



Physician Contracting: **An Ounce of Prevention Is Worth a Ton of Cure**

Ten best practices to maintain compliance in today's regulatory environment

In 2012, the United States government won or negotiated over \$3 billion in health care fraud and abuse judgments and settlements.

Some of the most significant penalties were assessed to health care systems that failed to adequately monitor their physician arrangements. Failure to do so proved to be costly for all involved. Often the simplest contract terms to monitor received the least attention (e.g., expiration dates) and resulted in the costliest penalties. Many systems lack a formal process that ensures regular contract reviews. Many more lack automated tools to help them with the work involved.

So in this era of ever-increasing hospital and physician integrations, coupled with a highly technical and complicated regulatory environment where everyone is potentially a whistleblower, what best practices can we offer to those who want to avoid the pain that comes from running afoul of the law and the disproportionate penalties that follow?

Ten Best Practices for Physician Contracting

1. Maintain a written protocol that describes the process applicable to all physician financial arrangements.

It should address the basics, including signature authority, the pre-execution review process, required terms, the fair

market value process, the periodic review process and the responsible internal contract manager or business lead.

2. Invest in standard contract templates for common contracts such as medical director arrangements, on-call agreements and leases for office space.

Templates help ensure required elements of Stark exception or AKS safe harbor are included in the terms of the contract (e.g., time sheet requirement for medical directors).

3. Verify the need for services.

Commercial reasonableness is an explicit requirement in most of the applicable Stark exceptions and AKS safe harbors. Do you have a sound business or clinical purpose for entering into the arrangement with the physician, even if the physician does not refer any patients to the hospital? Be sure to define the need for the service in the contract and avoid multiple arrangements beyond legitimate need (e.g., multiple medical directors for service lines).

4. Consider the use of evergreen clauses vs. term limits.

Evergreen clauses prevent contracts from expiring due to human error. Although the Stark law includes certain holdover provisions in the event a contract expires, these provisions are limited and do not apply to every exception. Your contracts will still require periodic attention.

5. Lease agreement penalties and late fees are a dual-edged sword.

It's okay to build penalties and late fees into your lease agreements - until the moment you fail to enforce them. Failure to enforce late fees may be considered physician remuneration so the lesson here is: if you have them - enforce them!

6. Define the specific services a physician is to provide, or in the case of office space leases, describe the space to be leased to the physician.

Being detailed helps demonstrate the commercial reasonableness and fair market value of the arrangement and avoid common problems created by including vague phrases like, "physician agrees to provide medical services to hospital patients." In the case of leases, include a copy of the floor plan in the lease document.

7. Confirm fair market value.

The concept that remuneration (be it purchase price, compensation for services or something else) must be at "fair market value" is found in the AKS safe harbors as well as nearly every Stark law exception. While not required, consider obtaining an FMV opinion from a third party if the FMV might be questioned. If there is no third-party opinion, then outside evidence supporting the FMV of the financial aspects of the arrangement should be included in the file.

8. Invest in a contract management system.

An effective contract management system is imperative.

The system should advise the provider of deadlines, necessary changes and other events when Stark compliance could become in jeopardy ("tickler system"). Link the system with accounts payable (no payment without verification of a written contract). Consider assigning specific staff with responsibility to monitor and supervise the ongoing maintenance of physician-related contracts.

9. Conduct regular contract reviews.

Confirm that the contract is not expired and that services are still necessary. Updating the FMV wouldn't hurt. Review accounts payable data and match to contract terms.

10. Self-disclosure.

If after a full internal investigation you find problems, then determine the appropriate process for reporting actual or potential violations. Confirm that there are no other problematic arrangements to avoid multiple disclosures. It is critical to also report any problems that resulted in government overpayments.

For more information, please contact Jerry Hallett at 317.429.3902 or jhallett@ntracts.com. Ntracts, LLC, a subsidiary of Hall, Render, Killian, Heath & Lyman, one of the nation's preeminent health care law firms, has created a Software-as-a-Service (SaaS) application that enables health care organizations to take command of their contracts by creating a single contract repository from which they can proactively notify, track, monitor and report. Learn more at ntracts.com.