

Watch out, it may be illegal

You may be violating the Stark II law without knowing it

By Jeremy N. Miller

Without realizing it, orthopaedists may be making illegal ancillary service referrals to their own group. How can that happen? The answer lies in a group's legal and business structure and the physician compensation formula. These may not comply with the Stark II law and related regulations proposed last year.

Unless an exception is available, the Stark II law makes it illegal for a physician to refer a Medicare or Medicaid patient to a solo or group practice for the furnishing of a "designated health service" if the physician has an ownership or investment interest in, or is compensated by, that practice. The practice, in turn, may not seek payment for items or services provided to anyone referred illegally.

The designated health services that the law covers include ancillary services such as lab tests, X-rays, MRIs and CTs, physical therapy, orthotics and durable medical equipment. Most orthopaedic practices seek to qualify under the exception for "in-office ancillary services." To qualify three conditions must be met:

First, the ancillary services must be provided by the physician who orders them, a physician who is a "member" of the same group practice or by technicians or others directly supervised by the referring physician or another physician member of the group.

Second, the ancillary services must be furnished in the same building in which the referring physician or another physician in the same group practice does work unrelated to the ancillary services, or in a building that the group practice uses for the centralized provision of the ancillary services.

Third, the ancillary services must be billed by the physician performing or supervising the services or by a group practice to which the performing or supervising physician belongs.

If the physician practices in a group, the in-office ancillary services exception requires the group to meet the Stark II law's seven-part definition of a group practice. The Stark law's group conditions include:

- The group must be owned by two or more physicians.
- At least 75 percent of the total patient care services rendered by the group's physicians must be provided through the group, the services billed under a group billing number and the collections treated as group receipts.
- No physician member of the group can receive compensation based directly or indirectly on the volume or value of a physician's Stark-covered Medicare referrals.

- Group members must perform no fewer than 75 percent of the group practice's physician-patient encounters.

In my experience, orthopaedic practices generally have Stark compliance problems in several areas:

Compensation for ancillary referrals. Many orthopaedic practices directly compensate physicians based on the amount and value of ancillary services and items the physician orders, such as X-rays, MRIs and CTs, physical therapy and orthotics. The Stark law prohibits such arrangements, at least with respect to Medicare patients.

On the other hand, the proposed regulations do allow a physician to be paid a share of the overall profits of the group practice, including profits from ancillary services, as long as that share of profits is not based on the volume or value of the physician's own referrals. The proposed regulations approve of sharing the group's overall profits if those profits are divided evenly or if they are based on the physician's seniority, ownership percentage in the group, the hours the physician devotes to the group or the difficulty of the physician's work. In addition, physicians in a group can be paid a productivity bonus for services the physician performs.

Hiring of radiologists. Many practices hire a radiologist to read MRI and CT scans. However, if the radiologist is hired as an independent contractor and not as an employee, it could be illegal for the orthopaedists to refer to and bill for the radiologist who would not qualify as a "member" of the group. It could also be illegal for the group to bill for scans if they are read by the radiologist off site.

Durable medical equipment. The in-office ancillary services exception does not allow DME to be supplied in the office. There is an exception for crutches so long as the orthopaedist makes no profit from furnishing them.

Separate PT Corporation. If orthopaedists furnish physical therapy services through a separate PT corporation or partnership that they own, they probably cannot refer their Medicare patients because the PT practice would not be considered a part of the group.

The Stark II rules are complicated and several bills in Congress seek to change them. Nevertheless, the law is in effect, and every orthopaedic practice needs to examine its structure and referral arrangements to ensure it is in compliance.

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