

Stark Regulations Spell Big Change For Recruitment

By Maureen Dunn McGlynn

For years, the Stark Law has imposed regulations that govern how physician recruitment must be conducted and the conditions under which recruiting incentives may be offered. Phase III of the Stark regulations recently took effect on Dec. 4, 2007, and with it came some major changes and clarifications regarding physician recruitment.

Background

The Stark III regulations, officially titled, "Medicare Program; Physicians' Referrals to Health Care Entities With Which They Have Financial Relationships (Phase III)," is the third phase of final rulemaking that amends the regulations regarding the physician self-referral prohibition in Section 1877 of the Social Security Act (the Stark Law).

The Stark Law prohibits a physician from making referrals of designated health services to any entity with which the physician or the physician's family member has a financial relationship — unless an exception applies.

Physician recruitment

One of the exceptions in the Stark Law involves remuneration provided by a hospital to a physician to induce the physician to relocate to the geographical area served by the hospital in order to be a member of the hospital's medical staff.

This is referred to as the Physician Recruitment Exception (the Exception). Generally, the Exception is applied to arrangements where the recruited physician will either practice on his own or as part of a physician practice.

To qualify for the protection of the Physician Recruitment Exception, the following requirements must be met:

- The physician must not be required to refer patients to the hospital;
- The amount of remuneration under the arrangement cannot be determined in a manner that takes into account the volume or value of any referrals by the referring physician;
- The recruitment arrangement and its terms must be in writing and signed by both parties;
- The physician cannot be precluded from establishing staff privileges at another hospital or referring to another.

Practice restrictions

Prior to Stark III, the Physician Recruitment Exception provided that a physician practice could only impose practice restrictions on the recruited physician related to quality of care.

Stark III clarifies that only restrictions placed on the recruited physician by a physician practice that would have a substantial effect on the recruited physician's ability to remain and practice medicine in the hospital's geographic service area after leaving the physician or group practice, would be precluded.

In the commentary to Stark III, the Centers for Medicare and Medicaid Services (CMS) gave the

following examples of permissible restrictions:

- Restrictions on moonlighting;
- Prohibitions on soliciting patients and/or employees of the physician practice;
- Requiring that a recruited physician not use confidential or proprietary infor-

mation of the physician practice;

- Requiring the recruited physician to repay losses of his or her practice that are absorbed by the physician practice in excess of any hospital recruitment payments;

- Requiring the recruited physician to pay a predetermined amount of reasonable damages (that is, liquidated damages) if the physician leaves the physician practice and remains in the community;

- Limited and reasonable non-compete provisions that comply with applicable state and local law.

Although it is not clear what constitutes a reasonable restriction, Stark III should have a positive effect on hospitals recruiting physicians.

Income guarantees

Stark III permits a hospital to offer a more generous income guarantee to a physician who is recruited to a rural area or health-professional-shortage area to replace a physician who retired, relocated, or died in the last 12 months.

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In those situations, a physician practice may, for purposes of an income guarantee, allocate to the recruited physician a per capita allocation of the practice's aggregate overhead and other expenses, not to exceed 20 percent of the practice's aggregate costs. In the alternative, the practice may allocate the actual additional incremental costs attributable to the recruited physician. In all other cases, the group may allocate to the recruited physician only the actual additional incremental expenses attributable to the recruited physician.

CMS also clarifies that the reference to an "income guarantee" includes gross income, net income, revenues, or some variation.

Relocation of practice

Stark III also clarifies that to meet the Physician Recruitment Exception, a physician must relocate his practice from outside the geographic service area to a location inside the service area and either: (1) move his medical practice at least 25 miles; or (2) have a new medical practice that derives at least 75 percent of its revenue from professional services furnished to patients (including hospital inpatients) not seen or treated by the physician at his prior medical practice site during the preceding three years.

It is not sufficient for the physician to relocate his practice within the geographic service area, even when applying the

above 75 percent test.

Stark III provides that the relocation requirement does not have to be met if, for at least two years immediately prior to the recruitment agreement, the recruited physician was employed on a full-time basis by one of the following:

- A federal or state bureau of prisons to serve exclusively a prison population

- The Department of Defense or Department of Veterans Affairs to serve active or veteran military personnel and their families

- A facility of the Indian Health Service to serve patients who receive medical care exclusively through the Indian Health Service.

CMS also modified the exception to provide that the relocation requirement would not have to be met if the Secretary of the U.S. Department of Health and Human Services has deemed in an advisory opinion that the physician does not have an established medical practice that serves or could serve a significant number of patients who are or could become patients of the recruiting hospital.

Geographic area

Stark III clarifies the definition of a hospital's "geographic area" to expand the sites to which a physician may be recruited. Under Phase III, a hospital's geographic area may include one or more zip codes from which the hospital draws no inpatients if such "no-patient" areas are surrounded by the zip codes from which the hospital draws 75 percent of its inpatients. If fewer than 75 percent of inpatients are drawn from contiguous zip codes, the physician can relocate to any contiguous zip code from which a hospital draws inpatients.

With respect to a hospital location in a rural area, the geographic area served by the hospital may be the area composed of the lowest number of contiguous zip codes from which the hospital draws at least 90 percent of its inpatients. If the hospital draws fewer than 90 percent of its inpatients from all of the contiguous zip codes from which it draws inpatients, the geographic area served by the hospital may include noncontiguous zip codes.

Conclusion

Stark III makes important changes to the rules governing physician recruitment. Health-care organizations should review physician recruitment and retention agreements to ensure they are compliant with all applicable Phase III changes to avoid offering recruitment packages that could lead to prohibited referrals and resultant sanctions. □

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