

# **Employment and Service Contracting: Doing the Dance in a Highly- Regulated Environment**

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## Laws and Regulations

- Stark Law
- Anti-Kickback Statute
- Civil Monetary Penalties
- Anti-Markup Rule
- Tax Exempt Organizations
- Medical Staff Bylaws
- Drug Enforcement Agency (DEA)
- OK Bureau Narcotics and Dangerous Drugs (OBND)



## STARK LAW

- 42 U.S.C. § 1395nn, definitions at 42 C.F.R. § 411.351
- Prohibits a physician from referring to an entity for designated health services (DHS) payable by CMS when physician or immediate family member has a financial relationship with entity, UNLESS EXCEPTION APPLIES.
- STRICT LIABILITY STATUTE- if Stark applies & you do not comply exactly with an exception= VIOLATION
- Intent does not matter



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## STARK LAW

### DHS Includes:

1. Clinical Laboratory Services
2. Physical Therapy
3. Occupation Therapy
4. Outpatient Speech Language Pathology Services
5. Radiology Services, including MRI, CAT, and ultrasound
6. Radiation Therapy Services and Supplies
7. Durable Medical Equipment and Supplies
8. Parenteral and Enteral Nutrients, Equipment & Supplies
9. Prosthetics, Orthotics, and Prosthetic Devices & Supplies
10. Home Health Services
11. Outpatient Prescription Drugs
12. Inpatient and Outpatient Hospital Services



## STARK- Employment Exception

- 42 CFR §411.357(c)
- Any amount paid by an employer to a physician who has a bona fide employment relationship with employer will not constitute a financial relationship as long as the following conditions are met:
  - Employment must be for identifiable services
  - Compensation must be consistent with fair market value and not determined in a manner that directly or indirectly takes into account the volume or value of the physician referrals
  - Agreement would be commercially reasonable even if there were no referrals



## STARK LAW

Bottom Line: almost every relationship a health lawyer is asked to evaluate or structure for physicians, groups, or health systems will involve DHS referrals and financial relationships- Get a good lawyer!



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## Anti-Kickback Statute (AKS)

- 42 U.S.C. 1320a-7b
- Anyone who knowingly or willingly pays or receives anything of value in order to influence referrals is guilty of a violation of the AKS.
- Requires Proof of Unlawful Intent (unlike Stark)
- Is Applicable to ANY PERSON not just physicians (unlike Stark)
- A criminal violation of the AKS may be punished by up to 5 years in prison and/or a fine up to \$25K
- Even if a violation can't be proven beyond a reasonable doubt for purposes of a criminal conviction, a violator can still be subject to Civil Monetary Penalties or exclusions from participation in government healthcare programs (e.g. Medicare and Medicaid).





## AKS- Employment Safe Harbor

- 42 C.F.R. §1001.952(i). 42 U.S.C. 1320a-7b(b)(3)(B).
- Under the employee Safe Harbor:
  - Remuneration doesn't include any amount paid by an employer to an employee, who has a bona fide employment relationship with the employer, for employment in the furnishing of any item or service for which payment may be made in whole or part under Medicare, Medicaid, or other Federal HealthCare Program.



## AKS- Personal Services and Management Contracts Safe Harbor

- Under this Safe Harbor, remuneration doesn't include any payment made by a principal to an agent as compensation for the services of an agent, as long as the following are met:
  - Agreement in writing, Signed by parties
  - Agreement covers and specifies all of services to be provided for the term of the agreement
  - If not a full time service contract- Agreement must specify exactly the schedule of intervals, precise length, and exact charge for intervals of time.
  - Term is at least 1 year
  - Compensation is set in advance, consistent with fair market value in an arm's length transaction, and is not determined in any manner that takes into account the volume or value of referrals.
  - Services performed do not involve counseling or promotion of a business arrangement that violates state or federal law
  - Services contracted for do not exceed those that are reasonably necessary to accomplish the commercially reasonable business purpose.



## Civil Monetary Penalties (CMPs)

- US Dept of Health and Human Services (HHS) has the authority to seek CMPs for a array of conduct. CMPs may be assessed against person and organizations that knowingly make payments to physicians to reduce or limit items or services provided to Medicare and Medicaid beneficiaries under the physician's direct care.
- 42 U.S.C. §1320a-7a



## Anti-Markup Rule

- Limits the ability of physicians to purchase certain diagnostic tests performed by other physicians with whom they do not share a practice and to bill for professional component (PC) or technical component (TC) of those tests at a higher rate than the physician paid for such tests.
- A physician is deemed to be sharing a practice with the billing physician if the physician "is an owner, employee, or independent contractor of the billing physicians or other supplier and the TC or PC is performed in the office of the billing physician or other supplier.
- If anti-markup rule applies, then the billing physician must be paid the lesser of the performing physician's actual charge, the billing physician's actual charge, or the applicable fee schedule amount.
- 42 C.F.R. §414.50(a)



## Tax-Exempt Organizations

- Tax Exempt hospitals have additional responsibilities with respect to maintenance of their tax exempt status.
- Hospitals must ensure that no part of its net earnings inure the benefit of any private individual or shareholder.
- Hospital should demonstrate a community need for physicians in a particular specialty.
- Compensation must be reasonable and otherwise in compliance with the rules applicable to tax-exempt organizations.
- Arrangement should be approved by hospital's governing board.



## Medical Staff Bylaws, Rules, Regs

- Dictate your behavior in the hospital
- Find out what they say before you sign your contract
- Do NPs, PAs utilize same Bylaws as physicians?
- What is the discipline procedure for Medical Staff?
- Do I have to maintain active status in my contract?
- What do they say about call coverage? Different than my contract?



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## DEA and OBND

- Have to follow regulations to maintain license
- Most contracts say “shall be registered with the DEA” and the narcotics control agency in your state.
- You will need to provide proof
- Who pays to maintain your DEA license according to your contract?



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# NOW WHAT- CONTRACT CHECKLIST

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## Contract Checklist

- Party LEGAL Names and Addresses
- Effective Date
- Commencement Date of Services if Different than Effective Date
- Description of Duties and Services (including any conditions to the commencement/continuation of services such as maintaining licensure, medical staff membership, etc.)
- Compensation
- Term and Termination (Include renewals)
- Insurance (who has tail)
- Restrictive Covenants (non compete, non solicitation)
- Confidentiality (HIPAA, state privacy)
- Medical Records
- Dispute Resolution
- Assignment
- Access to books and records
- Employee benefits
- Consideration from admission as an owner
- Assignment of government incentive payments
- ACO Provisions
- Jurisdiction and Venue



## Compensation

- Specify both the AMOUNT and TIMING of Compensation. Be clear and precise.
- Confirm payroll policies (bi-weekly, monthly, etc.)
- Annual compensation increases should be included and set out in detail
- Is a portion of comp based on productivity. If so, spell it out in the agreement. Is formula based on RVUs, billings, collections, etc.?



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## Incentive Comp

- Specify the Incentive Compensation, when it will be paid, and how. (Paid by a specific date in a lump sum?)
- If Bonus Calculation is based on collections, if you are terminated or at the end of your contract year, you get credited for collections received during a specified number of months after termination of your employment?
- If based on collections, are patients scheduled equitably so employer doesn't schedule based on procedures, payor mix, etc?
- How often do you get to see your billings generated?



## Fringe Benefits

- Vacation?
- CME?
- Expense reimbursement (cell phone, pager, fees, dues, journals)
- Health, Dental, Life, Disability, Malpractice Insurance
- Moving expenses
- Maternity Leave
- Retirement Plans



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## Malpractice Insurance

- Claims Based?- provides coverage for a claim that is brought within the policy period, no matter when the loss occurred. (Example- you are covered through 2016, but terminated December 31, 2016. On January 1- you aren't covered. In February 2017, you are sued for malpractice based on act that occurred in July 2016. Because claim is brought after policy terminated you aren't covered UNLESS YOU HAVE TAIL coverage.
- Occurrence-Based?- an occurrence based policy provides insurance coverage for a loss that occurred during the policy period, no matter when the claim is brought against the insured.
- Who is paying for Tail coverage after you leave if on claims based?



## Duties and Work Schedule

- Agreement should have:
  - Job Description
  - Projected Hours (Mon-Fri 8-5pm, 7p-7a)
  - Location in which you are expected to practice
    - Agreement should specify offices at which you will practice and when
    - Do they need your consent to move you? (this could effect a restrictive covenant)
  - What specialty?
  - What hospitals will you need to maintain staff privileges at?
  - On-call obligations (check Medical Staff Bylaws, Rules, and Regulations, as well as Department Regs).
    - What happens if you exceed the obligations?



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## Termination

- Is Employment at will (depends on state)- What does agreement say
- Can it be terminated by either party without notice for any reason?
- Agreement should contain notification requirements for termination
- Termination without cause should be mutual and should require written notice
- Events that allow the employer to terminate should be set forth in the agreement
- Are you given the opportunity to cure?



## Ownership Opportunities

- Do you expect to purchase an ownership interest?
- Agreement should set forth:
  - When you can buy in
  - What shareholder status includes
  - Valuation of the ownership interest
  - How you will pay for your share.



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## Moonlighting

- Do you plan to work elsewhere?
- If Yes:
  - Agreement should state that outside professional activities are permitted and
  - You can retain the income from such activities
- Common things:
  - Teaching, speaking, writing, testifying (do you need clearance from somebody to testify).



## Restrictive Covenants

- Are they permitted in your state?
- Is there a Post-Termination Restrictive Covenant
  - Non-Compete
  - Non-Solicitation
- What Geographic Area (remember from previous slide-What practice locations)
  - What is the radius?
  - Limit radius to where you saw patients, not all locations of hospital/group practice
- How long will they last?
- Do you want to carve out certain patient and referral relationships developed from a prior employment?
- Do you want a liquidated damages provisions-where you determine in advance what the damages are if you violate the restrictive covenant?
- Is the Restrictive Covenant applicable if your employment is terminated with or without cause?
  - Should be inapplicable if you are terminated without cause



## Promissory Notes

- Did they pay for education expenses?
- Did they pay for moving allowances?
- Is there a loan to you?
- What is the amount?
- When is any obligation to pay back waived?
- If you terminate your contract how much will you owe?
- If they terminate your contract do you owe?



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- KNOW what you are signing
- Get a healthcare lawyer- not your divorce attorney
- You are legally bound

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