

COVID-19 and Physician Compensation: Part 1 – Physicians on the Front Line

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The Blanket Waivers that CMS issued on sanctions under the physician self-referral law (Stark) do not halt application of the law during this emergency time period. Instead, they waive sanctions for certain circumstances that would otherwise violate the self-referral law. The 18 individual waivers address a variety of financial arrangements between physicians and designated health services (DHS) entities, including:



- Compensation to a physician above or below fair market value (FMV) for personal service performed
- Remuneration to a physician that is below FMV for items and services purchased by an entity
- Remuneration from entities to physicians that exceeds limits under the medical staff incidental benefits and the nonmonetary compensation exception
- Loans from entities to physicians, or from a physician to an entity, with interest that is below FMV or on better terms than otherwise would be available

The waivers provide significant flexibility to enable, in CMS's words, organizations and physicians to focus on "patients over paperwork".

We have heard from many of our clients that the extreme conditions are requiring creativity and flexibility, especially as it relates to provider and PPE shortages. Many organizations are considering:

- **Hazard Pay** in the form of one-time bonuses or premiums added to normal compensation to compensate employees for working in dangerous situations.
- **"Overtime" Pay** - Although salaried physicians typically are not eligible for overtime, providers are compensating physicians for the additional shifts/hours being worked.

- **Call Pay** – As best practice, hospitals generally do not pay employed providers for standard coverage, but due to demands on coverage, hospitals are paying physicians to be available to relieve their front-line providers.
- **Creative Staffing Solutions** - The hiring of independent physicians to assist on a temporary basis, or utilization of physicians who do not typically work in emergency departments or in the inpatient setting, is requiring the development of short-term compensation structures and mechanisms.

The waivers are not a “blank check” for hospitals but are limited to situations solely related to one of the defined COVID-19 purposes laid out in the regulation. Hospitals should proceed with caution, since the requirement that arrangements be commercially reasonable was not waived. Finally, the waivers will come to an end; they are effective only while the Secretary of HHS has authority to grant waivers for the COVID-19 public health emergency.

Therefore, we recommend discipline in approaching these compensation situations. Organizations should develop overall guiding policies and principles to assure fairness, consistency, and defensibility prior to implementing any of these temporary actions. It is important to:

- Develop uniform applicability criteria, to be able to document that the temporary compensation adjustments are unrelated to the volume and value of referrals (past, present or future). Often, we are lulled by the squeaky wheel;
- Develop and implement a process to document use of these waivers, including how the waiver was used to meet one of the "COVID-19 Purposes;"
- Implement adjustments uniformly; for example, if the organization decides that hazard pay is warranted, decide for whom and how much, so that business leaders have guidelines to work under; and
- Ensure you can unwind the arrangements, because once the waivers are lifted, the arrangements may not satisfy the requirements of Stark.

We at Veralon would be happy to work with you at no cost to develop the policies and framework related to front line physician compensation. ●