentivized to make designated health service referrals.

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Settlement Agreement and Corporate Integrity Agreement

The March 10 settlement agreement came to fruition just prior to the start of a trial on the extent of Halifax's Stark Law violation and whether such violation was intentional. As part of the settlement agreement, Halifax agreed to pay the United States $85 million in damages. Almost a quarter of that settlement amount will go to Baklid-Kunz, who currently serves as Halifax's director of physician services. Halifax also admitted, as part of the settlement agreement, that it violated the Stark Law. Finally, Halifax agreed to sign a CIA with the U.S. Department of Health & Human Services (HHS) Office of Inspector General (OIG).

The CIA subjects Halifax to significant oversight by the OIG for the next five years. In addition to the typical reporting and certification requirements generally found in CIAs, Halifax is required to engage the services of an outside compliance expert to assist Halifax's Board of Commissioners in complying with the terms of the CIA. Halifax also is required to hire an independent review organization to annually review and report to the OIG regarding Halifax's compliance with the terms of the CIA.

Halifax Lessons

Halifax offers hospitals and health systems some important takeaways:

- **Employment arrangements with physicians can create Stark Law liability**. Existing employment agreements, particularly those with incentive compensation, should be reviewed for compliance. Any incentive compensation arrangement involving total revenues, profits or operating margins should be carefully scrutinized. Going forward, special consideration should be given to structuring physician incentive compensation to ensure bonuses are based solely on personally-performed services.
- **Maintaining and promoting effective compliance reporting mechanisms are a critical tool for managing compliance risk**. Many whistleblowers, including Baklid-Kunz, pursue outside assistance only after an unsuccessful attempt, or attempts, to resolve the issue within the organization, through appropriate channels. Even if a reporting mechanism exists, hospitals and health systems need to review and evaluate the effectiveness of such mechanisms and ensure the protections afforded to persons who raise compliance concerns are not superficial. Having a well-documented and readily

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available reporting mechanism will not serve to encourage reporting if the organizational culture does not support and protect individuals who raise issues. Moreover, hospitals and health systems should consider periodically inquiring whether their senior leaders are aware of any potentially problematic arrangements.

The Health Care team at Reinhart Boerner Van Deuren s.c. is available to assist you with any of the aforementioned proactive measures. Please feel free to contact your Reinhart attorney, Heather Fields, Nicole Rosen or any other member of Reinhart's Health Care team, to discuss any questions or concerns related to your organization."

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