

## Part B Insider (Multispecialty) Coding Alert

### Fraud & Abuse: Stark II Regs Spell Changes For Physician Recruitment Practices

#### Prepare to bring contracts into compliance

In the past, physicians and hospitals have signed separate "income guarantee" deals with new physicians that added up to an understanding that the practice would hire the physician, but the hospital would underwrite his/her income. But the new Stark II regulations spell changes for these deals.

For one thing, hospitals and physicians will have to work together more closely on these arrangements, according to **Jack Valancy**, a consultant with **Valancy Associates** in Cleveland Heights, OH. And you can wave goodbye to non-compete clauses for new doctors.

Non-compete clauses have often left new physicians in a tight spot, according to Valancy. The new physician signs an agreement with the local hospital to remain in the geographic area for three years in return for one year of guaranteed income. If the physician leaves the area, she will have to repay the hospital the money it paid her. But the physician's employment agreement with the practice may last only one year.

**Problem:** If the agreement contains a non-compete clause and the practice doesn't renew it, then the physician may be unable to practice in the area in which she's promised to stay.

The non-compete clause "puts the new doctor at a disadvantage when renewing the contract," notes Valancy. "The practice could offer this terrible, terrible deal and the young physician was pretty much over a barrel."

But from the standpoint of practices, "they bring in a new physician, and he or she may basically walk out the door with a bunch of business," notes attorney **Bob Ramsey** with **Buchanan Ingersoll** in Philadelphia. "They in a sense have hurt themselves by recruiting the new physician."

Practices may still be able to put in place employment contracts forbidding new physicians from soliciting their existing patients, notes attorney **Charles Oppenheim** with **Foley & Lardner** in Los Angeles. It remains to be seen whether such non-solicitation clauses violate the Stark law.

#### Expenses Reined In Under New Regs

The biggest change in the new regs is on the expense side, notes Ramsey. Now "there's no real room to pass through anything that's not very specifically incurred related to that incoming doc," he says. In the past, most deals included "reasonable allocations of overhead," adds Ramsey. These deals may have included a pro rata allocation of expenses, so that if a new doctor joined a nine-person group, then one-tenth of the group's expenses would be included in the hospital's income guarantees.

But from Medicare's standpoint, letting the hospital cover a chunk of the practice's overhead opened the door for abuses, and appeared too much like a reimbursement for the business the physicians sent to the hospital. Any time a deal between a practice and a hospital includes extra compensation over fair market value, "the government naturally is going to be suspicious," says Ramsey.

Under the new regs, the hospital can pay your practice for any new expenses it incurs for the new physician, including new space rented or new staff hired specifically for this person, notes Oppenheim.

**Tip:** Keep all expense records for five years, he adds.

Now, the government can audit your practice's books to make sure that you really incurred the expenses you're claiming with respect to recruiting the new physician, notes Valancy. But in any case, Ramsey says hospitals should include their own auditing rights in contracts to ensure they're not paying for expenses they shouldn't be.

There are bound to be headaches with the requirement that a newly recruited physician must move at least 25 miles to receive income guarantees from the hospital, says attorney **William Maruca** with **Fox Rothschild** in Pittsburgh. If a physician moves 24 miles, will this be deemed a violation of the statute?

If the new physician doesn't move at least 25 miles, the regs suggest another standard: At least 75 percent of the patients must be new to the physician. Thus, a **Veterans Administration** physician who moves across the street and starts treating Medicare patients will be able to receive recruitment incentives, notes Maruca.