



STARK AND ITS APPLICATION TO: PAY FOR PERFORMANCE

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Overview of Pay For Performance



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What Is “Pay for Performance”?

- Financial incentives for:
 - adhering to recommended tasks or processes
 - adopting desired tools or infrastructure, and
 - meeting or improving measured outcomes
- Sometimes includes cost savings or efficiency targets (aka “gainsharing”)



Dramatic Increase in Pay for Performance Payments

- The number of private programs is increasing exponentially.
- Bonuses for physicians in their office practices, and for hospitals.
- The November 2, 2006 issue of *The New England Journal of Medicine* reports that 52% of 252 HMOs in geographic areas with at least 100,000 residents enrolled in HMOs had pay for performance programs.
- Of these pay for performance plans, 90% were for physicians and 38% were for hospitals.



Medicare Demonstration Project with Premier

- 270 hospitals participating.
- Measures 34 selected processes of care and outcome measures for 5 common clinical conditions.
- Heart attack, coronary artery bypass, heart failure, hip and knee replacement, and pneumonia.
- Hospitals were given financial rewards for better outcomes.
- Outcomes improved.



Other Initiatives

- Medicare demonstration project for pay for performance/gainsharing (January 1, 2007 deadline).
- Hospitals are now reporting quality data to CMS.



Legal Issues In Pay For Performance



Physician Support

- Often, hospitals will need to enlist physician support to achieve the desired results and earn the pay for performance incentive payments.
 - It is hard to enlist physician support by simply coaxing, cajoling, scolding, etc.
 - This is especially so if you do not (or cannot) employ physicians.



Physician Support (cont'd)

- So, typically you want to pay them to help, and the most effective way is to share the incentive payments with them, since they helped you earn it.
- You need a program to share this revenue with physicians who worked to help you earn it.



Legal Issues

- So, what Legal Issues Do Pay for Performance Physician Payment Programs Raise?
 - Anti-Kickback Statute. Section 1128B(b) of the Social Security Act prohibits the knowing and willful payment of remuneration, directly or indirectly, to induce the referral of patients for federal health care program covered items or services.



Legal Issues (cont'd)

- Stark. Subject to certain exceptions, the federal physician self-referral statute, commonly known as “Stark,” prohibits physicians from referring Medicare patients for “designated health services” to any entity with which the physician has a financial relationship, and prohibits the entity from billing for services provided pursuant to a prohibited referral. (42 U.S.C. § 1395nn).



Legal Issues (cont'd)

- CMP Statute. Section 1128A(b) of the Social Security Act, enacted in 1986, permits imposition of Civil Money Penalties (“CMPs”) on any hospital that “knowingly makes a payment, directly or indirectly, to a physician as an inducement to reduce or limit services” to Medicare or Medicaid beneficiaries who are under physician’s direct care. Physicians are also subject to CMPs for knowingly accepting such payments.



Legal Issues (cont'd)

- State Laws. Many states have statutes similar to the Anti-Kickback Statute and Stark.
- Other Laws. For tax-exempt hospitals, the prohibitions on inurement and private benefit apply; also, there are risk management/malpractice liability issues; finally, antitrust/business tort issues could arise.



Applicable Stark Exceptions

- Selected Compensation Arrangement Exceptions:
 - Fair Market Value compensation arrangements/“Indirect” Compensation Arrangements/Personal Services Arrangements.
 - Written agreement for a term of at least one year, signed by the parties,
 - Services contracted for do not exceed what is reasonable and necessary for legitimate business purposes,



Selected Compensation Arrangement Exceptions (cont'd)

- Commercially reasonable compensation, set in advance, that does not vary with value or volume of referrals;
- Services furnished do not include counseling or promoting any activity that violates law and all services between parties are included in the agreement,



Selected Compensation Arrangement Exceptions (cont'd)

- Note: fee-for-service compensation is permissible if the per service payment amount (i.e., the rate of compensation) (1) is fair market value and (2) does not change over the course of the arrangement based on referrals.



Potentially Problematic Legal Issues

- Examples
 - Lab utilization
 - duplicate orders
 - unhappy patients
 - wasted resources
 - IV to oral meds post-ventilator
 - good clinical care
 - reduced risk of infection
 - reduce costs



How To Limit Legal Risk – Practical Tips



Practical Tips

- Start with sharing payments received from a payor or payors, not a “homemade” pay for performance initiative.
- Make the Pay for Performance Program Specific.
 - Exactly what outcomes are intended?
 - How much are they worth?
 - Fixed payments?
 - Percentage of hospital’s bonus.
 - Hybrid?
 - Determine fair market value.



Practical Tips (cont’d)

- Build in Safeguards
 - Consider limiting payments that can be earned to the number of patients that matches the prior year’s patient base for that physician or group, to prevent incentivizing additional referrals.
 - Consider limiting physician participation to existing medical staff members, to limit the risk of luring new physicians to the hospital.
 - Consider outside exception to oversee quality and determine fair market value.



Practical Tips (cont'd)

- Obtain an OIG Advisory Opinion?
 - Start without an opinion, but making payments contingent on a favorable opinion?
 - Try to obtain “initial reaction” from OIG?
 - Beware of delays in obtaining an opinion!

