NEW STARK RULES POSE CHALLENGES TO HOSPITAL RECRUITMENT ACTIVITIES

Earlier this year the Centers for Medicare and Medicaid Services ("CMS") issued new final regulations to implement various aspects of the Stark self-referral statute. 69 Fed. Reg. 16054 (March 26, 2004). The new rules became effective on July 26, 2004. Among the most important changes made in the new rules are limitations on the circumstances in which hospitals may participate in physician recruitment activities to induce a physician to relocate and become a member of the hospital's medical staff.

The previous Stark exception for physician recruitment payments contained a single set of fairly undisruptive restrictions, with no distinction between physicians relocating into the community as solo practitioners and physicians relocating into an existing medical group. 42 C.F.R. § 411.357(e). Now, however, hospitals must treat recruitment payments to solo practitioners differently than recruitment assistance to physician joining a medical practice. These new rules will make it difficult for hospitals to participate in recruitment of physicians relocating to join a medical practice.

For hospital payments directly to a physician who is not joining a medical practice, the Stark exception requirements under the new rules are similar to the previous rule: (1) the recruitment arrangement is in writing and signed; (2) the arrangement is not conditioned on referrals to the hospital; and (3) the physician is allowed to establish staff privileges at, and refer to, other facilities. 42 C.F.R. § 411.357(e); 69 Fed. Reg. 16139.

The following additional criteria must be met if the hospital pays recruitment assistance either to a physician group or to a physician who joins a physician group: (1) the written agreement must be signed by the party that receives the funding, such as the physician's professional corporation; (2) other than actual costs incurred by the physician or the group in recruiting the new physician, the hospital's payment must be passed through to the physician; (3) when the hospital gives an income guarantee, only the actual additional incremental cost attributable to the recruited physician may be allocated to that physician; (4) the group must maintain records of the actual costs and passed-through amounts for a period of at least 5 years, and make the records available to the Department of Health and Human Services upon request; (5) the payment from the hospital must not take into account directly or indirectly the volume or value of any actual or anticipated referrals by the recruited physician or the group; (6) the group may not impose additional practice restrictions on the recruited physician, other than conditions related to quality of care; and (7) the arrangement must not violate the federal anti-kickback statute or any other Federal or state law governing billing or claims submission. 42 C.F.R. § 411.357(e)(4); 69 Fed. Reg. 16139.

With regard to the prohibition against additional practice restrictions on the recruited physician, CMS states that noncompete agreements are among the prohibited practice conditions. 69 Fed. Reg. 16095-16096. This means that if the group enters into a noncompetition agreement with the recruited physician, then the hospital is prohibited from billing Medicare for any hospital outpatient and inpatient and other designated health services referred to the hospital by the recruited physician. Effectively, the hospital is prohibited from participating in physician recruitment when the physician group insists on entering into a noncompetition agreement with the recruited physician.

It is also important for physician groups to recognize that when the hospital provides an income guarantee for the recruited physician, the group may not allocate a share of existing overhead to the recruited physician.
Unfortunately, the new Stark rules do not make exception for arrangements entered into prior to July 26, 2004. Accordingly, if a hospital makes any recruitment payments or income guarantees after July 26, 2004, even under an agreement already in place prior to July 26, then the new Stark rules apply to that arrangement, including the new rules on noncompetition agreements and income guarantee accounting. These new physician recruitment rules do not impact the Stark exception for employed physicians.

In addition, the new Stark rules have defined when a physician is “relocating” to a community such that the hospital’s recruitment payment can be considered a recruitment payment. These new Stark rules on hospital payments for physician recruiting will have a significant impact on the ability of hospitals to participate in physician recruitment activities for medical staff physicians, and should motivate hospitals to examine their recruiting activities and recruitment contracting practices.

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