

Expert's focus: Is your medical director agreement illegal?

By: Jeremy N. Miller, JD

On April 5, a jury in Kansas City, Mo., convicted two physicians, Robert LaHue, DO, and Ronald LaHue, DO, and two former Baptist Medical Center administrators of violating the Medicare-Medicaid anti-kickback law.

The physicians were convicted of receiving illegal kickbacks for referring their nursing home patients to the hospital. The kickbacks were disguised as "consulting fees" for allegedly setting up and operating an integrated geriatric care program.

The physicians were convicted even though they had attorney-drafted, written agreements with the hospital pursuant to which they were paid a fixed, annual fee. Unless the convictions are overturned on appeal, the physicians face prison sentences of up to 35 years and substantial fines.

Many physicians have consulting, medical director and other service agreements with hospitals, skilled nursing facilities, surgery centers, clinical labs, outpatient dialysis facilities and other entities to whom they refer their patients. In light of the convictions of the Drs. LaHue, all physicians need to carefully examine their own medical director and other agreements to be sure they comply with the federal anti-kickback law.

Briefly; the Medicare-Medicaid anti-kickback law (42 U.S.C. '1320 a-7b) makes it a crime for a physician to knowingly solicit or receive money or any other remuneration as an inducement or in return for referring patients for services paid for by Medicare or Medicaid. Most states also have their own anti-kickback laws that prohibit similar conduct, regard-less of the payment source.

The "safe harbors" to the Medicare-Medicaid anti-kickback law set forth six conditions that a "personal services" contract, such as a medical director agreement, must meet. If all of the safe harbor requirements are met, then payments to a physician under the contract will not violate the anti-kickback law. If the contract does not meet all six conditions, it is not automatically illegal. But it does mean that it is not clearly "safe."

The conditions are:

! The medical director, consulting or other services agreement must be in writing and signed by the parties.

! The agreement must specify the services to be provided by the doctor.

! If the services are to be provided on a less than full-time basis, the agreement must specify when the services will be provided, for how long and the exact charge for each service interval.

! The term of the agreement must be for at least one year, and the agreement can be terminated before one year only for good cause.

! The aggregate compensation to be paid to the physician over the term of the agreement must be set in advance, consistent with fair market value in an arms-length transaction and not determined in a manner that takes into account the volume or value of any patient referrals or other business generated between the parties for which payment is made by the Medicare or Medicaid programs. There is no precise definition of what constitutes fair market value. Physicians can assume, however, that if the medical director fee, for example, works out to \$500

to \$1,000 per hour; it will be harder to justify than a fee of \$100 to \$200 per hour.

! The services to be performed must not involve the counseling or promotion of a business arrangement or activity that violates any federal or state law.

In addition to the specific safe harbor requirements, the services to be provided must be reasonable, necessary and actually rendered. Obviously, it will be difficult to justify payments for services that the recipient does not really need or that are not, in fact, provided. Generally; physicians should keep detailed and accurate records of time actually spent on their medical director duties.

Given the increasing number of criminal and civil enforcement actions, physicians need to ensure that their medical

director and other service agreements comply with all laws. If the agreement does not, it should be either modified to come into compliance or terminated. —

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