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Review Article

Changes Coming for Group Practices under the Stark Law Effective January 1, 2022 – Are you Ready?

Allison Ness, J.D.[1a], Elizabeth Kastner, J.D.[1b], Gary Herschman, J.D.[1c]

[1] Epstein, Becker, and Green, PC

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Now is the time for all orthopedic groups to review their physician profit sharing or productivity bonus arrangements if your practice is structured as a "group practice" under the Medicare Physician Self-Referral (the so called (Stark Law)) – due to the upcoming effective date of revisions and clarifications issued by the Centers for Medicare and Medicaid Services (CMS).

Now is the time for all orthopedic groups to review their physician profit sharing or productivity bonus arrangements if your practice is structured as a "group practice" under the Medicare Physician Self-Referral (the so called (Stark Law)) – due to the upcoming effective date of revisions and clarifications issued by the Centers for Medicare and Medicaid Services (CMS).

By way of background a "group practice" is a defined term under the regulations implementing the Stark Law – not every group of physicians is a Stark group practice. To qualify as a "group practice", the practice must satisfy various requirements relative to its organizational and operational structure, physician members, services, and how revenues are distributed. If a practice meets all such group

a Health care organizations value the enthusiasm and creative thinking of compliance and white-collar investigations attorney Allison Ness. She advises clients on a full range of health care-related civil, criminal, administrative, and regulatory matters. Clients rely on Allison for guidance on an array of health care compliance issues, including fraud and abuse laws, such as the Stark Law, Anti-Kickback Statute, and the False Claims Act; federal and state self-disclosures; and Medicare and Medicaid billing and regulatory issues. She also designs and implements client-specific compliance programs.

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Conflicts of Interest Statement for Ms. Ness

b Hospitals, hospices, and health plans turn to health care attorney Beth Kastner for advice on contractual arrangements as well as regulatory, operational, and compliance matters. She regularly advises clients on vendor/supply chain relationships, clinically integrated networks, and managed care contracting, including narrow networks, shared saving, and bundled payment models.

Beth also routinely advises clients on compliance with health information privacy laws and health care fraud and abuse laws, with a particular emphasis on structuring compliant physician compensation arrangements.

EKastner@EBGlaw.com

Visit Ms. Kastner's Professional Practice Site

Conflicts of Interest Statement for Ms. Kastner

c Gary Herschman is a healthcare M&A and regulatory attorney partner at Epstein, Becker & Green. Gary has been advising physicians, healthcare facilities and business on mergers, acquisitions, and other strategic transactions for over 25 years, and is known throughout the country as a top leader in healthcare consolidation deals. Gary also advises physicians and other healthcare clients on healthcare regulatory and compliance issues. Gary writes articles and is quoted on this topic in many national publications (including Bloomberg Health, Crain's, Becker's, Orthopedics Today, Journal of Orthopedic Innovation and Excellence, Fierce Healthcare and others), and is a frequent speaker at healthcare industry conferences across the country (including recent ICJR conferences). In particular, he advises hospitals, healthcare systems, physician groups, long-term care companies, ASCs, and healthcare technology companies on their most important and strategic transactions.

Visit the Epstein, Becker & Green Web Site

Visit Mr. Herschman's Bio

Connect with Mr. Herschman on LinkedIn

Conflicts of Interest Statement for Mr. Herschman

GHerschman@EBGlaw.com

practice requirements, it may pay physicians in the practice a productivity bonus or a profit share, subject to certain important conditions.

One of these conditions is that a profit sharing or productivity bonus is permissible *only if it is not directly related to the volume or value of the physician's referrals*. Further, a practice must be structured as such a "group practice" in order to pay compensation to physicians that includes profits from in-office ancillary services, such as imaging, physical therapy, DME, and lab tests. Thus, an important benefit of qualifying as a "group practice" is that the prohibition on referrals of designated health services ("DHS")[1] does not apply to services which constitute "in-office ancillary services" – a Stark law exception that is only available to "group practices."

In December of 2020, CMS issued a final rule changing various provisions of the regulations that interpret the Stark Law (the "Final Rule"), the majority of which became effective in 2021. *However, certain changes governing how group practices compensate their physicians will not be become effective until January 1, 2022.*

This article will discuss these upcoming changes impacting group practices – specifically the changes governing profit sharing and bonuses, and payments that relate to a physician's participation in a value-based arrangement.

1. CMS' REVISIONS AND CLARIFICATIONS TO PROFIT SHARING

CMS revised its definition of "overall profits" to help provide clarity. Overall profits means the profits derived from **all** the DHS (combined) of any component of a group that consists of at least five (5) physicians in a group. If there are fewer than five (5) physicians in a group, overall profits means the profits derived from all the DHS of the group. Overall profits must be divided in a reasonable and verifiable manner. CMS continues to offer three different methodologies that can be used in order for the compensation received by a physician to be deemed *not* to directly relate to the volume or value of referrals.

For consistency, CMS removed the word "Medicaid" from the definition of overall profits so that the methodology aligns with the definition of DHS, which only includes those specified services that are payable by Medicare.

2. CMS CLARIFIES THAT "PROFITS" DOES NOT MEAN REVENUE

CMS has repeated (and clarified) that profits does not mean revenue. In this regard, CMS noted in the Final Rule that "[*a*]*lthough it may be true that it is easier to calculate revenues than to calculate profits, in general, we believe that a group practice's distribution of revenues to a referring physician rather than profits, which are calculated by deducting the expenses incurred in furnishing the designated health service, could serve as an inducement to make additional and potentially inappropriate referrals to the group practice*."

Thus, groups must calculate actual profits generated from all of their DHS – not just DHS revenues – in establishing a distribution methodology that is compliant with the Stark law.

3. CMS CLARIFIES THAT "SPLIT POOLING" IS PROHIBITED

CMS became aware that group practices were distributing profits on a service-by-service basis separately for each DHS, which CMS had not intended to permit. In the Final Rule, CMS acknowledges that stakeholders may have interpreted overall profits to mean the group's entire profits from any one of the individual categories of DHS identified in the definition by conflating the definition within the context of overall profits. In the Final Rule, CMS clarified its position that distribution of profits from DHS on a service-by-service basis is prohibited – that is, separate calculations for each category of DHS (or so called "split pooling") is prohibited.

Therefore, effective January 1, 2022, all "overall profits" from DHS must all be aggregated together before the distribution, and cannot be distributed on a service-by-service basis. This means that either all DHS profits from the entire group, or the entire DHS profits from any subset (or "Pod") of the group that consists of at least five (5) physicians, must be aggregated prior to distribution.

For example, a group practice that provides both physical therapy services and diagnostic imaging cannot distribute profits from physical therapy to one subset of its physicians and profits from diagnostic imaging to another subset of its physicians. However, a group practice is not required to treat all subsets of at least five (5) physicians the same with respect to distribution, but it must treat all physicians within each subset equally. This does not prohibit a group practice from using eligibility standards for different subsets of physicians – such as based on length of time with the practice, whether a physician is an employee or contractor, or whether a physician is full-time or part-time.

In other words, while DHS profit distribution on a service-by-service basis is prohibited after January 1, 2022, a group practice can still use eligibility standards, and use different methodologies to distribute shares of all overall profits from all DHS to various subsets of at least five (5) physicians (e.g., it can distribute per-capita to Pod A, based on productivity to Pod B, and based on seniority to Pod C).

1 Designated Health Services (DHS) that are covered by the Stark Law and which some medical groups may provide through their practices include: radiology and certain imaging, radiation therapy, clinical laboratory, physical and occupational therapy, durable medical equipment ("DME"), prosthetics, orthotics and prosthetic devices, home health, and outpatient prescription drugs. 42 C.F.R. § 411.351.

By contrast, a group practice must utilize the same methodology for distributing overall DHS profits to every physician within the same subset of the group.

If a group practice continues to distribute DHS profits on a service-by-service basis, it will no longer qualify as a "group practice", which means that any referrals that previously may have been protected by the in-office ancillary exception, will no longer be protected and will be prohibited after January 1, 2022.

A group practice's compensation must be established prospectively. Therefore, if you have not reviewed your medical practice's compensation agreements, we strongly encourage that you to do so immediately so that you do not run the risk of falling outside of the soon to be effective updated definition of a "group practice".

4. PAYING PROFIT SHARES AND PRODUCTIVITY BONUSES TO PHYSICIANS PARTICIPATING IN A VALUE-BASED ENTERPRISE

The Final Rule also adds a new provision, effective January 1, 2022, to encourage physicians to participate in value-based enterprises ("VBE"). The rules for profit sharing and productivity bonuses paid to physicians in a group practice prohibit calculation methodologies that directly relate to the volume or value of the recipient physician's referrals to the group practice. To address concerns that this language would restrict group practices from allocating profits from alternative payment or other value-based care models, and to encourage participation in value-based care programs, CMS finalized its policy that physicians may receive profits from DHS that are directly attributable to a physician's participation in a VBE without violating the Stark Law.

For example, if there is a group practice that includes 100 physicians and only two (2) physicians are part of a VBE, those two physicians could receive profit distributions that are directly attributable to his or her participation in the VBE (and its corresponding participation in the model). And importantly, neither such distribution would jeopardize the group's ability to qualify as a group practice. Keep in mind, however, that this still only applies to "profits" from DHS, and does not allow distribution based on DHS "revenue".

CMS believes that the protections and safeguards related to value-based delivery programs and payments will ensure that distribution of profits to individual physicians within a group practice should not increase the risk of overutilization of DHS or program or patient abuse.

This article is for informational purposes only. It is not intended to be legal advice and does not create or imply an attorney-client relationship. The Stark law is very complicated and comprehensive, so it is important to obtain legal advice with respect to particular situations, facts and terms from a healthcare attorney who has extensive experience interpreting and providing advice on the Stark law.

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