

Contracts 101

Physician Employment Agreements

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Legal Basics

- Tort Law
 - Medical Malpractice and Insurance
- Contract Law
 - State versus Federal
- Fraud and Abuse
 - What to Expect



Key Laws and Regulations

Stark Physician Self-Referral Law

- Prohibits referrals for designated health services to an entity with which the physician has an ownership interest or compensation arrangement

Anti-Kickback Statute

- Prohibits individuals or entities from knowingly offering, paying, soliciting, or receiving remuneration to induce referrals of items or services covered by Medicare or Medicaid

Civil Monetary Penalty: Gainsharing

- Prohibits payments to physicians, directly or indirectly, to induce a physician to reduce or limit medically necessary services to Medicare or Medicaid beneficiaries

Tax-Exempt Laws

- No private inurement, no excess benefit transactions with “disqualified” persons

False Claims Act

- Prohibits individuals to knowingly present or cause to be presented a false or fraudulent claim for payment or approval by the federal government

Review of Stark



The Stark Referral Prohibition

- If a physician (or his/her immediate family member) has a financial relationship with an entity that provides designated health services (“DHS”), then:
 - The physician may not refer DHS to the entity for which payment may be made by Medicare; and
 - The entity may not bill Medicare for any DHS referred by the physician
 - Unless the financial relationship falls within an exception.



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Designated Health Services

- Designated Health Services (“DHS”) include:
 - Hospital inpatient and outpatient services
 - Clinical laboratory services
 - Physical therapy, occupational therapy and speech-pathology services
 - Radiology services
 - Radiation therapy services and supplies
 - DME and supplies
 - Parenteral and enteral nutrients/supplies
 - Prosthetics and orthotics devices/supplies
 - Home health services
 - Outpatient prescription drugs



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Definition of Referral

- Under Stark, “referral” is defined as “the request by a physician for, or ordering of, or the certifying or recertifying of the need for, any designated health services . . . but not including any designated health services personally performed or provided by the referring physician.
- Definition of “referral” only includes the referral of DHS.



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- Frequently Used Exceptions in Cardiology
 - Employment
 - Personal Services Arrangements
 - In-Office Ancillary Services
- Common Elements:
 - FMV
 - CR
 - Volume or value restriction



What is FMV?

- All services exceptions require that compensation be fair market value (“FMV”).
- Stark defines FMV as “the value in arm’s length transactions, consistent with the general market value.”
- For services agreements, it means “the compensation that would be included in a services agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party.”



What is CR?

- Many services exceptions under Stark require that payment be commercially reasonable (“CR”) even if no referrals were made between the parties.
- Commercial reasonableness looks to the reasonableness of the business arrangement in general.
- An arrangement is commercially reasonable if the agreement is “a sensible, prudent business agreement, from the perspective of the particular parties involved, even in the absence of referrals.”



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	Bona Fide Employment	Personal Service Arrangements	In-Office Ancillary Services
FMV?	Yes	Yes	No
Set In Advance?	No	Yes	No
Volume or Value Restriction?	Yes	Yes	No
Business Otherwise Generated?	No	Yes	No
Writing?	No	Yes	No
Commercially Reasonable?	Yes	Yes	No



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Employment Exception

- Employment is for identifiable services.
- Amount of remuneration is:
 - (i) consistent with FMV; and
 - (ii) is not determined in a manner that takes into account the volume or value of any referrals by the referring physician.
- Remuneration is provided under an arrangement that would be CR even if no referrals were made to the employer.
- Expressly permits payment of remuneration in the form of a bonus based on services performed personally by the physician.



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Personal Services Exception

- Arrangement must be set out in writing;
- Arrangement covers all services to be furnished by the physician;
- Aggregate services covered by the arrangement do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement;
- The duration of the arrangement is at least 1 year;
- Compensation is set in advance, FMV, and not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.



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Group Practice

- Profit sharing and productivity bonuses:
 - Overall profits:
 - Physician in GP may be paid share of overall profits, provided that the share is not determined in any manner that is directly related to the volume or value of referrals of DHS by the physician.
 - Productivity bonus:
 - Physician in GP may be paid a productivity bonus based on services he/she personally performs, or services “incident to” such personally performed services, or both, provided that the bonus is not determined in any manner that is directly related to the volume or value of referrals of DHS by the physician.



In-Office Ancillary Services

- Permits physician to provide certain services (e.g., lab tests, X-rays, physical therapy) that are ancillary to the physician's care.
- Must be part of a “group practice.”
 - Single legal entity
 - Each physician in GP to furnish “full range of care” that physician routinely furnishes through GP
 - At least 75% of patient care services rendered by GP members furnished through GP and billed by GP
 - GP members must personally perform at least 75% of physician-patient encounters
 - Overhead expenses and income must be distributed according to methods determined before receipt of payment resulting in overhead income



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In-Office Ancillary Services

- Must be a group practice (continued)
 - Unified business:
 - Centralized decision making body
 - Body to effect control over GP's assets, liabilities, budgets, compensation
 - Consolidated billing, accounting and financial reporting
 - Overall profits from DHS distributed to members of GP or GP component of at least 5 physicians in manner not directly related to volume or value of referrals. Safe harbors:
 - Per capita;
 - Based on distribution of non-DHS revenues; or
 - Less than 5% of GP revenue and each physician's total compensation

Group Practice vs. Employment

Comparing the Stark Law Requirements

Stark Definition of a “Group Practice”

- Qualifying as a Group Practice
 - Single legal entity
 - Minimum of two physicians
 - Full range of services
 - Substantially all services test
 - Distribution of income and expenses
 - Unified business test
 - Compensation test (volume/value of referrals)
 - Patient encounters test
- Profit Sharing & Productivity Bonuses
 - Physicians in group practice may be paid share of overall profits of group
 - Physicians in group practice may be paid productivity bonus based on services personally performed, or services “incident to” personally performed services, or both
 - REQUIREMENT FOR BOTH: profit sharing amounts and bonuses may not be determined in manner directly related to the volume or value of referrals of DHS by the physician

Stark Bona Fide Employment Relationship Exception

- Employment must be for identifiable services
- Fair market value compensation
- Compensation does not vary with the volume or value of referrals
- Compensation is commercially reasonable even if no referrals made to employer
- Productivity bonus permitted, but may include only DHS that physician personally performs
- May mandate referrals to particular providers, often the employer, if:
 - Compensation set in advance
 - Written agreement signed by the parties
 - Exceptions for patient preference, insurance coverage, or best interests of the patient
 - Referrals limited to services within scope of agreement



Key Contract Terms

Term and Termination

- Term of the Contract – Commencement Date vs. Contract Date
- Termination Without Cause
 - Expect contracts to include termination without cause provisions, which either the physician or the practice may invoke
 - Generally requires giving 30-60 days' written notice
 - Consider how provision impacts other key contract terms (e.g., tail insurance, restrictive covenants, compensation)
- Termination “For Cause”
 - Typically for reasons enumerated in the contract (e.g., adverse licensure and medical staff actions, indictment for certain crimes, use of drugs, cancellation of malpractice coverage)
 - Beware of “catch-all language”
 - Secure a “cure period” to remedy



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Key Contract Terms

Covenants Not to Compete

- Imposes time-based and geographic limitations on a physician's ability to compete with the practice after termination of the agreement
- Assess state law to determine if restriction is enforceable
- Geographic area varies by specialty (how specialized) and population density
 - 20 mile radius of any office location of the employer is common
- Duration of restriction
 - 2 years common in many states
- Scope of prohibited activity
- Injunctive relief and liquidated damages



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Negotiation Process

- Allow adequate time
 - Initial transactions often take 12-24 months to negotiate
 - Contractual resets need a MINIMUM of 6 months
 - Compressed timeframes lead to bad outcomes
- Empower a subset of the whole group
 - Can't have every physician negotiating separately
- Focus on how the partnership will improve the product
- Money is important, but not the only focus



Physician Compensation Models

Fixed Salary

Physician receives a guaranteed "fixed" salary

RVU/ Production-Based

Compensation tied to amount of work performed

Net Income/ Production-Based

Compensation tied to profitability of practice

Net Collections/ Production-Based

Compensation tied to revenue of practice

Hybrids

Salary guarantee with incentives; recalculating RVUs; adding in overhead



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Non-Clinical Comp Definitions

PHYSICIAN NON-CLINICAL COMPENSATION DETAILS	INSTRUCTIONS
Leadership Positions	Include only payments not at risk for performance, such as time or stipend based chair positions and administrative leadership positions (CMO, CMIO, CVSL Director, etc.). NOTE: Do not include medical directorships here; they go in the box below.
Medical Directorships	Include only payments not at risk for performance, such as time or stipend based directorships (cardiac rehab, cath lab, EP lab, non-invasive imaging, etc.).
Call Coverage	Call pay for STEMI, general, outside facilities, etc.
Hospital/Health System Incentive Compensation	Include non-production performance (at risk) payments for improvements to quality, service and cost, co-management incentives, VBP, gain sharing, administrative incentives, etc. Please also provide the total payment available in Column C.
Commerical (non-governmental) Payer Incentive Compensation	Include non-clinical performance (at risk) payments for improvements to quality, service and cost, coding & documentation, etc. Please also provide the total payment available in Column C.



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Incentives Aren't Slam Dunks

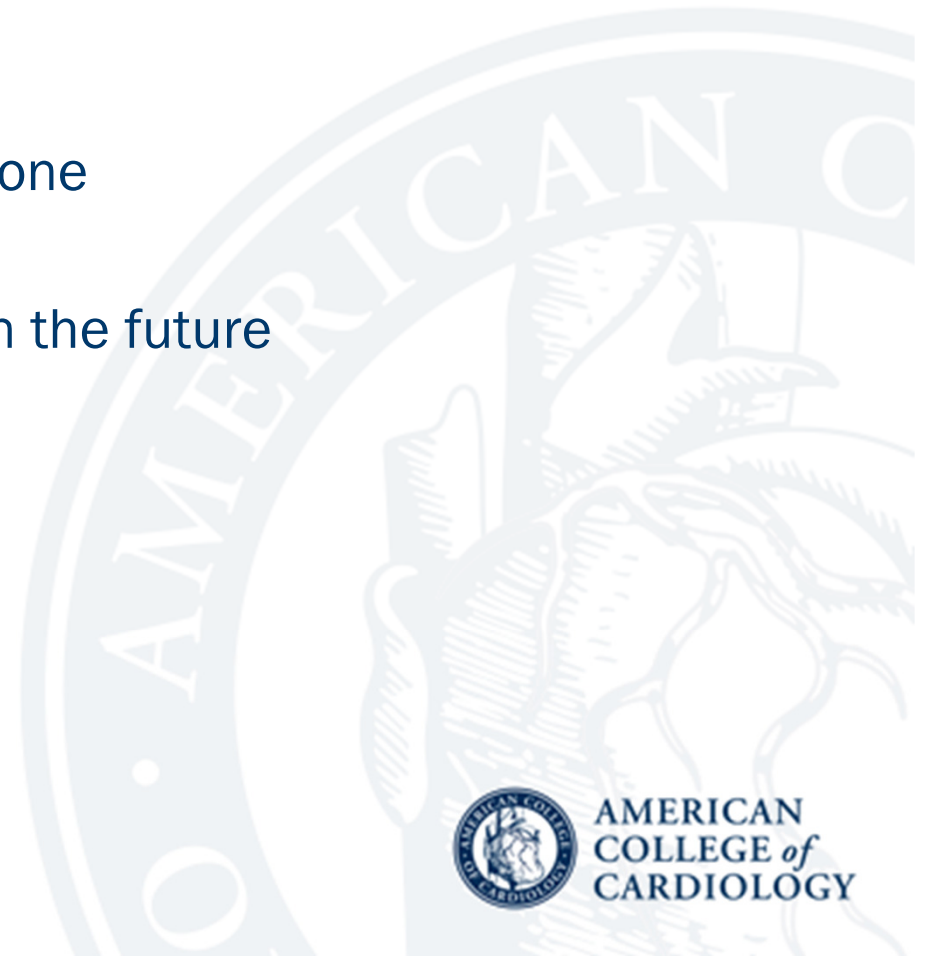
FIGURE 1g – Median Incentive
Achieved vs Available



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Business Side of the Negotiation

- It's not as simple as the survey data!
- Leverage matters
- Reimbursement no longer rewards production alone
 - Comp funding shouldn't either
- APPs and Care Teams will play significant roles in the future
 - Make sure incentives are aligned
- Stay united



Key Contract Terms

Duties and Responsibilities

- When Do I Work?
- Where Do I Work?
- Time commitment and compensation for administrative and supervision matters?
- Moonlighting
- Compliance with corporate and medical staff bylaws, rules and regulations, compliance plans, HIPAA policies
- Assignment of patients



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Key Contract Terms

Benefits

- Relocation Expense
- Signing Bonus
- Personal Insurance and Time Off
 - Health (single vs. family), life, disability and accident insurance; disability leave (length of time off, compensation, includes maternity leave?)
 - Time off for vacation and sickness (scheduling, notice, priority, carryover)
 - Time to attend CME
- Malpractice Insurance
 - Difference between “occurrence” and “claims made” policy language
 - Tail coverage (who pays, relationship to termination clause)
- Reimbursed Expenses
 - Licensure and board fees, medical staff fees, office equipment, books/journals, cell phone/pager, parking, mileage or auto allowance
- Retirement
 - Eligibility, types of plans, employer match
 - Deferred compensation
 - Vesting



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Key Contract Terms

Partnership/Career Development

- Reaching shareholder, member, or partner status
- If conversations occur in offer state, physician should obtain documentation in a final written agreement
- Typically, a physician must be an employee for 2 years before becoming eligible
- How much does it cost?
 - Valuation: book, fair market, set values
 - Hard vs. soft buy-in
 - Does it require buying in to related entities, such as real estate holding companies?
- Agreement should specify criteria for determining partnership and methods used to determine purchase price of equity interest



Key Contract Terms

Miscellaneous

- Non-Solicitation Clause
 - Typically prohibits physician from soliciting or attempting to solicit any patient of the employer that the physician treated during the term of the agreement for a period of time following termination
- Billing and Collections
 - Employers typically require assignment of billing rights for professional services provided under the agreement
- Medical Records
 - Employer will likely retain ownership of records of patients treated pursuant to the agreement; physician obligated to submit complete and accurate records for all patient care services
- Required participation in managed care contracts



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