Top Ten Legal Issues Facing Physician-Owned Hospitals in 2013

Physician Hospitals of America Annual Meeting

September 19, 2013

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I. What does the Stark law, as amended by §6001, really mean?

A. December 9th CMS guidance to surveyors clarified impact on certification/licensure

B. Limitations of §6001 and all of Stark law relates to referrals/reimbursement only

C. Meaning…
II. Required Disclosures

A. The Requirements under §6001 and Conditions for Coverage
   1. Hospital to patient
   2. Physician to patient
   3. 24/7
   4. Advertising

B. New Proposed Rules for disclosures

C. Best Practices Pending Rules Finalization
III. Two Hot Issues re. Maintaining Certification and Inpatient Billing

A. Definition of “Inpatient Stay” for billing purposes

B. Recent Challenges to Hospital Medicare Certification based on portion of inpatient business
IV. Reallocating Beds, Procedure Rooms and ORs (for purposes of §6001)
V. Physician Investment Nuances

A. Limitations Under §6001 of the ACA and Other Best Practices

1. Bona Fide Investment – i.e. risk taking is key.

2. No financing of physicians’ share by the Hospital or other investors

3. Shares priced at fair market value

4. Do not offer less or more shares or a higher or lower price based on the number, volume or value of referrals a physician can generate.
A. Limitations Under §6001 of the ACA and Other Best Practices (cont’d)

5. Do not reallocate shares based on the volume or value of referrals.

6. Do not focus on individual distributions being tied to the number of patient referrals. Never make any indications that could lead a potential investor to believe that referrals or performance will determine an individual’s “piece of the pie.” Focus on overall distributions and profits.
A. Limitations Under §6001 of the ACA and Other Best Practices (cont’d)

7. Physicians should not be allowed to invest based upon the fact that they can generate referrals for another physician who may use the hospital.

8. Avoid providing physicians with estimates as to the amount of revenue that will be generated from their referrals or from another physician’s referrals.
A. Limitations Under §6001 of the ACA and Other Best Practices (cont’d)

9. When creating target lists, avoid focusing on the potential number of referrals, the physician's age, the growth potential of the physician’s practice, etc.

10. Do not offer remuneration or special treatment under various disguises, such as directorship contracts or discounted lease arrangements, in order to induce investors.
A. Limitations Under §6001 of the ACA and Other Best Practices (cont’d)

11. Do not pressure physician investor to shift their current referral patterns.

12. Do not make any indications to investors that low-referring physicians will be pressured to withdraw.
V. Physician Investment Nuances (cont’d)

B. Three frequently asked question

1. Total percentage equity of physicians that matters (not number or identity of individuals)

2. Terms of investment – how they may, and may not, vary between physician and non-physician investors

3. The role of primary care physicians
VI. Risks Relating to Minimum Case Requirements in Medical Staff Bylaws
VII. Key Considerations for full or partial sales of your Hospital

A. How §6001 impacts structure --- most common stock /equity transaction

B. How the sale impacts future expansion and physician equity sale opportunities

C. Other Business and Legal issues
VIII. CMS/OIG Audits of §6001 Compliance
IX. Legal Issues Arising From Leases and Other Contracts with Physicians

A. Consider Several Important Critical Initial Questions

1. Is the relationship (i.e. the space leased or the physician leadership position) truly needed?

2. Is the position and payment wholly unrelated to referrals or the intent to retain business? If any one purpose of a payment is in exchange for referrals, it can be deemed unlawful.
A. Consider Several Important Critical Initial Questions (cont’d)

3. Is the payment fair market value? If so, what evidence supports this? Is there a third party valuation or objective, external evidence to defend this value?

4. Has the relationship between the hospital and the physician been approved by internal parties who are unrelated to the outside parties involved?

5. Has the hospital’s compliance officer, or legal counsel, approved the relationship?
B. Medical Director Agreements and Other Personal Services Contracts

1. Fair Market Value is always key!

2. Stark Act and Anti-Kickback Statute Safe Harbors
   a) Truly needed services paid at fair market value
   b) Compensation set in advance
   c) Minimum 1 year
   d) In Written agreement signed by both parties
2. Stark Act and Anti-Kickback Statute Safe Harbors (cont’d)

e) Terms otherwise commercially reasonable

f) Several similar elements between Stark Act exception and Anti-kickback Statute safe harbor. Note all elements of a Stark Act exception must be met or referrals by the physician to the hospital for Medicare/Medicaid business are illegal; whereas if all elements of an Anti-kickback Statute safe harbor are not met, then the intent behind the arrangement will be examined in order to determine the appropriateness of referrals by the physician to the hospital.
C. **Space and Equipment Leases**

1. Fair market value is still key!
2. Stark Act and Anti-Kickback Statute Safe Harbors
   a) Truly needed services paid at fair market value
   b) Compensation set in advance
   c) Minimum 1 year
   d) In Written agreement signed by both parties
   e) Terms otherwise commercially reasonable
2. Stark Act and Anti-Kickback Statute Safe Harbors (cont’d)

f) Several similar elements between Stark Act exception and Anti-kickback Statute safe harbor. Note all elements of a Stark Act exception must be met or referrals by the physician to the hospital for Medicare/Medicaid business are illegal; whereas if all elements of an Anti-kickback Statute safe harbor are not met, then the intent behind the arrangement will be examined in order to determine the appropriateness of referrals by the physician to the hospital.
D. Other Tips

1. Be sure to maintain documentation of FMV analysis and other compliance efforts. Independent third party assessments of FMV are the most effective way to ensure to FMV.

2. Periodically review all contracts with referring physicians to ensure ongoing compliance.

3. Note that there are additional Stark exceptions and Anti-kickback Statute safe harbors available for other arrangements between physicians and hospitals, including the Isolated Transactions Exception for one-time transactions such as the purchase of equipment.
X. Creating and Effectively Using A Compliance Program
A. Requirements under the ACA
X. Creating and Effectively Using A Compliance Program (cont’d)

B. Seven Key Elements

1. Conducting internal monitoring and auditing;
2. Implementing compliance and practice standards;
3. Designating a compliance officer or contact;
4. Conducting appropriate training and education;
5. Responding appropriately to detected offenses and developing corrective action;
6. Developing open lines of communication; and
7. Enforcing disciplinary standards through well-publicized guidelines.
X. Creating and Effectively Using A Compliance Program (cont’d)

C. Tips for Utilizing the Program
Questions or Comments?
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