External Expertise in Physician Compensation: A Smart Investment

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Summary

- As of 2024, 77.6% of all physicians were employed by a hospital, health system, or other corporate entity.
- These employers face intense regulatory scrutiny from CMS and the HHS OIG and must comply with federal (and often state) fraud and abuse laws, namely AKS and Stark.
- Understanding current physician alignment trends and when to bring in outside legal counsel or valuation firms to assist with assessing physician compensation arrangements to ensure regulatory compliance is essential.

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In response to the advent and emergence of accountable care and value-based reimbursement (VBR) models, which rely on achieving better outcomes at lower cost, hospitals have increasingly sought closer relationships with physicians, including direct employment, contracting, co-management, and joint ventures. At the same time, physicians have experienced increasing administrative burden and financial strain, pushing many to sell their medical practices and become hospital employees.

Consequently, there has been a steady shift away from independent physician practice owners and partners. [1] As of 2024, 77.6% of all physicians were employed by a hospital, health system, or other corporate entity. [2] These employers—hospitals in particular—face intense regulatory scrutiny from the Centers for Medicare & Medicaid Services (CMS) and the Office of Inspector General (OIG) of the Department of Health and Human Services (HHS) and must comply with federal (and often state) fraud and abuse laws, namely the Anti-Kickback Statute [3] and the Physician Self-Referral Law, or Stark Law. [4] Understanding current physician alignment trends and when to bring in outside legal counsel or valuation firms to assist with assessing physician compensation arrangements to ensure regulatory compliance is essential.

The Law: Anti-Kickback Statute and Physician Self-Referral Law

In certain industries, offering rewards for business referrals is a common and accepted practice. However, in the healthcare industry, providing payment in exchange for referrals can result in large fines and even jail time.

The Anti-Kickback Statute is a federal criminal law that applies to all entities and individuals participating in federal healthcare programs. [5] It prohibits entities and individuals from making a willful and knowing payment of remuneration or rewarding anything of value—including position, property, privileges, or free services—in exchange for patient referrals for services covered by a federal healthcare program. [6] Intent of an illegal inducement is necessary to establish liability under the Anti-Kickback Statute, [7] but if one purpose of remuneration under the arrangement is to encourage referrals—even if there are other, legitimate purposes to the arrangement—the arrangement still violates the law. The government is not required to prove that patients were harmed or that the programs suffered financial loss to establish a violation of the Anti-Kickback Statute; a physician may be found guilty of violating the statute even if the services were medically necessary and properly provided. [8] Although avoiding liability under the Anti-Kickback Statute may seem daunting, safe harbors exist to protect certain payments and business practices that would otherwise implicate and, depending on the facts and circumstances, violate the statute. [9] Common safe harbors in the physician context include bona fide employment and personal services and management contracts, as well as outcomes-based payment arrangements.

The Physician Self-Referral Law, more commonly known as the Stark Law, prohibits: (1) a physician from making a referral to an entity for designated health services (DHS) for

which payment may be made under Medicare if the physician (or immediate family member) has a financial relationship with that entity and (2) the entity from presenting or causing to be presented a claim for DHS furnished pursuant to such a prohibited referral, unless an exception applies. [10] Financial relationships include direct and indirect ownership or investment interests, as well as direct or indirect compensation arrangements. [11] The Stark Law is a strict liability statute, meaning no proof of intent is required to establish a violation. Violations of the law can result in claims denials, and knowing violations include civil monetary penalties and other penalties. Fortunately, numerous exceptions protect ownership/investments interests and compensation arrangements, and certain types of remuneration fall outside the scope of the Stark Law when specific requirements are met. [12] Common exceptions in the physician compensation context include those personal service arrangements and bona fide employment.

Fair Market Value

Certain Anti-Kickback Statute (AKS) safe harbors [13] and Stark Law exceptions referenced above require that any compensation paid be consistent with, or not exceed, fair market value (FMV). Under the Stark Law regulations, FMV is generally defined as the "value in an arms-length transaction, consistent with the general market value of the subject transaction." [14] Therefore, the FMV under the Stark Law depends on the target of payment. For compensation, the general market value is "the compensation that would be paid at the time the parties enter into the service arrangement as the result of bona fide bargaining between well-informed parties that are not otherwise in a position to generate business for each other." [15] Other considerations relevant to the value of remuneration offered include whether the transaction was legitimate, reasonable, and necessary; whether the remuneration was inflated; whether the hospital or other entity could have obtained services from a non-referral source at a cheaper rate or on more favorable terms; and whether the entity received free or below-market-rate items. [16]

Notably, the Stark Law's employment exception requires that the *total* physician compensation package—including base salary, bonuses, call coverage, medical directorships, sign-on or retention bonuses, student loan repayments, etc.—is consistent with FMV.

To provide parties with reasonable assurance that their arrangement is consistent with FMV, it is necessary to formally establish FMV for physician compensation. Common methods for determining the FMV of a physician compensation arrangement include

internal analyses and benchmarking, published physician salary surveys, and external independent FMV opinions.

Independently Published Physician Salary Surveys

It is customary to reference independently published physician salary surveys when valuing physician compensation arrangements. The three most frequently cited surveys in healthcare valuation and regulatory contexts are Medical Group Management Association (MGMA), American Medical Group Association (AMGA), and SullivanCotter. [17] However, other notable surveys include those published by Gallagher (formerly Integrated Healthcare Strategies), ECG Management Consultants, Medscape, and Merritt Hawkins (now AMN Healthcare's Physician Solutions division), among others. These surveys have gained recognition through their use in regulatory guidance and enforcement actions.

Using at least one salary survey to develop a physician compensation arrangement can help pinpoint where the total compensation package for a physician, by specialty or subspecialty, ranks nationally or regionally. These surveys allow comparison of finer details, such as payment by wRVU, unit of physician work, total cash compensation, etc.

While a great reference point, salary surveys still have their issues. The data included in these salary surveys are retrospective. Typically, salary surveys are released annually, based on data obtained from surveys of physicians in medical groups or independent practices over the past year. Therefore, there is a disconnect between the prospective FMV opinion and the retrospective nature of the data. One way to combat this is by using inflationary adjustments to account for the time difference between when a salary survey was released and when it is used to conduct an FMV.

Additionally, these salary surveys do not typically include data on physicians who are employed by hospitals—it is limited to physicians in medical groups or independent practices. [18] Therefore, it may be difficult for hospitals analyzing this data to get an accurate pulse on the FMV for hospital-based services. Hospitals may use certain internal financial benchmarks and market data (as well as a commercial reasonableness analysis) to bolster an FMV assessment.

Finally, survey data may not be sufficiently localized. This is especially true in rural areas where there is a lack of statistically significant number of survey participants. The result, unfortunately, is a small sample size that is inherently skewed.

Despite their issues, salary surveys remain industry staples for FMV assessments. CMS has indicated that "[r]eference to multiple, objective, independently published salary surveys

remains a prudent practice for evaluating fair market value." [19] The government uses these salary surveys in fraud and abuse enforcement, which indicates their reliance on them as well. CMS has also noted that "the appropriate method for determining fair market value… depend[s] on the nature of the transaction, its location, and other factors." [20] Thus, in order to withstand government scrutiny, hospitals must perform a qualitative review to support the underlying quantitative analysis.

Qualitative Analysis

In its commentary to the 2020 Stark Law revisions, CMS debunked certain widely held beliefs about the use of salary surveys. For example, simply setting compensation "at or below the 75th percentile in a salary schedule" is not a golden ticket. [21] For years, stakeholders have too heavily depended upon the belief that "reliance on salary surveys will result, *in all cases*, in a determination of fair market value for a physician's professional services." [22] It is now understood that salary surveys are merely an "appropriate starting point" in the FMV process [23] and should be rounded out with pertinent facts and circumstances surrounding the proposed arrangement in order to develop a more holistic view. There are valid reasons a physician compensation arrangement may be negotiated or set above the 75th percentile of salary surveys. Neither the salary surveys nor the government outright prohibit such an arrangement, and an accompanying qualitative analysis may be enough to withstand government scrutiny. Such qualitative analysis can include additional context such as multiple board certifications, documentation of the difficulty of recruiting a certain specialized physician, current reliance on locum tenens, workload or high productivity (i.e., physician is working as a 1.5 FTE), and administrative duties.

Independent Valuation

In their 2020 commentary, CMS also formally debunked the belief that an independent valuation is required for *all* compensation arrangements. [24] Nevertheless, obtaining an outside independent valuation from a specialized valuation firm can be helpful and provide additional validity to the arrangement. Hospitals will commonly engage the valuation firm through outside legal counsel to ensure that all valuation drafts are protected under the attorney-client privilege. Outside counsel can also serve a valuable role in reviewing the draft opinion to ensure the arrangement is accurately described, the relevant issues are addressed, and the draft report is consistent with the hospital's other documentation and communications.

When should hospitals involve these outside firms?

One scenario is the need to educate those involved in the deal. Valuation firms want to help their clients get to "yes," and they have the expertise to dig into the facts and circumstances to find a way to get there. These firms can also help build trust between buyers and sellers (e.g., hospital and physician), helping the parties jointly engage and navigate what can be a sensitive situation. By ensuring there is no *ex parte* communication, outside firms can assist both parties in feeling involved and well-educated on the essential terms of the deal. Additionally, the sooner outside firms are engaged, the more they can help avoid pitfalls. For example, hospital operators may inadvertently propose compensation terms to a physician that will not withstand government scrutiny. Walking that proposal back hurts not only that direct relationship, but possibly the hospital's reputation within the community. Sharing a proposed compensation arrangement with an outside firm prior to initiating those discussions with a physician to ensure it meets FMV and commercial reasonableness standards can help bring confidence to the negotiations. It should also be noted that the government has taken enforcement actions against hospitals under the AKS and Stark where it believes that the hospital is paying a physician in excess of FMV in order to attract the physician to the hospital and perform procedures at the hospital. [25] In other words, the government is concerned that the physician's salary is a loss leader with respect to the professional fee that is made up by the hospital's revenue from the facility fee.

Outside firms can also help navigate and develop "one-off," complex compensation arrangements. For example, a hospital may employ a physician who is a top performer, is renowned, or has developed a new treatment plan, and those physicians may, justifiably, command compensation at the 90th percentile. Outside firms can assist hospitals in working through those extraordinary arrangements; they can bring confidence to the legitimacy of such an arrangement and help brainstorm ways to make such a complex arrangement feasible. Law firms provide legal analysis and regulatory guidance, while valuation firms offer independent FMV opinions and commercial reasonableness assessments; in fact, the FMV and commercial reasonableness opinions are often included within the legal opinion.

Another reason to engage an outside firm is to wrap the process and discussions under the protection of the attorney-client privilege and attorney work-product doctrines. To invoke attorney-client privilege, an attorney-client relationship must exist between outside counsel and the hospital. [26] Use of in-house counsel may be the most practical approach, but it is unlikely to adequately promote the needed independence. [27] Outside counsel can also promote privilege through its direct communications with valuation firms.

The Stark Law: Commercially Reasonable

In addition to FMV, most physician compensation arrangements must be commercially reasonable. In the 2020 revisions to the Stark Law, CMS formally defined the term for the first time. An arrangement is commercially reasonable when it "furthers a legitimate business purpose of the parties… and is sensible, considering the characteristics of the parties, including their size, type, scope, and specialty." [28] An arrangement does not have to result in profit for one or more of the parties for it to "further a legitimate business purpose." [29] For example, a legitimate business purpose may include addressing community needs, providing timely access to healthcare services, fulfilling licensure or regulatory obligations, providing charity care, and improving quality and health outcomes. [30] Nevertheless, an arrangement that on its face appears to further a legitimate business purpose may not survive government scrutiny. Compliance with the Stark Law requires a review of the facts and circumstances to determine commercial reasonableness.

Establishing a systematic process for documenting commercial reasonableness is critical for regulatory compliance. Healthcare organizations should implement standardized procedures that require detailed documentation of the business rationale behind each compensation arrangement before execution. Developing a process for documenting commercial reasonableness is beneficial, if not essential. This process should include written assessments that clearly articulate how the arrangement serves legitimate organizational objectives, such as improving patient access, meeting regulatory requirements, or addressing documented community health needs. [31] While CMS clarified in its 2020 Stark Law revisions that commercial reasonableness is not an FMV exercise, [32] most valuation firms provide independent commercial reasonableness opinions. In the event that the government investigates a compensation arrangement, hospitals can turn to their documentation as evidence of the intentional (and contemporaneous) decision making that went into developing the compensation arrangement. Documentation of commercial reasonableness, as well as FMV, can save a hospital from trying to put together the pieces when those who made the decisions are no longer around.

Effective documentation processes should include contemporaneous written records that detail the specific business purposes the arrangement is intended to serve, the decision-making process used to evaluate alternatives, and the rationale for why the chosen approach best meets organizational needs. Regular reviews of existing arrangements should also be documented to ensure ongoing compliance and to demonstrate continued commercial reasonableness as circumstances evolve. [33]

Best Practices

One way to avoid compliance issues with fraud and abuse laws is to include a provision in the physician's employment contract that allows for changes based on their current productivity level. Generally, compensation levels are established using historical productivity data, meaning hospitals may find themselves in an inconvenient situation where, for various reasons, the physician is being compensated at a level that does not align with current productivity. Such a situation can open the door for potential government scrutiny. Reserving the power to unilaterally adjust compensation so that it aligns with current personal productivity (not to be confused with generating revenue through referrals) can save hospitals unexpected headaches.

Another option is to develop a team of C-suite executives and other important stakeholders who are tasked with reviewing all physician compensation arrangements through regular compensation review meetings and contract assessments. This helpful review process can proactively identify potential issues and promote organizational consistency. It is an opportunity for those around the table to discuss whether there is reasonable concern that an arrangement is no longer within FMV, the scope of services has changed, there has been a change in productivity, and whether there is a need to send an arrangement for an external valuation.

Another option, commonly employed for multi-year leases and other arrangements, is to include an inflation adjustment, sometimes tied to the Consumer Price Index for All Urban Consumers (CPI-U), to guard against the compensation falling below FMV. CMS has warned that, for Stark purposes, an arrangement must be consistent with FMV at its inception and throughout the length of the arrangement. [34] Building in an inflation adjustment helps maintain currency throughout the duration of the arrangement.

Conclusion

Salary surveys are only a starting point for physician compensation arrangements—they do not always tell the whole story. Sometimes the facts and the circumstances will necessitate higher compensation, and an accompanying qualitative analysis may be enough to survive government scrutiny. Other times, engaging a valuation firm, preferably through a law firm to gain attorney-client protection, can be worth the cost. Their amassed experience in non-standard physician compensation arrangements can be beneficial to hospitals who are looking for creative solutions to their current physician compensation arrangement problems.

Endnotes

1. Phillip Miller, "A Growing Number of Physicians are Employed," AMN Healthcare (May 6, 2022), https://www.amnhealthcare.com/blog/physician/perm/a-growing-number-of-physicians-are-employed/.

2. Eliza Dailey, "Over 77% of Physicians are Employed. Here's How That's Shaping Healthcare," Advisory Board (May 30, 2024), https://www.advisory.com/daily-briefing/2024/04/16/pai-avalere-ec.

3. 42 U.S.C. § 1320a-7b(b).

4. 42 U.S.C. § 1395nn.

5. *See* 42 U.S.C. § 1320a-7b(b) (applying to any person who knowingly and willfully solicits, receives, offers, or pays remuneration in connection with federal healthcare programs).

6. 42 U.S.C. § 1320a-7b(b).

7. Fraud & Abuse Laws, U.S. Dep't of Health & Hum. Servs., Office of Inspector Gen., https://oig.hhs.gov/compliance/physician-education/fraud-abuse-laws/ (last visited June 24, 2025).

8. *Id*. Note also that there is a civil statute, the Civil Monetary Statute, 42 U.S.C. 1320a-7a, which prohibits certain conduct, including that which violates the Anti-Kickback Statute. The HHS OIG is responsible for administering it, and the burden of proof on the government to show a violation is only by a preponderance of the evidence.

9. *Id*. Failure to meet all the requirements of a safe harbor does not necessarily mean that the arrangement violates the statute.

10. 42 U.S.C. § 1395nn.

11. Fraud & Abuse Laws, *supra* n. 7.

12. Jessica L. Bailey-Wheaton & Todd A. Zigrang, Stark & Anti-Kickback Revisions Finalized: Changes to Stark's Big Three Provisions, Health Capital Topics (Nov. 2020), https://www.healthcapital.com/hcc/newsletter/11_20/HTML/STARK/convert_stark-aks-final-rules-11.24.20a.php.

13. Even where the relevant AKS safe harbor does not require FMV, as a practical matter FMV will be required, because most physician compensation arrangements that implicate the AKS also implicate Stark, which generally requires FMV for physician compensation arrangements.

14. 42 C.F.R. § 411.351. The entire definition of fair market value is a bit more involved and includes a definition of "general market value" and specific provisions relating to the rental of

space and equipment. *Id.*

15. *Id.*

16. General Compliance Program Guidance, U.S. Dep't of Health & Hum. Servs., Office of Inspector Gen. (Nov. 2023), https://oig.hhs.gov/compliance/general-compliance-program-guidance/.

17. *See* Todd A. Zigrang & Jessica L. Bailey-Wheaton, Multispecialty Surveys for Physician Compensation Released, Health Capital Topics (Aug. 2024), https://www.healthcapital.com/hcc/newsletter/08_24/HTML/SURVEY/convert_multispecialty_surveys.php (noting that "when referring to physician salary surveys...if you look at the data that big healthcare use as the definitive benchmark there are only three names: MGMA, AMGA, and Sullivan Cotter").

18. Although medical groups owned by hospitals often participate in the surveys.

19. 72 Fed. Reg. 51015 (Sept. 5, 2007).

20. *Id.*

21. Nor is compensation above the 75th percentile inherently suspect. *See* 85 Fed. Reg. at 77558.

22. *Id.* (emphasis added).

23. *Id.*

24. *Id.*

25. *See. e.g., U.S. ex rel Schaengold v. Memorial Health*, settlement agreement available at https://www.vitallaw.com/news/stark-self-referral-law-settlement-agreements-georgia-health-system-pays-9-9m-to-settle-stark-fca-claims/hld016fa3aec87c581000974690b11c18c90208?refURL=https%3A%2F%2Fwww.google.com%2F#.

26. Rizwan A. Qureshi & Jay K. Simmons, The Value of Engaging Outside Counsel in Internal Corporate Investigations, 58 Rev. of Sec. & Commodities Regul. 57 (2025).

27. *Id.*

28. 42 C.F.R. § 411.351.

29. *Id.*

30. Bailey-Wheaton, *supra* n. 12

31. *See* 85 Fed. Reg. 77492, 77557 (Dec. 2, 2020) (providing examples of legitimate business purposes that may support commercial reasonableness).

32. 85 Fed. Reg. 77531 (Dec. 2, 2020).

33. *See* generally 42 C.F.R. § 411.351 (requiring that arrangements be commercially reasonable); *see* also General Compliance Program Guidance, U.S. Dep't of Health & Hum. Servs., Office of Inspector Gen. (Nov. 2023), https://oig.hhs.gov/compliance/general-compliance-program-guidance/ (emphasizing importance of documentation in compliance programs).

34. *See, e.g.,* 80 Fed. Reg. at 71319.

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