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Recent Stark Law Changes May Impact Physician Compensation Models

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On December 2, 2020, the Centers for Medicare and Medicaid Services ("CMS") finalized sweeping changes to the federal Physician Self-Referral Law, commonly known as the Stark Law. Many of the changes reflect CMS' intent to allow greater flexibility to address certain value-based compensation arrangements. However, at least one change may materially impact how physician group practices allocate profits from Stark Law designated health services ("DHS").

By way of background, the Stark Law prohibits a physician owner or physician employee of a medical practice from ordering DHS from the medical practice paid by Medicare or Medicaid, unless a Stark Law exception applies. DHS includes, among other items, clinical laboratory services, physical, occupational and speech therapy, certain imaging services, radiation therapy, durable medical equipment, and outpatient prescription drugs. Under the Stark Law, a medical practice with at least two physicians must qualify as a "group practice" in order to take advantage of the Stark Law in-office ancillary services exception, which is the exception often used to allow a physician owner or physician employee to order DHS from his or her own medical practice. As part of the group practice requirements, DHS profits must be distributed to all physicians in the group, or to a pool of five or more physicians in the group, in a manner that does not directly take into account the volume or value of a physician's referrals for DHS.

Currently, many physician group practices, especially large or multi-specialty practices, allocate DHS profits to its physicians based on DHS categories. For example, profits from one DHS category (*e.g.*,

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imaging services) may be allocated to certain physicians in the group practice while profits from a second DHS category (*e.g.*, physical therapy) may be allocated to a different (or possibly overlapping) subset of physicians in the group practice. Methodologies for allocating DHS profits to the physicians sometimes also vary based on DHS categories, with for example, the allocation of DHS profits from imaging services divided equally among all participating physicians and the allocation of DHS profits from physical therapy services divided based on each participating physician's non-DHS revenue distribution percentage.

However, under the new Stark Law rules, CMS has clarified that DHS profits can no longer be allocated based on DHS category. In its discussion accompanying the rule clarification, CMS states that it did not intend for DHS profits to be distributed on a service-by-service basis. Instead, profits from all DHS categories for all physicians in the group practice (or a component of at least five physicians in the group practice) must be aggregated and then distributed to all physicians in the group practice (or a component of at least five physicians in the group practice) in a manner that does not directly take into account the volume or value of referrals. Using the example stated above, under this new clarification DHS profits from both imaging services and physical therapy services ordered by physicians in the group practice (or a component of at least five physicians in the group practice) must be aggregated and then the total aggregated profits distributed to such physicians in a manner that does not take into account the volume or value of referrals.

Further, CMS states that the Stark Law does not require distribution by the group practice of DHS profits. However, if a group practice elects to distribute DHS profits, it must first aggregate all DHS profits from all physicians in the group practice or a component of at least five physicians in the group practice. Once aggregated, the group can choose to retain some of the aggregated profits or distribute all the aggregated profits to its physicians. The group practice cannot, however, decide to keep all profits from one DHS category and only aggregate and distribute profits from another DHS category.

CMS also clarified that if a physician practice has more than one pool of five physicians, each pool does not have to be treated in an identical manner. For example, DHS profits from one pool may be distributed in its entirety and DHS profits from another pool may be distributed only in part (with the group practice retaining the remainder). Nonetheless, each pool can only use one methodology for distribution purposes. However, one pool may utilize one distribution methodology and a second pool may utilize another distribution methodology, as long as the methodologies used are Stark Law compliant (*i.e.*, not based on the volume or value of referrals).

CMS recognizes that its prior regulatory guidance on the distribution of DHS profits has led to confusion by industry participants. While the other recent changes to the Stark Law take effect on January 19, 2021, the changes with regard to the distribution of DHS profits take effect on January 1, 2022 in order to allow physician practices ample time to alter their compensation methodologies.

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