

Risk Mitigation ROI

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Failure to structure physician contracts to comply with Stark and Anti-Kickback Statutes can easily result in seven-digit fines and repayments. Such violations can also adversely affect the status of tax-exempt entities. If you have not done so recently, now is time to audit your physician contracts to ensure compliance.

Stark and Anti-Kickback Statutes.

1. Ethics in Patient Referrals Act (“Stark”). Under Stark, if a physician or a member of the physician’s family has a contract or other financial relationship with a hospital or other health care provider, the physician may not refer patients to the provider for certain designated health services payable by Medicare, and the provider may not bill Medicare for such services, unless the arrangement is structured to fit within a regulatory safe harbor. Stark is a strict liability statute: even technical violations require repayments. It is therefore imperative to structure and maintain contracts consistent with a regulatory safe harbor.

2. Anti-Kickback Statute. The Anti-Kickback Statute (“AKS”) prohibits anyone from knowingly and willfully soliciting, offering, receiving, or paying any form of remuneration to induce referrals for items or services payable by government health care programs unless the transaction is structure to fit within a regulatory exception. The statute is violated if one purpose of a contract or other transaction is to induce referrals unless the transaction satisfies a regulatory exception.

Penalties for Noncompliance. Violation of the AKS is a felony punishable by a \$25,000 fine and up to five years in prison. Stark violations may result in a \$15,000 penalty per improper referral. Providers who bill for services in violation of Stark or the AKS must repay payments received from government programs. In addition, Stark and AKS violations often result in False Claims Act violations, exposing providers to additional penalties of up to \$11,000 per improper claim, treble damages, and potential qui tam lawsuits by disgruntled employees, competitors, or others who learn of the violations.

Top Issues for Physician Contracts. Given the massive exposure for even technical violations, it is critical to structure contracts appropriately at the outset and monitor continued compliance thereafter. Here are my top 10 regulatory issues to address when preparing or auditing physician contracts:

1. Have a signed, written contract. Stark and the AKS require signed, written agreements for independent contractor arrangements. Employment contracts need not be written, but it is generally a good idea to reduce them to writing to avoid disputes. Ensure both parties sign the contract before the services are performed or compensation paid.



2. Ensure the contract is current. Contract performance may morph over time. Ensure the contract is current and accurately documents the parties' performance. In *Kosenske v. Carlisle HCA* (3d Cir. 2009), a hospital faced millions of dollars in penalties because the parties expanded the physicians' services without amending or executing a new agreement. Do not continue performing after the contract has expired unless you fit within a different exception. Avoid unnoticed or unintended lapses in the contract by including automatic renewals subject to appropriate termination clauses.

3. Specify the services and compensation in the contract. The services performed and compensation paid must be stated in the contract. Do not pay or provide additional compensation, benefits or perks not specified in the contract (e.g., insurance, bonuses, side payments, free items or services, etc.) unless expressly permitted by a separate Stark or AKS exception.

4. Set compensation in advance. Stark and the AKS require that an independent contractor's compensation, or an objectively verifiable compensation formula, be set in advance. Doing so may also avoid problems in an employment contract. Do not change an independent contractor's compensation retroactively.

5. Beware changes to compensation within the first year. Stark and the AKS generally prohibit changes to terms that impact an independent contractor's compensation during the first year. If you terminate an independent contractor arrangement within the first year, you generally cannot enter a new contract with the same physician or provider for similar services during the original one year period. These limits do not apply to employment contracts.

6. Pay fair market value. This is the single most important factor in evaluating a physician contract. The compensation must be appropriate to the services rendered. In *Drakeford v. Toumey Healthcare* (D. S.C. 2010), a hospital was ordered to repay \$45 million due to Stark violations, and faces an additional \$200 million in False Claims Act penalties because the court found that its contracts with 18 physicians exceeded fair market value. When calculating fair market value, include all compensation paid to the physician, including insurance, benefits, and other perks. Providers are usually safe if the compensation is in the 50% to 75% range of relevant MGMA compensation surveys; however, differences in geographic location, specialty, services provided, productivity, hours worked, and similar factors affect fair market value. Parties often overestimate fair market value at the outset of a contract: actual productivity may not justify the compensation promised. Incorporating an appropriate productivity-based compensation formula can reduce the regulatory risk and ensure the long-term viability of the arrangement.

7. Do not pay based on referrals. Physicians may be paid a set salary or a fee per hour or service. They may be paid based on services they personally perform (e.g., per RVU, billings, receipts, encounter, etc.). They cannot be paid for referrals for items or services performed by others, including ancillary services referred by the physician. Outside of a qualifying group practice, contracted physicians generally cannot be paid according to the overall profitability of a facility, department, or cost center. Stark contains a limited exception that allows providers to condition



compensation on a physician's referrals for services directly related to the physician's services if certain safeguards are met, but such a condition may not satisfy the AKS.

8. Ensure the agreement is commercially reasonable absent referrals. Only contract and pay for legitimate, needed services. Do not contract for unnecessary services or services that exceed those that are reasonable and necessary for legitimate business reasons apart from referrals. This was an additional basis for the \$45 million verdict in *Drakeford v. Tuomey Healthcare*.

9. Comply with the contract. Perform the services required by the contract and pay according to services actually performed. Document performance through reports, time cards, or similar methods. Parties may become lax, modify their performance, or change the compensation without properly amending the contract, all of which can affect fair market value and result in Stark and AKS violations. In *U.S. v. Campbell* (D. N.J. 2011), a hospital violated Stark because the physician failed to perform the services for which he was paid. In *U.S. v. Anderson* (D. Kan. 1998), facility administrators and physicians were convicted of AKS violations and served prison time for the same reasons.

10. Remember contracts with family members. Stark also applies to financial relationships between a provider and family members of referring physicians, including spouses, children, and parents. Agreements with family members must also satisfy the foregoing requirements. Stark generally prohibits referrals between spouses for designated health services unless certain conditions are satisfied.

If Your Contract Violates Stark or the AKS.... If you discover that your physician contract fails to comply with Stark and AKS requirements, simply correcting the contract going forward is not enough. If a physician has been overpaid, the period of non-compliance under Stark is deemed to continue until the physician returns the amount overpaid. If you have received government payments for services referred by the physician, you likely have an affirmative obligation to report and repay those payments by the later of 60 days after discovery or the date your corresponding cost report is due. The knowing failure to timely report and repay overpayments is a violation of the False Claims Act and the Civil Monetary Penalties Law, subjecting the parties to additional fines and qui tam lawsuits in addition to repayments. Significantly, many of the recent enforcement actions have resulted from complaints filed by physicians who were excluded from beneficial transactions. If you think you have a problem, it may be wise to contact a qualified health care attorney to help you resolve the issues.

Conclusion. Given the huge exposure for non-compliance, it is far better to practice preventative medicine by ensuring that your physician contracts comply with Stark and the AKS at the outset and throughout the relationship.



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CONTRACTS MANAGEMENT FOR HEALTHCARE

1. 42 U.S.C. § 1395nn; 42 CFR § 411.350 et seq.
2. Designated health services covered by Stark include inpatient and outpatient hospital services; outpatient prescription drugs; clinical laboratory services; physical therapy, occupational therapy, or speech-language pathology services; radiology and certain other imaging services; radiation therapy and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment and supplies; and prosthetics, orthotics and prosthetic devices and supplies.
3. 42 U.S.C. § 1320a-7b(b); 42 C.F.R. § 1001.952.
4. 42 U.S.C. § 411.354(d)(4).