

Healthcare Employment Agreements: Key Provisions, Compliance Considerations, Certification

Stark and AKS, Credentialing and Privileging, Noncompete Provisions, Payment Challenges

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HEALTHCARE EMPLOYMENT AGREEMENTS: KEY PROVISIONS, COMPLIANCE CONSIDERATIONS, CERTIFICATION

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This presentation and outline are limited to a discussion of general principles and should not be interpreted to express legal advice applicable in specific circumstances.

OVERVIEW

- I. Factors Driving Employment of Physicians
- II. Entities Employing Physicians
- III. Quick Overview of Application of Stark, Anti-Kickback, Tax Exemption and Corporate Practice of Medicine Restrictions
- IV. Common Provisions in Employment Agreements
 - Duties, Practice Location(s)
 - Qualifications, Payor Credentialing and Medical Staff Privileging
 - Ownership of Fees, Patients, Patient Records
 - Compensation and Benefits
 - Malpractice Insurance
 - Restrictive Covenants, Buyout
 - Term, Termination for Cause/No Cause, Unwind
- V. Pitfalls to Avoid/Best Practices When Drafting and Negotiating Physician Employment Agreements

FACTORS DRIVING EMPLOYMENT OF PHYSICIANS

PHYSICIAN PRESSURES

- Complex regulatory environment.
- Proposed cuts to Medicare Part B Physician Fee Schedule.
- Increasing practice costs for overhead, staff, technology and professional liability insurance.
- Physician shortages for primary care and specialty practices in certain geographic areas.

PHYSICIAN PRESSURES

(continued)

- Decreasing reimbursement by third-party payors under managed care contracts.
- Life balance and potential for burnout = more hours, more procedures, less free time which leads to diminishing returns.
- Public perception/Media.

PHYSICIAN PRESSURES

(continued)

- Decreasing government and third-party reimbursement.
- Increasing overhead/operating costs.
- Emergence of the assertive consumer/patient.
- Physicians are getting “less for more” and giving “more for less.”

PHYSICIAN HOPES

- Achieving easier compliance with Federal and State regulations.
- Increasing operational efficiencies and effectiveness.
- Improving patient relations.
- Greater ability to manage risk.

HOSPITAL GOALS

- Hospitals are choosing to employ physicians to support:
 - Pursuit of mission objectives
 - Programmatic growth
 - Ensure supply of physicians
 - Ancillary business development at the highest and best reimbursement level
 - Avoid paying for call
 - Value-based contracting

ENTITIES EMPLOYING PHYSICIANS

Entities Employing Physicians

- Hospital
 - Provider-based clinic
 - Provider-owned physician directed clinic
- Hospital-affiliated professional corporation
- Private physician group practice

QUICK OVERVIEW OF APPLICATION
OF STARK, ANTI-KICKBACK, TAX
EXEMPTION AND CORPORATE
PRACTICE OF MEDICINE RESTRICTIONS

STARK IN 60 SECONDS

- Rationale: Financial interests influence referral patterns.
- Any physician who has a financial relationship with an entity cannot refer designated health services (DHS) to the entity and the entity cannot bill for the DHS referrals unless an exception covers every financial relationship.

STARK IN 60 SECONDS

- DHS: inpatient and outpatient hospital services, radiology and certain other imaging services, radiation therapy, clinical laboratory services, PT, OT and speech pathology services, DME, home health, outpatient prescription drugs, prosthetics, orthotics and prosthetic devices, parenteral and enteral nutrients.

STARK IN 60 SECONDS

- Financial relationships may be direct/indirect and either:
 - Ownership/investment (including debt)
 - Compensation
- Exceptions fall into three categories: compensation; ownership; and services. Services exceptions cover either type of financial relationship.

STARK IN 60 SECONDS

- Higher penalties for circumvention schemes
- Civil statute
- Strict liability – intent is irrelevant

STARK IN 60 SECONDS

- Penalties/Sanctions:
 - Denial of payment.
 - Refunds of amounts collected for services performed in violation of the statute.
 - Civil money penalty of up to \$15,000 for each bill or claim for a service person knows or should know is for a service for which payment may not be made under the statute.
 - Civil money penalty of up to \$100,000 for each arrangement of scheme which the Physician or entity knows or should know has a principal purpose of assuring referrals which, if directly made, would be in violation of the statute.
 - Exclusion from the Medicare, Medicaid and/or other federally funded health care programs.

ANTI-KICKBACK IN 60 SECONDS

- Rationale: Kickbacks influence professional judgment, raise costs and lead to unnecessary or unsafe procedures.
- Any payment or solicitation of any remuneration (cash or anything else of value) with the intent of inducing, influencing or rewarding referrals violates the Anti-kickback Statute.
- Criminal statute – must have illegal intent.

ANTI-KICKBACK IN 60 SECONDS

- OIG: If one purpose is related to referrals the number of good purposes is irrelevant.
- Courts: Illegal intent if engage in conduct knowing its wrong.
- OIG has promulgated a variety of safe harbors, but failure to fit one does not mean there is a violation.

TAX-EXEMPTION IN 60 SECONDS

- Rationale: Exempt organizations are subsidized by the taxpayers; that subsidy should not benefit private parties.
- In order to maintain 501(c)(3) status, no part of the net earnings may inure to the benefit of any insiders (such as paying more than fair market value), and any benefit to private parties cannot be more than incidental (i.e., indirect and insubstantial in amount).

TAX-EXEMPTION IN 60 SECONDS

- Payments in excess of fair market value are taxable excess benefits to any Disqualified Person and also subject approving management to excise tax.
- Physicians are Disqualified Persons (and insiders) if they or their family members are directors, officers or persons of substantial influence over the hospital.
- Tax-exempt organization may not share net profits.

CORPORATE PRACTICE OF MEDICINE IN 60 SECONDS

- A hospital may only employ a physician if permitted by state law.
- Many states have permitted employment of physicians by affiliated professional corporation.
- California permits physician employment through the foundation model.
- Basically, as long as non-physicians do not interfere with an employed physician's professional judgment, there is usually a way for physicians to be employed by hospitals (or an affiliate thereof).

COMMON PROVISIONS IN EMPLOYMENT AGREEMENTS

DUTIES

- What services will you provide?
 - Clinical
 - Administrative
 - Managerial
- When and where will you work? Hours?
- How are patients assigned?
- Are you prohibited from moonlighting?
- No restrictions on professional independence.

LICENSURE, MEDICAL STAFF PRIVILEGES, PAYOR CREDENTIALING

- Minimum credentials include:
 - Board certification or Board-eligible
 - Medical staff privileges at specified hospitals
 - Participation with designated payors

MANDATED REFERRALS

- The employed physician's compensation may be conditioned on the physician's referrals to a particular provider if:
 - The compensation is set in advance
 - Is consistent with fair market value
 - The requirement is in a written agreement, signed by the parties

MANDATED REFERRALS

- The requirement does not apply if the patient expresses a different preference, the patient's insurer determines the provider, or the referral is not in the patient's best medical interests in the physician's judgment.
- The requirement must further a legitimate business purpose.

COMPENSATION

COMPENSATION AND BENEFITS

- Salary
 - How is salary determined?
 - Bonuses and incentives.
 - Are production and/or collections relevant in determining compensation?
 - Managed care formula v. fee-for-service formula
 - Uncollected amounts
 - Will you have sufficient opportunity to confirm calculations?
- Will you be allowed to keep honorariums and lecture fees?

COMMON COMPENSATION COMPONENTS

- Personally performed wRVUs and wRVUs personally performed by supervised physician assistants and nurse practitioners (APPs)
- Share of profits from ancillary services
- Value-based incentive compensation
- Personally-attributed income less expenses
- Income guaranty
- Signing bonus

COMMON COMPENSATION COMPONENTS

- Need to exclude duties/income from co-management company, medical directorship, administrative services, and gainsharing arrangements from scope of duties and ownership of revenues.

COMPENSATION FROM HOSPITAL/AFFILIATE

- Compensation must be consistent with fair market value and, except for permitted productivity bonuses, may not be determined in a manner that takes into account the volume or value of referrals
- In determining whether compensation is consistent with fair market value, all sources of compensation must be considered (e.g., signing bonus, relocation payments, tuition reimbursement).
- The basis for FMV should be documented contemporaneously (e.g., opinion from expert, comparison to MGMA data, etc.).

COMPENSATION FROM HOSPITAL/AFFILIATE

- Hospital CAN pay an employed physician a productivity bonus that is based on services that are personally performed by the physician.
- Hospital can NOT pay an employed physician a bonus based upon “incident to” services.

PHYSICIAN GROUP COMPENSATION

- Group practices CAN pay employed physicians a bonus that is directly based on services that are personally performed and services that are “incident to” those services
- Group practices CAN pay employed physicians a share of the overall profits from DHS, provided the share is not directly related to the volume or value of such referrals

GOVERNANCE OF CONSOLIDATED ENTITY

The Consolidated Entity must operate as one unified, integrated, centralized business for purposes of governance and management, and should include, without limitation:

- a) centralized decision-making by a managerial body that maintains effective control over the Consolidated Entity's affairs and business operations, and compensation; and
- b) consolidated billing, accounting and financial reporting.

GOVERNANCE OF CONSOLIDATED ENTITY

The Consolidated Entity's managerial body (the "Board") must possess the authority to establish the overall business policy and direction of the Consolidated Entity and will ordinarily consist of representatives designated by each Practice (and then, following the consolidation, by the Divisions). **CANNOT BE A SHAM.**

GROUP PRACTICE OPERATED AS ONE BUSINESS DIVISION OR MULTIPLE BUSINESS DIVISIONS?

- The Group Practice's business can be operated as either a single business division or through multiple separate divisions (each a "Division").
- In the event that the multiple division model is chosen, operational decisions internal to a specific Division that do not affect the Group Practice as a whole can be reserved to such Division and its Participating Physicians, subject to the review (for, among other things, compliance with applicable law) and final approval by the Group Practice's Board.
- Shared Expenses/Division Expenses.

WILL THERE BE INTERNAL REFERRALS AND/OR ANCILLARY DESIGNATED HEALTH SERVICES (“DHS”) INCLUDED?

- If **YES** – The Group Practice must meet the definition of a “Group Practice” under the Federal Stark Law (and other relevant State laws)
- This is a **KEY CONSIDERATION** in consolidation.
- One often hears of meeting the “Group Practice” exception under Stark because it is a definition that allows you to meet certain “global” exceptions.

“GROUP PRACTICE” DEFINITION

- The term “Group Practice” is defined as a group of two (20 or more Physicians legally organized as a single entity operating primarily for the purpose of being a Physician group practice.
- A “Member” of a group practice generally includes: (a) a Physician with a direct ownership interest in the Practice; or (b) a full or part-time Physician/Employee of the Practice.
- Operational requirements must be satisfied to qualify as a “Group Practice” for purposes of the Stark Law.

“GROUP PRACTICE” DEFINITION

- a) Each of the Members of the Group Practice must provide substantially the full range of patient care services that he or she routinely provides using the group’s resources, such as office space, facilities, equipment and personnel;
- b) Substantially all of the services of the Members must be provided through the Group Practice, billed under the group’s billing number, and any reimbursement received must be treated as receipts of the group, which means that Members of the group practice must personally conduct no less than seventy-five percent (75%) of the Physician/patient encounters of the group practice (stated differently no more than twenty-five percent (25%) of group practice’s patient encounters can be performed by independent contractors); and which must be demonstrated by establishing that at least seventy-five percent (75%) of the average of the group practice Member’s patient care service time is rendered on behalf of the group practice.

“GROUP PRACTICE” DEFINITION

- c) The group practice must operate as a unified business, meaning that it has (i) centralized decision-making by a body representing the practice that maintains control over the group practice’s assets and liabilities; and (ii) consolidated billing, accounting and financial reporting;
- d) The overhead expenses of, and income from, the group practice must be distributed according to methods that are determined prior to receipt of payment for the services; and
- e) No member may receive, directly or indirectly, compensation based on the volume or value of the Physician’s DHS referrals, except through a permitted profit sharing or productivity bonus arrangement (as further provided in the regulations).

DISTRIBUTION OF DHS PROFITS – SPECIAL RULE FOR PRODUCTIVITY BONUSES AND PROFIT SHARES

- A Physician in a group practice may be paid a share of overall profits of the group, provided that the share is not determined in any manner that is directly related to the volume/value of DHS.
 - “Overall Profits” means the group’s entire profits derived from DHS payable by Medicare/Medicaid OR the profits derived from DHS payable by Medicare/Medicaid of any component of the group practice that consists of at least 5 Physicians.
 - A Physician in the group may be paid a productivity bonus based on services he/she has personally performed or services “incident to” such personally performed services.
 - All distributions must be done in a Stark Law compliance manner.

APPLYING THE TEST TO SEE IF WE MEET THE DEFINITION OF A “GROUP PRACTICE”

- Do we have two or more Physicians legally organized as a single entity for the purpose of being a Physician group practice?
- Does the practice operate as a unified business?
- Are overhead expenses of (and income of) the practice distributed according to methods that are determined prior to receipt of payment?
- Does each member provide substantially the full range of patient care services that he/she routinely provides using the group’s resources?

APPLYING THE TEST TO SEE IF WE MEET THE DEFINITION OF A “GROUP PRACTICE”

- Are substantially all of the services of the members provided through the group, billed under the group’s billing number, and reimbursement is treated as receipts of the group?
 - **Basically, do members of the practice personally conduct no less than seventy-five percent (75%) of the Physician/patient encounters of the group practice?**
 - Does any member receive (directly or indirectly) compensation based on the volume or value of his/her DHS referrals (except through permitted profit sharing or productivity bonus arrangement)?

BENEFITS

- Fringe Benefits
 - Health, life and disability insurance
 - Pension, profit-sharing and other retirement plans
 - Schedule of benefits
 - Vesting schedule
 - Sick Leave and effects of disability on compensation, employment and duties
 - Vacation
 - Does unused vacation time accumulate?
 - Scheduling of vacation

BENEFITS

- Reimbursement of expenses
 - Professional associations
 - Continuing education
 - Books and subscriptions
 - Automobile
 - Relocation
 - Application expenses (HMO/PPO)
 - Meetings
 - Home computer
- Tax consequences

BENEFITS

- Fringe benefits
 - Health, life and disability insurance
 - Pension, profit sharing and other retirement plans
 - ✓ Schedule of benefits
 - ✓ Vesting schedule

COMPENSATION AND BENEFITS

- Sick leave and effects of disability on compensation, employment and duties
- Vacation
 - ✓ Does unused vacation time accumulate?
 - ✓ Scheduling of vacation
- Reimbursement of expenses
 - Professional associations
 - Continuing education

COMPENSATION AND BENEFITS

- Books and subscriptions
- Automobile
- Car phone
- Relocation
- Application expenses (HMO/PPO)
- Meetings
- Home computer

TERM

- Natural Expiration
- Procedure for renewal of the contract
 - Is renewal automatic?
 - Is notice required?

TERMINATION

- Grounds for cause to terminate
 - Will you have the opportunity to cure defaults?
 - Can cause be determined objectively?
 - Is it fair to allow termination on the grounds specified?
- Can you be terminated without cause?
- Can you terminate the employment agreement without cause? If so, what notice is required?

WILL YOU HAVE AN OPPORTUNITY TO ACQUIRE AN INTEREST IN THE PRACTICE?

- Is the practice obligated to offer an interest, or merely to consider whether to offer an interest?
- What rights will you have?
 - Tangible assets
 - Accounts receivable
 - Stock or partnership interest
 - A share in profits from the work of associates
 - The right to your own collections
 - Share in management

WILL YOU HAVE AN OPPORTUNITY TO ACQUIRE AN INTEREST IN THE PRACTICE?

- How much does it cost?
 - How is the purchase price determined?
 - Duration of payments
 - Explore methods to minimize the after-tax costs and to finance the purchase.
- What are the conditions for the exercise of the option?
- How are profits, compensation, expenses and managerial control allocated?

WILL YOU HAVE AN OPPORTUNITY TO ACQUIRE AN INTEREST IN THE PRACTICE?

- Buy-Sell Agreements
 - Prevent transfers to parties who are unacceptable to the remaining shareholders/partners or unlicensed.
 - Allow reasonable opportunity for a departing shareholder/partner to receive fair compensation.
 - Require sale upon death, disability, retirement or failure to maintain license.
 - Purchase price.
 - Tax consequences.
 - Life and disability insurance to fund purchase.

MISCELLANEOUS ISSUES

- Malpractice Insurance
 - Who pays?
 - Amount of coverage
 - Who is responsible for maintaining coverage?
 - Indemnification might not be covered by malpractice insurance
- Will you have access to medical records after termination (for example, in order to defend against malpractice claims or respond to disciplinary investigations?)
- Comply with all formalities, such as written notice

KEY CONSIDERATIONS FOR COVENANTS NOT TO COMPETE AGREEMENTS

Checklist

Reasonable restrictive covenants are enforceable both during employment and for a reasonable time after termination in most states.

- ✓ What is the scope, geographic limitations, and duration of the restrictive covenant?
- ✓ What type of activities are restricted?
- ✓ Are there any prohibitions on soliciting current employees, patients, referral sources, and/or vendors during the term of the agreement and upon termination?
- ✓ Do the restrictive covenants protect the interests of the party seeking to enforce the covenants?

KEY CONSIDERATIONS FOR COVENANTS NOT TO COMPETE AGREEMENTS

Checklist

- ✓ How are current patients of the practice/facility defined?
- ✓ Are there any restrictions on the use and disclosure of confidential information?
- ✓ Is there a liquidated damage and/or injunctive relief if the restrictive covenants are violated?
- ✓ Is there a prevailing party provision regarding payment of attorney's fees to the non-breeching party?
- ✓ Are the restrictive covenants in compliance with federal and state regulations?
- ✓ Are there any new state regulations and/or case law which impact the enforcement of restrictive covenants?

**PITFALLS TO AVOID/BEST
PRACTICES WHEN DRAFTING
AND NEGOTIATING PHYSICIAN
EMPLOYMENT AGREEMENTS**

GENERAL GUIDELINES

- Understand your obligations and rights before signing the contract.
- The written contract governs your employment relationship.
 - Promises which do not appear in the written contract are generally not enforceable.
 - Amendments should be in writing.
- Employment contracts generally favor the employer.
 - Employers are often (though not always) willing to make reasonable revisions. Consider how the interests of the employer can be protected while minimizing the

GENERAL RULES

- Maintain a file for each physician arrangement that holds:
 - The signed, written agreement
 - Documentation that describes how the compensation was determined and why it is consistent with fair market value
 - Documentation that describes how the proposed arrangement furthers the hospital's tax exempt purposes

GENERAL RULES

- Have the proposed arrangement approved under a process that will give the arrangement the rebuttable presumption of reasonableness if challenged by the IRS.
- Arrangement should be approved by disinterested board members or duly authorized officers who have been duly informed of all relevant facts and comparable transactions and who contemporaneously document the basis for their approval of the arrangement.

GENERAL RULES

- No payments for contracts that don't exist.
- Never back date a contract.
- Don't change compensation any earlier than annually.
- Periodically review contract performance to make sure you are getting what you're paying for.

GENERAL RULES

- Let lawyers draft the contract – this is complicated stuff that should not be done at home – YOU could go to jail, have to pay a substantial fine and lose your job. And your hospital (if applicable) could lose millions of dollars in lost payments or taxes.
- Think before you write or speak – it is never legal to pay for referrals, allocate or monopolize markets or fix prices!

COMPENSATION MUST BE CONSISTENT WITH FAIR MARKET VALUE (FMV)

- FMV means the value determined in arm's length transactions, resulting from bona fide negotiations between well-informed parties who are not in a position to generate business for the other party (i.e., is not based on the volume or value of referrals).
- Opinion from independent expert is the gold standard – not required, but very useful.

Q & A

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