

HEALTH CARE LAW UPDATE

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Hospital Law Issues

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Hospitals Hit Hard in Recent Government Enforcement Actions

Recently, the OIG and other federal law enforcement agencies brought a host of enforcement actions against healthcare providers for alleged violations of the Stark law, the Anti-Kickback Statute (the "AKS"), and the False Claims Act (the "FCA").

This flurry of enforcement activity provides a sobering reminder to all hospitals and physicians of the need to structure their arrangements to comply with these laws and of the consequences of non-compliance.

Set forth below is a brief summary of some recent enforcement actions and settlements, as well as certain practical recommendations to keep in mind in order to protect your hospital against similar enforcement actions.

Hospital Pays \$1.9 Million to Settle Stark Law Violations

A Texas hospital agreed to pay approximately \$1.9 million to settle allegations that it violated the Stark law and the FCA.

Among other things, the government alleged that the hospital received federal Medicare and Medicaid reimbursement for orthopedic items and services referred to the hospital by a physician group that utilized space owned by the hospital without paying rent.

Generally, the Stark law permits physicians to rent office space from hospitals as long as there is a written lease signed by the parties and the rental payment is fair market value.

Notably, the settlement resulted from the hospital's self-disclosure to the OIG

following its discovery of the improper lease arrangement during an internal compliance audit.

HealthSouth and Physicians Settle with OIG for \$14.9 million

HealthSouth Corp., the nation's largest provider of inpatient rehabilitation services, and two affiliated physicians settled allegations that they violated the Stark law, the AKS and the FCA.

The government claimed that HealthSouth and the physicians had entered into improper "sweetheart deals" pursuant to which the physicians were illegally compensated to induce patient referrals for HealthSouth services.

Specifically, the government alleged that the doctors were receiving above fair market value payments pursuant to "sham" medical director agreements with HealthSouth, and as such, it was improper for the physicians to refer patients to HealthSouth.

In bringing the action, the government commented that it will not tolerate hidden financial agreements between healthcare providers which may influence where patients receive treatment and what treatment is received.

In addition to the hefty fines, HealthSouth was required to amend its Corporate Integrity Agreement.

Federal Court Awards \$4.7 Million for Stark Law Violation

A Federal court in Louisiana recently ruled that a home health agency and its owner violated the Stark law and the FCA

and ordered them to pay \$4.7 million in damages and fines.

The government presented evidence that the home health agency and its owner billed Medicare for services furnished pursuant to prohibited physician referral arrangements.

The court concluded that the defendants entered into sham “advisory services agreements” with several physicians under which the physicians were paid by the defendants but did not perform any actual services, other than referring patients to the home health agency.

The home health agency and its owner created fake physician service logs, listing services which the physicians never actually performed or already provided as part of caring for their patients, and which were not in fact “advisory services” for the agency. The court also found that the defendants had submitted false cost certifications to Medicare for unperformed physician services.

Practical Guidance

In light of these developments, hospitals may wish to consider the following recommendations in structuring and monitoring their arrangements with physicians:

1. Document All Arrangements with Physicians: All arrangements involving payments by hospitals to physicians for professional services, medical director duties or other services, or pursuant to which hospitals provide services, space, equipment or anything of value to physicians, should be memorialized in a written agreement which satisfies the requirements of a Stark law exception.

2. Fair Market Value: It is exceedingly important that all of the terms of the arrangement are commercially reasonable and that all payments are fair market value. In this regard, it is advisable to obtain a written analysis from an independent healthcare consultant verifying that the payments are fair market value for the items/services provided. If

this is not feasible, the hospital should maintain a record of all relevant information (i.e., regional market data and figures from comparable arrangements) upon which it relied to determine the payments.

3. Monitor and Review All Physician Agreements: Hospitals should periodically review all of their physician agreements (preferably on an annual basis) to ensure that they conform with current Stark regulations. Hospitals should also confirm that physicians are properly performing all required services. If physicians are not performing their duties under the contracts, the payments may not be fair market value.

One way to monitor performance of services under contracts is to require each physician to complete and submit bona fide service logs that document all of the services performed by the physician under the agreement during a specified time period (e.g., each month). Hospital managers should carefully review and verify the logs.

Although ongoing review by a hospital of its various physician agreements can be time consuming, given the healthcare regulatory environment, it is a critical prophylactic measure.

Such reviews may not only be an opportunity to ensure compliance with the Stark law and the AKS, but may also be an opportunity to ensure that the hospital is meeting The Joint Commission’s new leadership standard, which requires hospitals to closely monitor patient care, treatment and services provided through contracts (this new standard was the subject of our February 2008 Update).

We send these Updates to our clients and friends to provide information on recent developments in the law. The Updates, however, should not be relied on for legal advice in any particular matter. If you would like additional information, please contact: Gary W. Herschman at 973-643-5783 or Anjana D. Patel at 973-643-5097.

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