Physician Recruitment under Stark II-Phase II: Do’s and Don’ts - Ins and Outs

Health Care Compliance Association
Tuesday, April 25, 2006
Physician Transactions Track: Session 503
Agenda

- Physician Recruitment Contract Requirements
- Challenges of Recruitment to an Existing Group Practice Versus a New Clinic
- Stark II-Phase II Definition of Hospital’s “Geographic Area”
Speakers

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Contract Requirements

• Demonstration of community need
• Salary or income guarantee that meets “fair market value”
• Elimination of any non-compete
• Signatures required by recruited physician and the party receiving payment if the new physician is recruited to an existing practice
Contract Requirements

• Basis of community need outweighs any non-compete covenant with a group practice
• No financial gain to the group practice
Exception Types

- Group Practice Physicians
- Bona Fide employees
- Personal Service Arrangements
- Fair Market Value Compensation (Hospital Recruitment cannot qualify)
- Academic Medical Centers
Income Guarantees and other forms of Compensation

- Determination of fair market value
  - Average local hourly rate for ER services
  - No more than 50% in four of the six nationally recognized salary surveys
- HPSA “retention” payments
- Set in advance
  - Per-click compensation allowed
Stark II Phase II stance on non-compete agreements

- Prohibited (except pursuant to an employment contract or service agreement)
Part II: Challenges of Recruitment to an Existing Group Practice Versus a New Clinic

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Recruitment Market Factors

- Aging physician population
- Shortages of physicians in key specialties
- Shortages of physicians in underserved and rural areas
- Large group practice/staff model attraction (e.g., Kaiser and other staff model groups)
- On-call coverage conundrum
- Mature managed care markets
Solo Practice Considerations

- Substantial start-up costs and working capital needs for new practices
- Few reasonable commercial financing sources to fund new practices
- Difficult to gain access to patients in mature managed care markets in absence of acquiring existing practice
- Rising costs and declining reimbursement
- Physician life style considerations
Group Practice Considerations

• Lesser start-up and working capital costs associated with group practice recruitment
• Group practice usually has existing cash flow to cover some costs related to recruited physician
• Greater likelihood of success
  – Access to managed care and other patients
  – Shared call and patient coverage
  – Professional expertise and peer review
• Physician life style considerations
Stark Recruitment Exception

- Silent on group practice recruitment payments
  - “Remuneration which is provided by a hospital to a physician to induce the physician to relocate . . .”
  Section 1877(e)(5)

- 1998 Proposed Regulations
  - “If a hospital makes recruitment payments to . . . a group practice that intends to employ the physician and contracts with the hospital, these payments might be excepted under the new compensation-related exception that we have included in §431.357(l)” 63 FR 1702 (Jan. 9, 1998)
Interim Final Regulations

• 2004 Interim Final Regulations expanded recruitment exception to group practices:
  – “Recognize that many new or relocating physicians prefer to join existing practices rather than set up a new practice . . . and that hospitals may want to provide financial support through existing medical groups to aid recruiting new physicians to the community.”
  – “Recruitment arrangement involving direct or indirect payments to an existing physician practice might be improperly used to pay for referrals from the existing physician practice . . .”
69 FR 16096 (March 28, 2006)
Group Practice Recruitment Regulatory Requirements

- Written agreement signed by party (e.g., group practice) to whom payment is made
- Except for actual costs incurred by physician or group practice, remuneration is passed directly through or remains with recruited physician
- Records of actual costs and passed through amounts are maintained for 5 years and available to HHS upon request
Group Practice Recruitment
Regulatory Requirements

• In the case of an income guarantee to physician who joins a group practice, costs allocated to the recruited physician do not exceed the actual additional incremental costs attributable to the recruited physician.

• Remuneration is not determined in a manner that takes into account the volume or value of actual or anticipated referrals by the recruited physician or group practice.
Group Practice Recruitment Regulatory Requirements

• Group practice may not impose additional practice restrictions on recruited physician other than conditions related to quality of care

• Arrangement does not violate the anti-kickback statute or any federal or state law or regulation governing billing or claims submission
“Actual Costs” Limitation

- Recruitment payments must be paid directly to recruited physician or group practice must pass recruitment payments directly through to recruited physician other than:
  - Actual recruitment costs incurred by the group practice (e.g., recruiter fees, etc.)
  - Actual additional incremental costs directly attributable to recruit that are incurred by the group practice
Actual Additional Incremental Costs

- Reimbursable costs no longer calculated based on a pro-rata share of group practice’s operating expenses
- Reimbursable costs limited to increased or new group practice costs that are directly attributable to recruited physician
- Costs can include amortized (over generally accepted useful lives) portion of capital items and tenant improvements attributable to the addition of recruited physician
Actual Additional Incremental Costs

• Example 1
  – 5 MDs rent 2,000 sq. ft. at $2.50/sq. ft.
  – Recruit new MD but don’t add any office space
  – Cannot allocate any rent to recruited MD

• Example 2
  – 5 MDs rent 2,000 sq. ft. at $2.50/ft.
  – Recruit new MD and add 500 sq. ft. of office space at $2.75/sq. ft. for new recruit and additional staff
  – Additional rent of $1,375 qualifies as actual additional incremental cost
Actual Additional Incremental Costs

• CHW Recruitment Guidelines
  – Financial pro-forma for income guarantee that identifies group practice’s potential additional incremental costs attributable to recruited physician
  – To develop pro-forma and establish potential additional incremental costs, Hospital must obtain following information from group practice:
    • Financial statements for last 2 fiscal years
    • Year-to-date financial statements
    • Financial or other data to assess past and projected expenses of recruited physician
Actual Additional Incremental Costs

- CHW Recruitment Guidelines provide direction on calculation of additional incremental costs for pro-forma:
  - Office space rent
  - Phone and answering service/exchange
  - Utilities
  - Malpractice Insurance
  - Insurance Costs (office)
  - Salaries/fringe benefits/payroll taxes for staff
  - Medical Supplies and Office Supplies
Actual Additional Incremental Costs

- Professional licenses, dues and subscriptions
- Leased Equipment and Maintenance Fees
- Building or Office Maintenance, Repair and Janitorial Services
- Marketing/Advertising
- Accounting, Bank and Billing Fees,
- Business License Fees
- Security costs, transcription costs, x-ray supplies
- Misc. Office Expenses and Start-Up Expenses
Actual Additional Incremental Costs: Additional Rent

• Reimburse office rent only to extent that group practice leases additional office space as direct result of recruitment
• Reimburse actual and reasonable cost of new or additional office space, provided that additional space does not exceed the amount of space reasonably necessary to accommodate the recruited physician
Actual Additional Incremental Costs: Office Rental Costs

- If additional space exceeds amount of office space reasonably necessary to accommodate recruited physician, then reimburse:
  - Amount of square feet per physician of the pre-existing space, multiplied by
  - Rental cost per square foot of additional space
- Unusual or extenuating circumstances
- Document (e.g., copy of lease) additional space attributable to recruited physician
Actual Additional Incremental Costs: Phone or Utilities Costs

- Separate phone lines or utility metering, then reimburse only actual costs incurred by group practice attributable to recruited physician.

- If no separate lines or metering, reimburse amount actual costs incurred by group practice exceed average per physician costs over 12 months prior to recruited physician joining group practice adjusted for CPI.
Actual Additional Incremental Costs: Malpractice or Other Insurance Costs

- Reimburse actual and reasonable costs of the malpractice or other insurance premiums incurred by the group practice attributable to recruited physician
- Obtain documentation to support the amount of the insurance premium
Actual Additional Incremental Costs: Office Staff Costs

- Reimburse reasonable costs of new office staff hired or additional time (and increased costs) spent by existing staff directly attributable to recruited physician
  - Additional time without additional cost is not additional incremental cost
  - If new office staff works for recruited physician and others, cannot allocate full cost to recruited physician except in unusual circumstances
Practice Restrictions

• Group practice cannot impose practice restrictions on recruited physicians (e.g., non-compete covenant), unless restrictions relate to quality of care

• Unclear as to other practice restrictions
  – Patient non-solicitation covenants
  – Employee non-solicitation covenants
  – Non-disclosure covenants
  – Moonlighting restrictions
  – Others?
Expense Sharing Arrangements

• Expense sharing arrangement exists when 2 or more physicians share some or all operating costs of a medical office but do not share any revenues from their practices (e.g., separate billing using separate provider numbers)

• Concern about use of expense sharing arrangements to circumvent “actual additional incremental costs” limitation of group practice recruitment
Expense Sharing Arrangements

• Example
  – 5 MDs in an OB/Gyn professional corporation
  – 2 MD-shareholders and 3 MD-employees of PC
  – PC has integrated revenues and operating costs
  – Prior physicians joined PC as employees
  – New OB/Gyn recruit to join PC as “independent contractor” in expense sharing arrangement
  – New OB/Gyn recruit to pay pro-rata share (1/6) of all PC’s operating expenses
Expense Sharing Arrangements

• What constitutes a recruited physician “joining a physician or physician practice” for recruitment exception?
  – If “joining” a group practice, then actual additional incremental costs limitation and other group practice requirements apply
  – If not “joining” a group practice, then the group practice requirements do not apply, including actual additional incremental costs limitation
Expense Sharing Arrangements

• Indicia of bona fide expense sharing arrangements
  – Individual physician vs. medical group expenses sharing arrangements
  – Historical practice regarding expense sharing
  – Related vs. unrelated medical specialties in expense sharing arrangement
  – Full “turn-key” expense sharing arrangements vs. limited shared services
Anti-Kickback Considerations

• Don’t forget about the anti-kickback law
  – “Not only did physician recruitment provide a means for AHMC to rebuild its ‘primary care base,’ but it also offered a vehicle through which AHMC could funnel large amounts of money to physician practices already existing in the AHMC service area, for the purpose of buying loyalty and increasing admissions from those practices.” Government Trial Memorandum, *U.S. v. Weinbaum*, et al., Criminal Case No. 03cr1587-L (Oct. 14, 2004)
Part III: Stark II-Phase II
Definition of Hospital’s “Geographic Area”

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Hospital Service Area

Lowest number of contiguous zip codes from which the hospital draws at least 75% of its inpatients
Physician Relocation

- Relocation of PRACTICE only
  - 25 miles

Or

- Derives 75% of revenue from “new patients”
Physician Relocation

- Exception for new physicians and physicians who have practiced for less than one year
Questions?