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Physician Compensation and Compliance: More Than Just the Individual Components

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Compensation paid to physicians has been thrust into the spotlight as health care settlements continue to rise both in number and in settlement awards. This increased scrutiny on what physicians are paid has made all parties involved in the physician compensation contracting process wary. As a result, it is imperative to have appropriate protocols in place to ensure the necessary due diligence has been completed prior to executing any physician compensation agreements. Although the process may vary from organization to organization, there are certain elements that should not be neglected. This article is not designed to cover every element of the physician contracting process, but rather focus on key elements from both a valuator's and an attorney's perspective related to "stacked" physician compensation arrangements. Stacked arrangements are where a physician is paid for multiple types of services or receives multiple forms of compensation for the same services (e.g. a call stipend and work Relative Value Unit (wRVU) incentive credit).

Current Environment

The current health care environment has seen a surge in physician employment, new delivery models, payment reform, and regulatory scrutiny. Increased integration and financial relationships with physicians have created an opportunity for increased qui tam lawsuits. In addition, we have begun to see more focus on personal accountability which has been evident in recent court cases. As a result, the Justice Department has focused substantial time and resources in the health care sector. In Fiscal Year 2018, the Justice Department recovered over \$2.8 billion from False Claims Act cases of which \$2.5 billion were related to the health care industry.¹ In addition, according to the *Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2018*, "The return on investment (ROI) for the HCFAC program over the last three years (2016-2018) is \$4.00 returned for every \$1.00 expended."² With increased enforcement and disproportionate penalties, both facilities and physicians are at risk if caution is not taken when entering into agreements. As a result, physician compensation arrangements must be compliant with the Stark Law,³ the Anti-Kickback Statute (AKS),⁴ False Claims Act,⁵ and other regulations designed to prevent fraud and abuse. As part of meeting the Stark Law, physician compensation arrangements must be commercially reasonable⁶ and consistent with fair market value (FMV).⁷

A Valuator's Perspective

When analyzing a physician compensation package, it is imperative to understand each individual component, but also to analyze the compensation in total. For example, it is common for physicians to receive compensation for each of the types of services they provide. This may include clinical services, call coverage, administrative leadership services, advance practice clinician supervision, academic teaching and proctoring, and participation on committees, among others. Health care

organizations often compensate physicians pursuant to one or more of the following methodologies: base salary, hourly rate, stipend, compensation for activations, and/or performance-based incentives tied to quality, value, productivity, and leadership. A substantial amount of time is given to understanding the individual components, but often overlooked is whether the total compensation makes sense; does the work effort align with each component and can the total number of hours be reasonably worked. In addition, if each individual component is consistent with FMV, is anything else needed to confirm the total stacked compensation is as well? This is a significant issue that is often neglected and must be considered by legal counsel and the compliance team when analyzing complex compensation arrangements. To help ensure compliance of the physician arrangement, appropriate protocols and safeguards should be implemented and a documented process should always be followed.

An Attorneys Perspective

To bolster the case that stacked compensation meets regulatory considerations, organizations should be able to explain how the various individual components of compensation work together. For example, when evaluating stacked compensation that includes clinic coverage compensation and call coverage compensation, some important considerations might include: (1) whether the physician will be paid for call coverage while performing their clinic work; (2) how frequently clinic coverage and call coverage occur on the same day; and (3) how other individuals (frequently advanced practice providers) factor into the physician's clinic coverage and call coverage responsibilities. Thorough understanding and explanations by organizations as to how the various components of compensation work together allows valuation consultants and attorneys to create documentation that better supports the arrangement.

Additionally, in assessing whether stacked compensation is appropriate for an individual physician, the organization should consider how the individual physician's stacked compensation arrangement supports organizational goals. Items to consider may include: (1) how a stacked compensation arrangement may impact the quality of care provided by the physician under a taxing work schedule; (2) whether the physician has unique qualifications that make the physician the most appropriate person to provide the various services; and (3) how much alternatives to the individual physician providing the services would cost the organization. Oftentimes, as the number of components to an individual physician's compensation methodology increases, the risk the arrangement poses for the organization also increases. As such, careful consideration of stacked compensation is critical.

Process for Supporting Compliant Physician Compensation Arrangements

When establishing a physician compensation, one should focus on the following to ensure the arrangements are compliant:

1. Create written policies and protocols for physician contracting.
 - Risk tolerance will need to be established and appropriate thresholds should be implemented. Consistency is crucial. The organization should document when and why deviations occur.
 - Compensation should not be tied to anticipated or actual referrals. This is important when establishing compensation or when setting mechanisms to drive compensation.
 - Carefully construct alternative payment models as these are often tied to other (non-physician) income streams.
2. Educate the team responsible for administering physician compensation on FMV, commercial reasonableness, and written policies and protocols that are in place.
3. Create a compliance checklist and a centralized approval process.

4. Determine if the arrangement is commercially reasonable and establish when/if an independent third party should assist with this process.

- The arrangement must make business sense even absent the consideration for referrals. This is the “why” of the arrangement.
- Document non-referral business rationale supporting compensation arrangements.

5. Determine if the compensation is consistent with FMV and establish when/if an independent third party should assist with this process.

6. Obtain legal counsel review of the arrangement to ensure it complies with health care laws and regulations and is not based on the volume or value of the physician’s referrals.

- Arrangements and their corresponding supporting documentation should always be reviewed by counsel.

7. Routinely audit arrangements and establish a monitoring program to ensure policies and processes are followed, services are provided, and compensation is paid accordingly.

8. Analyze arrangements annually to verify the need for the services still exists.

Questions to Consider When Reviewing Stacked Physician Compensation

1. Are the proposed hours reasonable and consistent with the market? Can the proposed hours be worked without adversely affecting quality or expected productivity?
2. Are each of the services separate and distinct without overlapping duties or hours? If compensation is paid via hourly rates, are the items being tracked/documented?
3. Are the benefits and paid time off (PTO) package consistent throughout the organization and in line with the market?
4. Have one-time payments such as retention, relocation, student loan repayments, etc. been considered when analyzing the total compensation package?
5. Has the compensation package been analyzed with reasonability tests based on various levels of productivity?
6. How does the physician's compensation package compare to the market survey data and to what other physicians in the same specialty receive in the local market?
7. Does the physician receive multiple income streams during the same hours worked? For example, a minimum number of hours are required for physicians receiving base salaries. In essence, this time has already been paid for.

Stacking Example

To help illustrate the concept of stacking, let us look at a real example of a neurosurgeon employed by a large health system:

Example: Highly Productive Neurosurgeon			
Compensation Component	Notes	Compensation	Estimated Annual Hours
Annual Base Guarantee	Base Guarantee or \$65 per WRVU	\$1,100,000	2,080
Quality Incentive	Outcome based metrics	\$50,000	n/a
Medical Director	\$250 per hour up to 250 hours per year	\$62,500	250
Call Coverage Compensation (1:5 Rotation)	Required to provide five (5) days per month uncompensated. Paid \$1,000 per 24 hour shift after day five (5). Physician provides two (2) additional days per month.	\$24,000	576
Total		\$1,236,500	2,906

WRVU = Work relative value units (a method for calculating the volume of work or efforts expended)

On paper, the hours and total compensation seem to be high. However, when reviewing the details of the arrangement, the total compensation may be reasonable for the actual services provided. What the chart does not show is that the physician currently produces above the 90th percentile of market surveys with top decile quality. Additionally, if the health system is able to confirm that each of the various components of compensation are for additional incremental work effort (the physician is not being paid for medical director time when they are performing clinical services under the annual base guarantee), then the compensation may be consistent with FMV and commercially reasonable, despite the stacked nature of the compensation.

When analyzing a high dollar arrangement, it is imperative that productivity metrics are benchmarked to the market surveys to confirm that compensation is reasonably aligned. Often an FMV assessment on high dollar stacking arrangements may be beneficial to provide independent support for a stacked compensation arrangement.

Conclusion

As there continues to be an increase in regulatory scrutiny and massive settlements, physician compensation compliance must be a focus for all organizations. Creating a robust compliance plan and ensuring consistency with the contracting process is required. In addition, it is crucial that all physician compensation arrangements are consistent with FMV and commercially reasonable both individually and in aggregate. While much of the current focus is on analyzing each component of a physician's agreement, it remains important to assess the aggregate compensation for the physician and ask the appropriate questions. By doing so, hospitals and health systems can mitigate risk and potentially avoid overpayments while ensuring regulatory compliance.

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¹ *The Department of Justice Office of Public Affairs* (Dec. 21, 2018).

² *The Department of Health and Human Services and The Department of Justice Health Care Fraud and Abuse Control Program Annual Report for Fiscal Year 2018* (May 2019).

³ 42 U.S.C §§ 1395nn.

⁴ 42 U.S.C §§ 1320a-7b(b).

⁵ 31 U.S.C. §§ 3729–3733.

⁶ 69 Fed. Reg. 16093 (Mar. 26, 2004).

⁷ 42 CFR § 411.351.