New Stark Law Exception for Non-Physician Practitioner Recruitment Subsidies: A Gift or Pandora's Box for Hospitals?

PUBLISHED ON
February 24, 2016

As of January 1, 2016, a new Stark Law exception allows hospitals to give subsidies to physician practices for the recruitment of non-physician practitioners (**"NPPs"**). In the Phase III Stark Law regulations, the Centers for Medicare and Medicaid Services (**"CMS"**) declined to expand the Stark Law exceptions to include NPP recruitment. So what changed, and will this new NPP exception be a welcome gift or a Pandora's Box for hospitals?

In the new regulations, CMS cited "significant changes" in the nation's healthcare system, predicting "alarming" shortages of primary care practitioners and an increased demand for NPPs. CMS attributed the increased demand to the healthcare initiatives of the Affordable Care Act and to a growing and aging population. CMS identified a similar increase in the demand for mental health services, noting that 1 in 5 adults suffer from mental illness or substance abuse, but less than half of these adults receive mental health services. In order to promote increased access to these services, CMS approved an NPP recruitment exception that now allows subsidies for physician assistants, nurse practitioners, certified nurse mid-wives, clinical social workers and psychologists.

On the surface, the new NPP Stark Law exception seems to be a good thing, providing the hospital with an additional tool in its recruitment toolbox for attracting new practitioners to the hospitals' service area. However, before using this new tool, hospitals should read the instruction manual closely, and understand the potential hazards.

First, NPP subsidies are sure to attract a great deal of attention from many primary care practices in the hospital's service area. Once the hospital offers a subsidy to assist one physician practice, the hospital can expect that many more physicians will want equal treatment. Indeed, although CMS limited the new Stark Law exception to primary care and mental health services, it left the door open to adding other specialties based on future needs. In doing so, hospitals can anticipate further expansion of NPP subsidies to other specialties along with more subsidy requests by physicians.

Secondly, the subsidy formula approved by CMS raises some concerns. In the interests of simplicity, CMS declined to adopt an income guarantee or incremental cost methodology as used for physician recruitment. Instead, CMS chose a simpler, "bright-line approach" that caps the subsidy at 50% of the NPP's actual compensation (including salary, signing bonus and non-cash benefits). Although CMS chose a "bright-line approach" for capping the subsidy, it did not set clear boundaries for establishing the NPP's total compensation, including specific limits on signing bonuses or non-cash benefits, which may include health insurance, paid leave, relocation expenses, etc. In fact, the total amount of the NPP's compensation is limited only by "fair market value," which for some markets may exceed $150,000 annually. So in the end, what was proposed initially to be a small NPP subsidy program for physician practices, may prove to be costly for hospitals.

Thirdly, although the subsidy is limited to the first two years of the NPP's employment, CMS waived the requirement that the compensation arrangement be "set in advance," allowing physicians to adjust an NPP's compensation (or hours) on an annual or more frequent basis. As a result, there is nothing to prevent the physician practice from front-end loading the NPP's compensation/benefits in the early years. Indeed, there is no limit on the revenues that a practice can generate from hiring/engaging the NPP during this time, including billing for services rendered by the NPP directly or incident-to the physician. To protect against the potential abuse and inequities of NPP subsidy arrangements, hospitals should consider setting dollar limits or caps on subsidy amounts, and then gradually increasing this cap for all similarly-situated physicians as the demand for NPPs grows.

Finally, in order to be eligible for the subsidy, a physician practice must meet many of the same requirements that apply to physician recruitment arrangements (e.g., the arrangement must be set out in writing, not conditioned on referrals, etc.). However, CMS clarified that the NPP exception is separate and apart from physician recruitment and has its own requirements. As such, the NPP subsidy is available only once every three years to the same physician practice, and it can be used only to recruit an NPP who has remained outside of the hospital's service area for at least one year. Nevertheless, CMS recognized that there still is room for physicians to "game" the system, by cycling or swapping NPPs with outside practices etc., and there is nothing to prevent a physician practice from terminating an NPP after three years and then requesting a new NPP subsidy from the hospital. CMS has warned about, and hospitals should guard against, physician abuses that potentially shift the costs of their NPP staffing to the hospital on a permanent or continual basis. Again, hospitals should establish their own NPP subsidy limitations and guidelines before initiating NPP recruitment programs.

In fact, hospitals should consider whether the NPP exception is even necessary, since as CMS acknowledged, the Stark Law applies only to compensation arrangements that involve the referral of certain designated health services by "physicians," not NPPs. CMS stated that NPP subsidies do not implicate the Stark Law unless the NPP compensation arrangement serves as a "conduit" for prohibited physician referrals. Still, CMS has expressly indicated that all NPP subsidy arrangements, regardless of how structured, will be scrutinized for compliance under both the Stark Law and the Anti-Kickback Statute for potential abuses.

Given that CMS has provided a specific Stark Law exception for structuring NPP recruitment arrangements, hospitals are advised to utilize this framework for structuring their own NPP subsidy programs. At the same time, hospitals must remain on guard against possible physician abuse and establish their own guidelines to assure that NPP subsidy programs are implemented fairly for all physician practices at a reasonable cost.

If you have questions concerning the new Stark Law exception for NPP recruitment, please call Chris Churchill, Partner and Chair of Barley Snyder's Health Law Group, at 717-399-1571, or contact him at cchurchill@barley.com.

:

Christopher J. Churchill

Partner

Tel: (717) 399-1571

Email: cchurchill@barley.com