Vermont Bar Association

Seminar Materials

Health Law:
Legal Issues in Physician Employment

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LEGAL ISSUES IN PHYSICIAN EMPLOYMENT
138TH VBA ANNUAL MEETING

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Physicians Are Moving Out of Private Practice

The Trend

- Uncertainty about effects of health care reform
- Electronic medical records
- Declining reimbursements in some specialties
- Young physicians seeking stability, lifestyle benefits
- Hospitals moving toward greater integration
- New payer models, compensation schemes
### Complex Relationship

#### Common Provisions
- Compensation
- Benefits
- Duties
- Physician Warranties
- Billing
- Records
- Outside activities
- Intellectual Property
- Discipline/Termination
- Insurance
- Restrictive Covenants
- Equity Status
- Employer Obligations
- Dispute Resolution

### Topics for Today

- Basic employment law concepts (Indep. Contractor v. Employee, FLSA, Discharge, Negligent Hiring)
- Non-compete agreements, broadly and as they relate to physicians
- Compensation issues (Stark, Anti-Kickback, False Claims Act, IRS Regs, etc.)
- Ethics restrictions
- Other issues

### What is a “Non-Compete” Agreement?

- Purpose
- Restrictions
- Public Policy Concerns
NCA Enforceability

- Reasonability in...
  - Time
  - Scope
  - Geography

Independent Contractor vs Employee

- 2 Federal Tests
- 2 State Tests
- 6 General Considerations (under the FLSA)
- The "Nature of the Business" Test

Termination of Employment

- At-Will vs. Just Cause
- Defamation Issues
- References / Negligent Hiring Concerns
Independent Contractor vs Employee

- Tax Implications
- Workers' Compensation
- Labor Law
- Civil Protections

Physician Non-Competes

- Enforceability depends on jurisdiction.
- Some states: no employment non-competes at all.
- DE, MA: Generally enforceable, but no employment non-competes for physicians.
- VA, TN & TX: Stricter standards applied to physician non-competes.

Physician Non-Competes

- New (2016) laws in RI & CT:
  - CT: non-competes are enforceable under narrow standards. Conn. Pub. Act. 16-95
  - RI: physician non-competes are unenforceable except in connection with sale of a practice. R.I. Gen. Laws §35-7-33
Antitrust Concerns?

- Summer 2016 FTC Action:
  10 cardiologists exempt from non-competes in Reno, NV out of concern for competition in local market.

Compensation Issues
Fraud & Abuse Laws; IRS Regulations; Fair Market Value

Federal Fraud & Abuse Laws
- False Claims Act
- Stark Law
- Anti-Kickback
Key Point:
Compensation, not payment for referrals.

The Stark Law

- What is it?
  - Physician self-referral prohibition.
  - Prohibits physicians from ordering “designated health services” for Medicare patients from entities with which the physician has a “financial relationship.”
  - (Also prohibits entities from submitting claims based on referrals that violate the law.)

Federal Fraud & Abuse Laws

Physician Self-Referral

Key Point:
Compensation, not payment for referrals.

"Designated Health Services"
42 C.F.R. § 411.353
- Clinical lab services
- Physical therapy, occupational therapy & outpatient speech-language pathology
- Radiology and certain other imaging services
- Radiation therapy & supplies
- Durable medical equipment & supplies

"Financial Relationship"
42 C.F.R. § 411.354(a)
- "A direct or indirect ownership or investment interest"
- "A direct or indirect compensation arrangement"
  - Includes "any arrangement involving remuneration (very broad), direct or indirect, between a physician (or a member of the physician’s immediate family) and an entity."
  - Apply to hospital employees?

Exceptions
- Two sets:
  - Ownership/financial interest exceptions (42 C.F.R. § 411.356)
    - E.g., publicly traded companies, mutual funds, some specific limited types of providers
  - Compensation arrangement exceptions (42 C.F.R. § 411.357)
    - E.g., rental of office space or equipment, certain incentive plans, physician recruitment efforts, charitable donations, nonmonetary compensation, etc.
- Strict Liability Statute – if no exception applies, there will be a violation.
"Employment" Exception

42 C.F.R. § 411.357(c): Exception to "compensation arrangement" for "[a]ny amount paid by an employer to a physician (or immediate family member) who has a bona fide employment relationship with the employer for the provision of services if the following conditions are met:"

- Employment is for "identifiable services"
- Amount of remuneration is consistent with fair market value of the services and not determined in a manner that takes into account value of referrals
- The remuneration is provided under an arrangement that would be commercially reasonable even if no referrals were made to the employer
- (Productivity bonuses are not prohibited)

"Employment" Exception

United States v. Halifax Hospital Medical Cent

- Incentive Program: Physicians to take an "equitable portion" of a pool that includes 15% of "operating margin" (i.e. profits) for the medical oncology program.
- Margin included profits from drug sales and other "DHS"
- Court: incentive program is a "compensation arrangement" not subject to the employment exception (because compensation included profits from services not provided by the physicians)
- This was not a "productivity bonus" allowed by regs even though it was divided based on productivity, because bonus pool itself was not based on personally performed services.

"Employment" Exception

United States v. Halifax Hospital Medical Center
No. 6:09-cv-1002, 2013 WL 6167275 (M.D. Fla. Nov. 18, 2013)

- Second MSJ related to claims that neurosurgeons were being paid more than fair market value.
- Halifax paid physicians a base salary, plus benefits and a bonus equal to the difference between their base salary and the physician's collections.
- "[I]n a number of years, the neurosurgeons appear to have been paid more than twice as much as neurosurgeons at the 90th percentile of their specialty despite collections from the work falling below (in some instances, well below) that rank."
- Court allowed claim to go to trial.
Stark Penalties

- Claims in violation are not paid
- Civil monetary penalties up to $15,000 per (knowing) violation plus treble damages and/or $100,000 per circumvention scheme
- Potential exclusion from federal programs
- False Claims Act liability

Ant-Kickback Statute

- 42 U.S.C. § 1320a-7(b)
  - Prohibits knowingly and willfully soliciting or receiving, offering or paying any remuneration (including kickbacks, bribes or rebates) directly or indirectly, overtly or covertly, in cash or in kind, to induce or reward the referral, purchase, order, lease or recommendation of any item or service paid for under a federal health care program.
- Criminal Statute: Violation is felony
- Intent requirement: "One purpose rule", ACA makes clear no "specific intent" required

Stark Penalties

- Halifax Case: Hospital settled for $85 million
- Covenant Medical Center (Iowa):
  - Settled claim with DOJ that five physicians had been compensated in excess of fair market value for $4.5 million
- Tuomey Health Care System:
  - $237 million penalty after jury found that compensation paid to physicians under certain part-time employment agreements violated False Claims Act and Stark Law.
Anti-Kickback Statute

- Statutory Exemptions (42 U.S.C. § 1320a-7b(b)(3))
- Regulatory Safe Harbors (42 C.F.R. § 1001.952)
- Unlike Stark, AKS is not "strict liability"; even if safe harbor is not satisfied, court will still look at entirety of facts/circumstances.

Anti-Kickback Penalties

- Criminal fine up to $25,000 per violation
- Civil monetary penalties up to $50,000 per violation
- Treble damages
- Up to 5 years imprisonment
- Potential exclusion from federal health programs
- False claims predicate

Anti-Kickback Employment Exception

- 42 U.S.C. § 1320a-7b(b)(3)
  - Anti-kickback prohibitions do not apply to "any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services."
- 42 C.F.R. § 1001.952(h):
  - "Remuneration" does not include payments from employer to bona fide employee, as defined in 26 U.S.C. § 3121(c)(5).
- Does not apply to independent contractors, but otherwise broad. No FMV requirement.
- Less of a concern for physician employees.
### Stark vs. Anti-Kickback

<table>
<thead>
<tr>
<th>Stark Law</th>
<th>Anti-Kickback Statute</th>
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<tbody>
<tr>
<td>Applies only to referrals from &quot;physicians&quot;</td>
<td>Applies to anyone who gives or accepts (or attempts to do either) kickbacks, etc.</td>
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<tr>
<td>Referrals where financial relationship exists are unlawful</td>
<td>Payments to induce or reward referrals</td>
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<td>No showing of intent required.</td>
<td>Intent required</td>
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<td>Civil statute (no criminal liability)</td>
<td>Criminal liability (incl. prison time)</td>
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<tr>
<td>Exceptions must be met</td>
<td>Safe harbors are &quot;voluntary&quot;</td>
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### False Claims Act

- Prohibits "knowingly" presenting (or causing someone else to present) a false or fraudulent "claim" for payment to the U.S. Government.
- Encourages whistleblowers to file suit under qui tam provisions.
- Penalties are severe. As of August 1, 2016:
  - Up to $20,000 per false claim (with minimum of $10,781 per claim)
  - Treble damages for any loss sustained by government
  - Costs and attorney's fees (for qui tam plaintiffs)
- It is a false claim to falsely certify compliance with Stark and Anti-Kickback laws when submitting claims for payment under federal health programs.

### IRS Non-Profit Rules

![Treasury Internal Revenue Service Logo]
IRS Rules

- 501(c)(3): Private Inurement or Impermissible Private Benefit
- IRS Info 2002-02a:
  * "Any compensation arrangement between a section 501(c)(3) organization and an employee or an independent contractor must not result in private inurement. If that person is an insider, and must not confer impermissible private benefit whether or not that person is an insider. Implicit in these two proscriptions is the requirement that compensation actually paid must be reasonable." (emphasis added)
  * Lists factors for determining whether compensation is reasonable.
  * Is a physician an "insider"?

IRS Rules

- IRS "Intermediate Sanctions Rules" (Treas Reg. §§ 53.4958-1 et seq.):
- Prohibits "excess benefit arrangements":
  - If compensation paid to a "disqualified person" exceeds fair market value, and "excess benefit" has been awarded
- Penalties:
  - 25% excise tax on excess benefit (paid by disqualified person)
  - 200% tax if not corrected (paid by disqualified person)
  - 10% tax on excess benefit (paid by organization)

A Note on Fair Market Value

- Important under Stark law, Anti-Kickback (impliedly) and IRS Rules:
- Stark Law: FMV is the "value in arm’s length transactions, consistent with the general market value." 42 C.F.R. § 411.335.
- In the context of physician employment, typically done using survey data. E.g.,
  - Medical Group Management Association
  - American Medical Group Association
Ethical Considerations

AMA Guidance
- AMA Code of Medical Ethics
  - Broad principles
- AMA Principles for Physician Employment
  - Physicians should be free to exercise personal and professional judgment
  - Patient welfare takes priority over economic considerations
  - Physicians should be free to engage in outside volunteer work consistent with duties to employer
  - Contractual arrangements should be clear and consensual
- "Physicians are discouraged from entering into agreements that restrict the physician's right to practice medicine for a specified period of time or in a specified area upon termination of employment."
  - Physicians should remain involved in billing issues, including negotiation of fee arrangements and billing review to ensure accuracy.

Vermont Professional Conduct
- 26 V.S.A. §1354 (a): List of unprofessional conduct.
  - Includes patient "abandonment"
  - See also Vermont Medical Practice Board Advisory on Termination of the Physician-Patient Relationship.
  - Careful with non-compete, other restrictive covenants
Other Issues

- HIPAA/Privacy Concerns
- Federal Health Care Quality Improvement Act
- "Corporate Practice of Medicine" Doctrine?
- Others?