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Winner of the Compliance Institute's *"#HCCAci"* Twitter contest for 2014

an interview with John H. Fisher, II

Health Care Attorney, Ruder Ware

See page 16

by Gail Peace

Monitoring fair market value in physician arrangements

» Stay within fair market value (FMV) in physician arrangements.

» Checks and balances related to FMV through the life of the agreement.

» Avoid common FMV pitfalls in the practice of managing physician arrangements.

» Strategies for monitoring FMV in real time.

» Protect your organization by separating FMV study and annual adjudication.

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If you are in healthcare, you are without a doubt aware of all the regulations. The Office of Inspector General (OIG) update at the HCCA's 14th Annual Compliance Institute highlighted that physician arrangements remain a high priority for the OIG's Work Plan for 2014. Physicians are referral sources to designated healthcare providers, so all agreements and related payments must fit within the vast landscape of regulation.

Peace

Being a C-suite executive is much like bungee jumping every day. There is so much risk that it is easy to become numb. Physician agreements are frequently managed in different parts of the organization and in different ways, opening the exposure to Stark Law and Anti-kickback Statute (AKS) implications. Are you following your agreements as written? The settlements related to paying physicians incorrectly are on the rise. There is strict liability, meaning that the punishment for inappropriate payment is the same regardless of the intent.

Recent Stark Law and AKS case settlements involving administrative physician agreements all have a central theme of fair market value (FMV). Upon further review, the FMV violations do not center on the structure of the agreement, but what happened *after* the agreement went into effect. As many cases settle with FMV cited, the violation is due to a technical violation of the agreement. Most FMV violations are errors in following the agreement as written, not in the setup of the agreement.

What is fair market value?

FMV is required to ensure that all physician agreements fit within a safe harbor. This means that the rate the physician is paid needs to represent the market rate. Not only do the agreements need to check all the boxes for a Stark Law and AKS exception, but the agreements must at all times fit into an exception. This is the key theme to recent violations—FMV was not maintained at all times.

There are many approaches to arriving at a FMV rate for payment. FMV firms render opinions about specific cases, and there are published studies such as those from the Medical Group Management Association. For this discussion we will assume your legal counsel was comfortable with the rate and that a FMV analysis was performed at the start of the agreement.

Now that you have a formal agreement, the real work begins. In all cases, FMV is an hourly rate multiplied by an expected number of worked hours. The physician agreement may specify the physician is to be paid hourly for work performed. In this instance, each month the physician is paid for exactly the number of worked hours. Most commonly, there are a minimum number of hours and a maximum number of hours.

The other option is to estimate the number of hours the physician will work and then make equal monthly payments based on that estimate. These payments are called stipend payments and must be reconciled. For example, if the physician is expected to work 10 hours per month, the annual hours worked must be 120 hours. In the case of stipend payments, it requires the organization to keep up with the reconciliation of the hours at a minimum annually. At first blush, stipend payments seem easier to process, but it should be noted they introduce the need for adjudication and possibly taking money back from physicians if they are overpaid.

FMV pitfalls

At minimum, agreements should be adjudicated annually, but best practice is to monitor FMV in real time, to prevent over and under payments. Even if you have the FMV clearly spelled out in the agreement, if you don't follow the hours outlined, you might find yourself in violation of FMV.

Most hospital Finance departments track the payments and have checks and balances in place. Some consulting firms offer adjudication services. It is important to use a different firm from the one that setup the agreement to make sure checks and balances are in place.

In all cases, the tracking of the payments is complex. When manual systems are used, errors may occur that are not easily discovered. Best practice involves using technology to actively manage each agreement. Technical violations can result in large settlements, so it is important to track and ensure documentation is in place to avoid these violations.

FMV strategies

It is important that you follow the agreement as it stands for all types of physician agreements. If the physician is to submit a time log each month, the documentation must support this payment. Here is a checklist to use before making each payment:

Steps to Establish and Maintain FMV
1. At the start of an agreement, establish the FMV rate using a consistent source or process. Use an independent credible source.
2. Review the FMV rate on a regular schedule, 2- or 3-year intervals.
3. Use a physician payment checklist each time a payment is made to ensure proper documentation is in place before making payment.
4. Adjudicate at the end of the year to ensure paid hours were worked hours, especially in the case of stipends.

Protect your organization

It is critical that your organization follow those agreements exactly as written to stay within FMV guidelines. Two recent settlements highlight the need to regularly update and adjudicate FMV rates are being met. One involves a safety net hospital in the New Jersey market.[1] Payments for medical directorships were deemed not to be FMV. This can occur because the rate is too high or low, but more commonly occurs when payments are made without the necessary documentation and adjudication. The other case relates to a health system in South Carolina that employed 19 specialists.[2] It was deemed that their pay was in excess of FMV, thus causing a Stark Law violation. This case in particular is important because the 19 physicians were employed by the system. Though the details are still being tested in the courts, this case has set precedent that employment does not eliminate the need to stay within FMV rates, as had been assumed.

Summary

Most organizations do a good job of setting up the agreement to clearly fit within a safe harbor, but over time may fall out of compliance. Best practice with establishing FMV rates involves a clear separation of duties and a system of checks and balances. Monthly management of the agreement means confirming the payments fit within the specifics of the agreement. Using a physician payment checklist will ensure each box is checked for each payment.

Many organizations use an outside consultant to advise on how to set up the structure of the agreement with the physicians. They then may use this same company to perform the FMV analysis and adjudication each year. This creates a potential for a conflict of interest that can be best avoided by using a separate company to perform FMV and adjudication of the agreements. The payments should be adjudicated every year, either internally or with an audit team.

Tips for success:

- FMV is an important part of staying within Stark and AKS guidelines and should be updated after the agreement is in place at regular intervals.
- FMV studies should always be performed by an independent party and not the consulting firm assisting with setting up the agreement or the audit function.
- Mistakes are expensive and avoidable when agreements are not followed as written—consider automation.

1. *See* http://1.usa.gov/1jbFZDq
2. *See* http://1.usa.gov/1kMpfSx