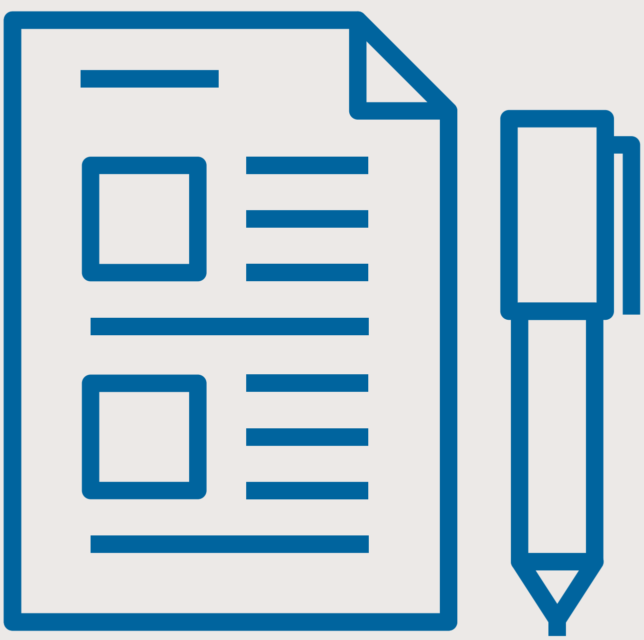
GOVERNANCE THOUGHT LEADERSHIP SERIES

Texas Healthcare Trustees

Physician Contracts



Providing education, resources, leadership development to inspire excellence in health care governance.

Hospitals regularly contract for many products and services ranging from the linens used in patient rooms and the food served in the cafeteria to professional services provided by physicians. While all contracts should meet certain basic legal requirements, contracts with physicians must meet special criteria, and they carry a higher compliance risk due to state and federal laws governing such contracts.

Stark / Anti-Kickback

One of the greatest threats to a hospital is associated with contracting with actual and potential sources of referral. With estimates of Medicaid and Medicare fraud costing the country anywhere from $68-$230 billion a year, the Office of Inspector General has shown increased interest in reviewing contracts between hospitals and physicians.

Although most hospitals appropriately handle the initial contractual arrangements with physicians, some hospitals lack monitoring procedures that ensure continued contract compliance. If such monitoring procedures are not already in place at your hospital, you should consider creating and maintaining an arrangements database to ensure that each new and existing physician contract complies with the Anti-Kickback Statute and/or Stark Law, two of the most important federal laws relating to physician contractual relationships.

The Stark Law generally prohibits physicians from referring Medicare and Medicaid patients to entities that provide designated health services if the physicians or their immediate family members have “financial relationships” – which include many ownership interests and compensation arrangements – with the entities. The Anti-Kickback Statute is a criminal statute that prohibits anyone from knowingly offering, paying, soliciting or receiving anything of value to induce or reward referrals or to generate business for a federal health care program.

Violation of either statutory scheme exposes offenders to severe penalties. The Stark Law imposes civil penalties that may include: refunding sums paid by the government for illicit referrals; exclusion from federal health care programs; a fine of up to $15,000 for each illicit referral; and a civil assessment of triple the amounts billed for the services. The Anti-Kickback Statute’s criminal penalties include fines of up to $25,000 and up to five years in prison per violation, in addition to civil/administrative penalties similar to those imposed for Stark violations – except Anti-Kickback violations can cost $50,000 per violation.

The key to compliance with both the Stark and Anti-Kickback laws is to utilize the contractual relationships that the government has specifically exempted from punishment: the Stark exceptions and the Anti-Kickback safe harbors. Fortunately, there is significant overlap between some of the exceptions and safe harbors that relate to physician contracts.

Types of Physician Contracts

Employment Relationships

The exception for employment relationships is one of the most useful contractual structures that meets the elements of both a Stark exception and an Anti-Kickback safe harbor. To satisfy the requirements, an employment arrangement must have the following elements:

- It must be a bona fide employment relationship for identifiable services.
- The amount of remuneration must be consistent with fair market value and not determined in a manner that takes into account the volume or value of referrals generated by the physician (or their immediate family member).
- The remuneration must be provided under an arrangement that would be commercially reasonable even if no referrals were made to the employer.

Personal Services Arrangements

The exception for personal services arrangements is another common structure used for complying with the Stark and Anti-Kickback statutes. To comply with Stark and Anti-Kickback, these arrangements should:

- Be in writing, signed by the parties, and specify the services covered by the arrangement.
- Cover all of the services to be furnished by a physician or an immediate family member of the physician. This element is satisfied if all arrangements with the physician (and immediate family members) incorporate each other by reference or if they cross-reference a master arrangements database.
- Ensure that services provided, in aggregate, do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement.

- Have a term of at least one year.
- Ensure that compensation paid over the course of the arrangement is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account the volume or value of referrals.

Leases

Another common arrangement with physicians involves situations where a hospital leases either space or equipment to referring physicians or other parties in a position to influence referrals. To comply with Stark and Anti-Kickback, a lease arrangement should:

- Be in a written agreement signed by the physician and hospital.
- Specify the covered premises or equipment.
- Set a schedule in advance for space/equipment use and lease payments, if access to the space or equipment is for periodic intervals.
- Not be for less than one year.
- Ensure the total amount of payments is set in advance and is based on fair market value.

Fair Market Value

A common theme found in many exceptions and safe harbors is that the amount of payment involved must be consistent with "fair market value." This is one of the most important elements in any Stark exception or Anti-Kickback safe harbor, and it is also one of the hardest elements to comply with, if an entity is not careful.

In general, "fair market value" is the value that a good or service would have in a bona fide arm's-length transaction between well-informed parties who are not otherwise in a position to generate business for the other party. In the context of physician contracts, "fair market value" means that physicians must be paid according to what a similar market would pay for their particular services, rather than the value of the business they might generate for the entity via referrals.

Determining whether an arrangement is consistent with fair market value is not as straightforward as it may seem. For instance, a common practice for parties seeking to comply with the fair market value requirement is to engage a third party to render a fair market value determination based off a review of relevant comparable data – e.g., what similarly situated physicians are paid. Many parties who engage these auditors take the determinations at face value. But, as stated by the Centers for Medicare & Medicaid Services, "[w]hile good faith reliance on a proper valuation may be relevant to a party's intent, it does not establish the ultimate issue of the accuracy of the valuation figure itself." Put differently, good faith reliance on a fair market value determination may protect a person or entity from criminal liability under the Anti-Kickback Statute, which requires a knowing violation, but it will not shield them from liability under the Stark law, which does not.

Given the importance and complexity of keeping compensation/remuneration consistent with fair market value, hospital administrators and their attorneys should rigorously review their physician contracts and any fair market value determinations obtained for them. Once they are satisfied that all exception and safe harbor requirements are met, the next step is to log the details of the contract into an arrangements database.

Arrangements Database

Certain vendors sell arrangements-database software, but a hospital's arrangements database can also be in the form of a spreadsheet. The database should contain certain information to assist the hospital in evaluating whether each arrangement violates the Anti-Kickback Statute or the Stark Law, including but not limited to:

- Each party involved in the arrangement.
- The type of arrangement (e.g., physician employment contract, medical director agreement, lease).
- The term of the arrangement, including the effective and expiration dates and any automatic renewal provisions.
- The amount of compensation to be paid.
- The methodology for determining the compensation, including the methodology used for any "fair market value" determinations.
- Whether the amount of compensation is determined based on the volume or value of referrals between the parties.
- Whether the arrangement satisfies the requirements of an Anti-Kickback Statute safe harbor and/or a Stark Law exception, and if so, which one(s).
- Whether the parties are complying with their obligations (e.g., whether a physician is paying rent or submitting required timesheets).

Upon approval and execution, each arrangement should be given to the chief financial officer or chief compliance officer to promptly load into the database. The CFO or CCO should review the database on a regular basis to ensure hospital dealings with a particular physician comply with his or her contract. For example, if a physician expenses $3,000 for a CME event, the hospital should check the arrangements database to confirm the physician's contract allows for CME reimbursement. If not, reimbursing that expense could remove the protections of an exception or safe harbor. In this way, having and maintaining an arrangements database will help to avoid violations of the Anti-Kickback Statute and Stark Law.

Drafting Tips: What Should We Look For?

When reviewing a contract, you should look for certain basic elements:

- Parties – The contract should correctly name all parties to the contract. Sometimes, services are provided by physicians as individuals and sometimes by group practices. If the hospital is paying an individual physician, then the named party will typically be the physician; if the hospital is paying the group practice, then the party should be a professional association or professional limited liability company.
- Consideration – All contracts must have consideration, which is usually one party agreeing to provide services or goods in exchange for payment by another party. A contract with a physician should specifically state the following:
    - The services or goods to be provided.
    - The payments to be made.
    - The schedule of payments.
    - To whom payments will be made.
- Obligations/Warranties – The contract should describe what each party is required to do. Sometimes, a party will warrant that particular facts are true or that the goods or services to be provided meet a certain standard or condition.
- Term – The contract should state how long it will last. Certain "evergreen" contracts renew automatically for additional terms unless one of the parties terminates the agreement. Other contracts require renewal on a regular basis by executing a new contract or a written amendment to the existing contract.
- Termination – The contract should describe how it can be terminated. All contracts should include a for-cause termination provision; if certain performance standards or basic qualifications are not met, a party can terminate the agreement either immediately or upon some notice period with an opportunity for the other party to rectify the issue. Many contracts also contain provisions allowing for termination without cause following a notice period. Although short no-cause termination provisions reduce the overall financial risk of any contract, the underlying business considerations of an agreement may call for a long notice or the elimination of a no-cause termination provision entirely.
- Dispute Resolution – Many contracts contain provisions requiring mediation and/or arbitration. In mediation, which is typically nonbinding, the parties attempt to resolve their differences with the assistance of a third-party mediator. If resolution is not possible, the parties may proceed to arbitration or a court proceeding. In arbitration, which is typically binding and non-appealable, a third-party arbitrator issues a determination regarding the dispute between the parties and may award damages.
- Non-Compete Covenant – Physician agreements often contain a non-compete covenant. Texas law has specific statutory requirements for physician-related noncompetition covenants, and counsel should be consulted when drafting one. Generally, non-compete covenants should be drafted in a manner that reasonably protects the legitimate business interests of an employer or contractor without unreasonably restricting the physician's ability to practice. There is no pre-established reasonableness standard; each agreement will be judged on the facts and circumstances – e.g., the geographic restriction, time period and buyout amount – of the individual case.

In summary, a well-crafted physician agreement, regardless of whether it is a lease, employment agreement or independent contractor agreement, benefits any organization by clearly outlining the obligations and expectations of the parties. Similarly, a poorly written agreement or no agreement risks significant liability.

There is a lot to keep up with in health care. Texas Healthcare Trustees is here to help our members, trustees of hospitals and health care systems throughout Texas, with resources that will help to stay up-to-date on important information that can impact how they lead their organization. THT's Governance Thought Leadership Series is one of many resources THT has available for health care board members. To learn more about this series and to view other tools and resources available, visit **www.tht.org**.

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