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# Physician Employment Arrangements in Light of 2015 Stark Law Settlements

Conventional wisdom has always been that physician employment arrangements were a less risky alternative to independent contractor arrangements. This notion was clearly upended by two of the largest Stark Law based settlements in 2015—both the result of whistleblower actions—which arose in the context from hospital affiliated physician practices that were losing money. In both cases, the government and the whistleblower(s) alleged that the health system tolerated the losses because they were outweighed by referrals made by the physician.

Specifically, on September 15, 2015, the United States Department of Justice ("DOJ") announced that Florida's North Broward Hospital District ("NBHD") agreed to pay $69.5 million to resolve allegations that it had violated the False Claims Act by submitting claims in violation of the Stark Law. Less than a week later, the DOJ announced that Adventist Health System ("Adventist") agreed to pay $118.7 million to resolve similar allegations.

The two settlements have caused concern in the health care industry, particularly because of the large number of hospital affiliated physician practices that operate at a loss each year. The purpose of this article is to offer clarity and guidance in light of these two settlements.

**Question**: Does the fact that a hospital affiliated physician practice operates at a loss mean the Stark Law has been violated?

**Answer**: No. The Stark Law exception for "bona fide employment relationships" requires that each of the following three conditions be met: (1) the employment is for identifiable services; (2) the amount of remuneration provided under the employment relationship is consistent with fair market value and is not determined in a manner that takes into account (directly or indirectly) the volume or value of referrals by the referring physician; and (3) the remuneration is provided pursuant to an agreement which would be commercially reasonable even if no referrals were made to the employer.

The employment exception does not require that the employment of a physician generate a profit. Rather, with respect to compensation, the test is whether such compensation is fair market value, commercially reasonable and does not take into account referrals. Both NBHD and Adventist allegedly discussed or produced

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actual calculations and documents justifying the losses based on the referrals that would be generated. In both cases, these "bad facts" were the basis of the purported Stark Law violations.

A hospital affiliated physician practice may operate at a loss as long as each physician's employment agreement fits squarely within the Stark Law employment exception. This requires the hospital to have legitimate justifications for the compensation being paid under the agreements. Justifications may not be based on prohibited considerations.

**Question**: What steps can hospitals take to mitigate the risks posed by the financial performance of a hospital affiliated physician practices?

**Answer**: Hospitals and health systems can best manage their risk by developing and documenting the processes used to establish compensation rates and methodologies. Compensation plans should document consideration of the nature of the services provided, the expertise of the physician furnishing the services, and the prevailing rates of compensation in the relevant geographic market. Often, these factors are assumed or not evaluated in the aggregate. By establishing predefined metrics, rates or methodologies, and consistently applying them, hospitals and health systems can manage risk and create more efficiency in the contracting process. Developing parameters around compensation can help hospitals and health systems demonstrate an intentional process and may create the opportunity for a more robust review process.

**Question**: Can there be exceptions from the compensation plan for "special" physician candidates?

**Answer**: The need for flexibility in setting compensation can be challenging when seeking to create a well-defined compensation plan. However, it is important to note that variations in compensation rates for similar services provided by similarly qualified individuals (e.g., the same specialty) may give rise to the inference that one purpose of the more lucrative arrangement is to compensate a physician for past or future referrals. For example, if an administrative position does not require specialty expertise, it may be difficult to justify paying an orthopedic surgeon more than a family practice physician to perform the same duties. In contrast, for clinical work, it is likely appropriate to pay an orthopedic surgeon more than a family practitioner.

As such, deviations from established compensation rates or standards should only be made for reasons that are objectively reasonable from a business

standpoint. It is generally advisable to have a defined procedure that subjects significant deviations to critical review by independent persons within the organization, such as a compensation committee. It is critical that differences be supported by documentation of comparative data reviewed and the business rationale behind the rates of pay selected.

**Question**: Are hospitals immunized from risk if they use template agreements and pay fair market value compensation?

**Answer**: The use of template agreements and the payment of compensation consistent with fair market value will not save a physician compensation arrangement for which there is no underlying business justification. It is essential that each physician compensation arrangement (1) be supported by evidence of an actual need for the physician's services, (2) accurately reflects the services actually provided, and (3) be commercially reasonable. It is also important that hospitals and health systems evaluate their overall need for the physician services and ensure the number and complement of physician expertise is consistent with the hospital's or health system's size and scope of operations. When reviewing physician compensation arrangements, hospitals and health systems should compare the physician services actually being provided to the contracted services. Hospitals and health systems should also evaluate whether certain services are being fulfilled in whole or in part by two or more physicians. Overlapping job duties performed by multiple physicians may give rise to the inference that at least one relationship involves, at least in part, an inducement for referrals if the redundancy is not justified by current business needs.

Often, the bird's eye view of contractual relationships (in the aggregate by an individual, group or facility) can be helpful when identifying potentially problematic arrangements. As with any large organization, it is easy for silos to develop within health systems. By monitoring arrangements at a regional or system level, health systems can more effectively monitor and verify that employed physician services objectively reflect actual business needs.

**Question**: Who should be trained regarding physician compensation arrangement policies and procedures?

**Answer**: It is important that hospitals and health systems provide ample training regarding physician compensation arrangement policies and procedures to all personnel involved in recruiting physicians, as well as those involved in conceptualizing and negotiation the compensation arrangements. Training

should also be provided to all groups responsible for oversight of physician compensation (e.g., the compliance committee and compensation committee).

Reinhart's Health Care team is available to assist you in reviewing your physician compensation arrangements, policies and procedures. Please feel free to contact Larri Broomfield, Heather Fields or any member of Reinhart's Health Care team, or your Reinhart attorney to discuss any questions or concerns related to your hospital or health system.