

ARE YOU MAKING ILLEGAL REFERRALS?

Expert's Focus: Jeremy N. Miller, JD

Without realizing it, physicians may be making illegal 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.

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 gets compensation from, that practice.

The practice, in turn, may not seek payment for items or services provided to anyone referred illegally unless an exception is available.

The designated health services that the law covers include ancillary services such as lab tests, x-rays and other imaging modalities, physical therapy outpatient prescriptions and durable medical equipment. Most groups 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 member physician.

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 where 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.

In my experience, many groups that assume they comply with the Stark II law fail to satisfy a number of these conditions.

It should be noted that this column is intended to be an overview of this complex law and is not a substitute for a careful analysis of each group's unique situation.

The Stark law's group conditions include:

! The group must be owned by two or more physicians.

! At least 75% 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% of the group practice's physician-patient encounters.

Among the arrangements that would fail to qualify as a group are practices that hire too many part-time physicians, causing them to fail to meet the 75% test; a joint venture that is legally separate from the physicians' regular practice and an expense-sharing arrangement or "clinic without walls" or similar setup that treats each practice site as a separate profit center.

Further, group members cannot be compensated, directly or indirectly, based on the volume or value of a physician's Medicare referrals within the group for Stark-covered services, such as laboratory imaging, physical therapy and outpatient prescription drugs.

Many groups compensate physicians based on "productivity" as measured, in part, by the amount and value of ancillary services the physician orders. The Stark law prohibits this arrangement, at least in 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.

The Stark II rules are complicated and still subject to change. Nevertheless the law is in effect, and every medical group needs to examine its structure and physician compensation arrangement to ensure it is in compliance.

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