

# Physician Care: Physician Compensation



Presented by  
Albert R. Riviezzo, Esq.  
Fox Rothschild LLP  
Exton, PA

# Overview



- Compensation trends for employed physicians
- Regulatory risks of physician compensation models
- Using market survey benchmarks to determine fair market value
- Physician compensation arrangement best practices

# Compensation Trends



- Many healthcare organizations are employing greater numbers of physicians to achieve physician alignment and vertical integration
- These organizations are increasingly faced with developing more sophisticated compensation programs to attract and retain physicians
- As organizations develop and review compensation programs, they should keep in mind the legal and regulatory framework that governs hospital payments to physicians as well as valuation concerns

# Compensation Models



- Fixed
- Base plus percentage of revenue
- Base plus performance
  - Patient volume
  - Physician revenue
  - Patient satisfaction
  - New patients
  - Administrative tasks
- Relative value unit performance
- Combination of above

# Compensation Trends



- Types of physician compensation arrangements
  - Employment
  - Professional services
  - Income support
  - On-call pay
  - Administrative – medical director services, etc.
  - Committee work
  - Co-management

# Today's Compensation Trends



- Compensation for clinical work consists of
  - Pay for work effort (volume and time)
  - Pay for quality, patient satisfaction and performance
- Most common incentive measures
  - Productivity
  - wRVUs
  - Corrections
  - Net income
  - Patient visits
  - Quality
  - Patient satisfaction
  - Alignment with organization objectives

- Evolving patient care models toward episodic or accountable care will modify how physicians are compensated, with increased focus on
  - Quality metrics
  - Organizational objectives
  - Patient experience
  - Utilization goals
  - Shared savings
  - Other risk and value based models
  - Other performance measures reflecting perceived value

# Regulatory Risks



- Current and evolving physician compensation models present legal challenges
  - Stark
  - Anti-kickback
  - Civil monetary penalties
  - False Claims Act
  - Maintaining tax exempt status
  - Antitrust laws
  - Insurance laws



# Regulatory Risks



- Fair market value problem
- Stark, Anti-kickback and tax exempt laws ALL require physician compensation arrangements to be fair market value (“FMV”)
- Increasingly, enforcing entities are also focusing on “commercial reasonableness”
- FMV definitions differ between Stark/Anti-kickback and IRS matters

# Regulatory Risks



- Stark Law prohibitions
  - Prohibits physician from referring to an entity for “designated health services” (“DHS”) if physician has financial relationship with entity providing DHS, unless arrangement satisfies all requirements of Stark exception
  - Key Stark exceptions require compensation is FMV and commercially reasonable
  - DHS include all inpatient and outpatient hospital services
  - If an entity provides DHS based on a “tainted” referral, it cannot bill Medicare or any third party

# Regulatory Risks



- Key exceptions to Stark prohibitions (each requires compensation to be FMV)
  - “Bona fide” employment
  - Personal services
  - Indirect compensation

# Regulatory Risks



- Stark Law definition of FMV
  - Value in arm's length transaction, consistent with general market value
  - “General market value” is the compensation that would be included in a service agreement as the result of bona fide bargaining between well informed parties who are not otherwise in a position to generate business for the other party at the time of the agreement
  - Fair market price is generally based on bona fide comparable service agreements, where compensation has not taken into account the volume or value of anticipated or actual referrals

# Regulatory Risks



- Stark on compensation
- Stark requires compensation arrangements to be commercially reasonable even if no referrals are made to the entity providing DHS
  - “Commercially Reasonable”: Arrangement would make commercial sense if entered into by a reasonable entity of like type and size and a reasonable physician ... of similar scope and specialty even if there were no potential DHS referrals (69 Fed Reg 16093, 16107)

# Regulatory Risks



- Anti-kickback law (42 USC 1320a-7b(b))
  - Criminal law that prohibits the offer, payment, solicitation or receipt of remuneration to induce or reward referrals of items or services payable by federal health care programs
  - “Remuneration” = anything of value
  - Statutory exception for employment
  - Regulatory safe harbors protect qualifying arrangements from prosecution
    - ALL safe harbor requirements must be met
  - Some safe harbors require payment at FMV

# Regulatory Risks



- Anti-kickback law: Employment exception and safe harbor
  - Allows “any amount paid by an employer to an employee” for employment in provision of covered items or services covered by Medicare or Medicaid
  - Employee must be “bona fide”
    - Behavioral control
    - Financial control
    - Specified relationship factors
    - FMV analysis not required
  - Personal services safe harbor
    - Similar to Stark personal services exception

# Regulatory Risks



- Civil Monetary Penalties Law prohibition on payments to reduce or limit care (42 U.S.C. 1320a-7a(b))
  - A hospital or critical access hospital may not knowingly make a payment, directly or indirectly, to a physician as an inducement to reduce or limit services provided to a Medicare or Medicaid beneficiary under the direct care of the physician



# Regulatory Risks



- Tax exempt IRS laws (for 501(c)(3) entities)
  - Prohibit using charitable assets to benefit private persons, such as physicians
  - Require tax-exempt entities to pay FMV compensation to employed physicians
  - Require total compensation package for actual physician services rendered to be reasonable for geographic market and physician specialty
    - Total compensation package may include
      - Base salary
      - Bonus
      - Fringe benefits
      - Deferred compensation
      - Any other form of compensation

# Regulatory Risks



- IRS's definition of FMV
  - Price at which property would change hands between a hypothetical willing and able buyer and seller acting at arm's length in an open and unrestricted market when neither is under compulsion to buy or sell and when both have reasonable knowledge of relevant facts (Rev. Rule 59-60)
- Reasonable compensation
  - Amount that would ordinarily be paid for like services by like enterprises under like circumstances (IRC Section 162)

# Regulatory Risks



- Other regulatory concerns
  - False Claims Act
  - Antitrust laws
  - Insurance laws
  - State anti-kickback and self-referral laws
  - State insurance laws
  - State corporate practice of medicine and fee-splitting

- Proprietary physician compensation surveys
  - Conducted by independent organizations (e.g., Medical Group Management Association)
  - Largely based on private medical groups
    - Cash compensation levels reported include: base salaries, incentive compensation, on-call pay, compensation for ancillary services, compensation for midlevel provider work effort, and shareholder profits
  - Not-for-profit medical groups and hospital-employed physicians
    - Compensation provided for personally provided services only, excluding compensation for ancillary services and shareholder profits

# Using Multiple Survey Sources



- Compensation benchmarked against a broader physician labor market and not tied to just one aspect of market
- Helps balance unusual swings that may occur within single survey from year to year
- Helpful when reviewing physician compensation levels for reasonableness and FMV

# Revealing FMV Misconceptions



- 90th percentile of survey data cannot be FMV
  - Metrics, such as services provided, experience, total hours worked and production levels must be collectively considered
  - If metrics are in excess of 90th percentile of reported data, it may be reasonable and within FMV to pay compensation levels above 90th percentile

# Revealing FMV Misconceptions



- Relying on median survey data to establish FMV
  - Median compensation indicates half of respondents earned less than this rate
  - Depending on metrics of particular physician, median compensation may not be justifiable (unproductive, high average expenses, less than 40 hour work week, etc.)
  - Focus on metrics such as productivity, payor mix, practice overhead, historical compensation, experience, hours worked, etc.

# Revealing FMV Misconceptions



- Misapplying reported compensation per RVU data
  - When using productivity-based compensation models, make sure total compensation falls within FMV range
  - Do not assume that if a physician's RVUs fall at a certain percentile, say 90th percentile, that the physician should be compensated per RVU at the 90th percentile rate
  - Example: 21,330 RVUs annually (MGMA's 90th percentile) x \$64.12 per unit (MGMA's 90th percentile) = \$1.37 million (far in excess of MGMA's 90th percentile for total compensation)



# Revealing FMV Misconceptions



- Relying on one survey
  - Employers may rely on a single survey to determine compensation plans; however, regulatory guidance suggests other sources should be considered
  - Stark Law recommends using multiple, objective surveys when determining FMV of physician compensation (72 Federal Register 51012 (September 5, 2007))

# Best Practices for Physician Compensation Arrangements



- An organization's physician incentive compensation approach should be carefully designed and tested to make sure it produces intended results
- Most organizations use some form of productivity-based incentive compensation for its physicians
- There is no single productivity incentive approach
  - Range from placing all risk on physicians (no guaranteed base salary, paid on a pure productivity model) to a guaranteed salary with no incentive compensation
  - Most organizations' compensation schemes fall in the middle

# Best Practices for Physician Compensation Arrangements

---



# Best Practices for Physician Compensation Arrangements

---



- Considerations
  - Arrangements must meet tests of several complex laws and regulations
  - Proper valuation of the variety of physician payments should be conducted and considered (base salary, productivity incentives, quality bonuses, administrative pay, etc.)
  - Planning stages should involve individuals who understand how to apply benchmarking methodologies, the financial impact of the plan and regulatory requirements

# Best Practices for Physician Compensation Arrangements

---



- Considerations (cont.)
  - Policies and procedures should be developed to ensure compensation plans comply with regulatory requirements
    - An established procedure for physician compensation review should be applied to all new physician compensation arrangements (pre-approved salary ranges, productivity thresholds, incentives)
    - If compensation plan deviates from the pre-approved norms, make sure it is justified

Albert R. Riviezzo, Esq.  
610.458.4949  
ariviezzo@foxrothschild.com