
January 2022 Changes to the Stark Law That Impact Group-Practice Physician Compensation

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At the beginning of the year, the Department of Health and Human Services (HHS) issued new Stark Law regulations that affect how physician practices may share profits and that clarify how they may pay productivity bonuses. These regulations were promulgated to address undue regulatory burdens imposed by the former rules, to support healthcare innovation and, most notably, to promote value-based arrangements (i.e., arrangements promoting quality care and cost-effective treatments) over a volume-based system (i.e., one that compensates physicians based on the number of services provided). The Stark Law generally prohibits physicians from referring certain health services payable by Medicare to an entity they have a financial relationship with, unless an exception applies.

The most recent amendments were effective starting January 1, 2022. Those amendments clarify and modify methods by which group-practice physicians may be compensated in two main ways.

First, the amendments clarify that physician groups may pay productivity bonuses based on (1) services a physician has personally performed or (2) services incident to those services the physician personally performed. Productivity bonuses may not directly consider the volume or value of referrals made by a physician, unless they concern referrals for services incident to services the physician personally performed. See C.F.R. § 411.352(i)(2). Comments to the amendments noted specific types of productivity bonuses that are permissible:

- A productivity bonus based solely on services personally performed by the physician;
- A productivity bonus based solely on services performed by a member of the physician's care team that are not designated health services; and
- A productivity bonus based solely on designated health services ordered by the physician and provided by members of the physician's care team incident to the physician's billed Medicare services. See Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 Fed. Reg. 77,566-67 (Dec. 2, 2020).

Second, the amendments modify bonus and profit-sharing rules in value-based enterprises. Historically, productivity bonuses or profit sharing to group-practice physicians that directly considered the volume or value of their referrals to the group practice was prohibited, unless an

exception (e.g., the Shared Savings Program) applied. The Stark Law now allows profits from designated health services that are directly attributable to a physician's participation in a value-based enterprise to be distributed to that physician; this compensation will not be deemed to directly relate to the volume or value of the physician's referrals. See C.F.R. § 411.352(i)(3); Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 Fed. Reg. 77,559 (Dec. 2, 2020). This shift is intended to further a transition away from a volume-based healthcare system and toward a value-based healthcare system and associated new payment models.

These amendments are now effective, so healthcare providers and physician practices should evaluate their current policies regarding productivity bonuses and profit sharing to ensure Stark Law compliance. As noted, these changes are part of a broader shift to promoting value-based arrangements, suggesting further changes in this area may continue to unfold.

Authors



Stephen A. Jonas

RETIRED PARTNER

☎ +1 617 526 6000



Ericka Aiken

PARTNER

✉ ericka.aiken@wilmerhale.com

☎ +1 202 663 6504



Benjamin Conery

COUNSEL

✉ ben.conery@wilmerhale.com

☎ +1 617 526 6797