

Outpatient Facility Coding Alert

Compliance: Determine the Kickback Status of Your Marketing Plan

Are you marketing the physicians or the surgery center?

The line between promoting your center's services versus individual physicians can be murky. To clear things up, ask yourself questions like the following, according to attorney **Kim C. Stanger** of Holland & Hart LLP:

- Is your marketing saving the physician money they would normally spend to promote their own practices?
- Does the marketing focus on what your facility does or what the physician's practice does? For example, does it mention physician services that are unrelated to your surgery center?
- Does the marketing contain specific information about the physician's private practice, such as contact information other than that of the surgery center?

If you can answer "yes" to any of these questions, then there's a possibility that your marketing could constitute a kickback. However, that doesn't mean you have to abandon joint marketing altogether. You just need to make sure you play by the rules.

Grasp Rules of Joint Marketing

For joint marketing, each physician either needs to pay his share at fair market value (FMV) for the advertising or you need to find another safe harbor it can fit into.

"Any time you're doing a marketing deal with, or that benefits, a referring physician, you need to make sure you structure that deal to fit within one of the Stark safe harbors," Stanger says.

Whatever you decide, make sure the arrangement is documented. If multiple physicians are involved, have separate written agreements for each physician.

Understand the Anti-Kickback Statute

Similar to the Stark Law, only broader in scope, the Anti-Kickback Statute (AKS) prohibits offering or receiving any type of payment meant to induce or reward patient referrals for services reimbursable by a federal healthcare program.

"AKS is a criminal statute, while Stark is not," according to attorney **Michael D. Bossenbroek, Esq.** of Wachler & Associates, P.C. in Royal Oak, Michigan. "However, Stark is a strict liability statute, meaning intent is not required, but AKS has an intent requirement."

If you don't have a dedicated marketer on staff and don't have the time to hire or train someone, you might consider retaining the services of a marketing firm. But marketing firms that aren't familiar with healthcare's web of regulations could unintentionally land you in hot water.

Caution: Never provide an outside contractor compensation that's related to the amount of business generated. Payment by a healthcare provider to a marketer could be interpreted as an inducement for the marketer to refer patients to your practice.

Compensation should be set in advance (and documented) and should never be based on the volume or value of referrals. In addition, make sure all payments for marketing are at FMV. Document how FMV was determined and document that the marketing services were actually performed.

Don't miss: Just because you're not involved with government programs like Medicare and Medicaid doesn't mean your

marketing can be a free-for-all. States typically have their own fraud and abuse laws, as well as consumer protection and patient solicitation laws. You are still accountable to your state and professional licensing board, even if you only work with private payers.