IS YOUR PAY PLAN STARK COMPLIANT?

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Generally, the physician's self-referral law (often referred to as "Stark") prohibits a physician from referring a patient whose services may be reimbursed by a government payor (e.g., Medicare) for certain "Designated Health Services" ("DHS") to an entity in which the physician or immediate family member of the physician has a financial relationship, unless an exception applies. "Designated Health Services" is defined to be ancillary goods or services reimbursed by Medicare, and include (i) clinical laboratory services, (ii) physical and occupational therapy services, (iii) radiology and other imaging services, and (iv) durable medical equipment. Stark defines DHS by reference to certain CPT codes, a list of which is published each year and can be found at https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral.

Physician practices that provide DHS implicate the Stark prohibitions because the physicians in the practice order tests, goods, or services to be performed or provided by the practice. For example, if a physician orders lab tests to be performed by a laboratory that is owned by the practice, the Stark law is implicated. The same would be true for a cardiologist ordering imaging services to be done in-house, or an orthopedist ordering physical therapy services. In these examples, physicians would be referring tests to an entity (i.e., their practice) in which the physician owns an interest.

Like many regulatory paradigms, the prohibition is broadly defined, but exceptions carve out behavior that the government does not want to prohibit. While a deep dive into each exception is beyond the scope of this article, a prevalent exception for referrals within the same practice is the In-Office Ancillary Services Exception (IOASE). In order to rely on IOASE, a practice must meet the definition of a "group practice" under Stark. IOASE protects the in-office provision of certain DHS that are ancillary to the medical services provided by the physician practice. IOASE requires services to be personally provided by the referring physician, a physician-member of the same group practice as the referring physician, an individual who is supervised by the referring physician, or if the referring physician is a group practice, by another physician in the group practice, provided the supervision complies with all Medicare care payment/coverage rules for the services.

Second, IOASE requires that services be furnished in the same or centralized building. There are three alternative tests for this location requirement, but only one must be met. All three tests require the referring physician to have offices in the building that are open to patients a minimum number of hours per week and the physician must regularly practice medicine and furnish physician services for a minimum number of hours per week in that office. Additionally, IOASE requires the DHS to be billed by the physician group practice performing and supervising the services, or by an entity fully owned by the physician or the physician's group practice (or by an independent third-party billing company acting as an agent for the group practice).

Compensation Arrangements

Regulations promulgated under Stark prohibit physicians from being paid based on the "volume or value" of their referrals of DHS. This has generally prohibited group practices from paying physicians based upon the specific orders or prescriptions for DHS provided by the group practice. Additionally, Stark regulations allow practices to split profits from DHS either on a share and share-alike basis or based on the physician's production excluding DHS compared to the production (excluding DHS) of other participating physicians in the practice.

New Regulations Clarify Physician Compensation

New regulations promulgated effective January 1, 2022, require compensation arrangements to meet certain criteria in order for the practice to enjoy the designation of a "group practice" under Stark.

The requirements for a group practice can be summarized as follows:

Practices should not pay physicians for DHS the physicians order, either by counting the revenues or profits from the referrals in the physician's production or using the revenues or profits to calculate a productivity bonus.

A practice may pay a productivity bonus based solely on a physician's personally performed services (these services are not "referrals" because they are personally performed by the physician).

A practice can distribute profits from DHS and not be deemed to be paying physicians based on the "volume or value of referrals" by distributing the profits in one of the following manners: (i) per capita; or (ii) based on distributions of the group's revenues attributed to services that are not DHS and would not be considered DHS if the service had been paid by Medicare even if the service was paid by a private payer.

A practice may use certain criteria to pay productivity bonuses to ensure that the bonus is not based on the "volume or value of referrals" of DHS: (i) the productivity bonus is based on the physician's total patient encounters or the RVUs personally performed by the physician; or (ii) the services on which the productivity bonus is based are not DHS and would not be considered DHS if they were payable by Medicare.

Practices may have an exemption from these rules if revenues derived from DHS constitute less than 5 percent of the group's total revenues, and the portion of those revenues attributed to each physician in the group constitutes 5 percent or less of his or her total compensation from the group.

Notably, the oft-used method of carving out government payer business does not work. In order to enjoy the designation of a "group practice" under Stark, the services on which the productivity bonus is based cannot be DHS nor can they be DHS if they were payable under Medicare. Thus, pay plans that may once have been compliant may have fallen out of compliance.