

Physician Compensation Scrutiny Continues in Recent FCA Settlement

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A hospital system in Missouri recently agreed to settle with the US Department of Justice (DOJ) for \$34 million to resolve claims related to alleged violations of the Stark Law. On May 18, 2017, DOJ announced a settlement agreement with Mercy Hospital Springfield (Hospital) and its affiliate, Mercy Clinic Springfield Communities (Clinic). The Hospital and Clinic are both located in Springfield, Missouri. The relator's complaint was filed in the Western District of Missouri's Southern Division on June 30, 2015.

The complaint's allegations center on compensation arrangements with physicians who provided services in an infusion center. According to the complaint, until 2009 the infusion center was operated as part of the Clinic, and the physicians who practiced at the infusion center shared in its profits under a collection compensation model. In 2009, ownership of the infusion center was transferred to Mercy Hospital so that it could participate in the 340B drug pricing program, substantially reducing the cost of chemotherapy drugs. The complaint alleges that the physicians "expressed concern about losing a substantial portion of the income they had received under the collection compensation model as a result of the loss of ownership of the Infusion Center." In response, the Hospital allegedly assured them that they would be "made whole" for any such losses. While it doesn't provide precise details, the complaint alleges that the Hospital addressed the shortfall by establishing a new work Relative Value Unit (wRVU) for drug administration in the

infusion center, which now operated as part of the Hospital. The value of this new wRVU was allegedly calculated by “solving for” the amount of the physician’s loss and “working backwards from a desired level of overall compensation.” Physicians were able to earn the wRVU for the patients they referred to the infusion center. The complaint alleges that the drug administration wRVU rate was 500 percent of the comparable wRVU for in-clinic work. In its announcement of the settlement agreement, DOJ characterized the compensation arrangement as being “based in part on a formula that improperly took into account the value of [the physicians’] referrals of patients to the infusion center operated by [the Hospital].”

In addition to the monetary settlement payment, the Hospital and Clinic have entered into a five-year corporate integrity agreement (CIA) with the Office of Inspector General (OIG). Neither the settlement nor the CIA constitutes a determination of actual liability or wrong-doing by the Hospital.

The facts in this case underscore some of the challenges that providers face when structuring compensation arrangements with physicians accustomed to operating in a group practice setting where the Stark Law allows for profit sharing. Depending on the details, efforts to structure compensation terms to enable physicians to maintain consistent compensation levels may inadvertently raise potential compliance concerns. To avoid an argument that such arrangements violate the Stark Law (on the theory that the compensation takes into account the volume or value of the physician’s referrals or that the arrangement would not be commercially reasonable in the absence of referrals), providers should exercise caution and careful deliberation in structuring arrangements with employed physicians, consulting with valuation experts and experienced counsel to avoid potential issues.

Even where providers are well-intentioned, because the Stark Law is a strict liability statute, they can face substantial liabilities from arrangements deemed to be non-compliant. Moreover, the inherent complexities of physician compensation and the nuances of the Stark Law’s requirements make the prospect of litigation particularly costly and perilous, risking the potential for treble damages and penalties under the False Claims Act.

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