Foster Garvey

Is It Time to Adjust Physician Compensation Models in Light of the COVID-19 Crisis?

Legal Alert
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As hospitals and health care providers struggle to meet the demands arising from the COVID-19 pandemic, ERs and ICUs are filled to capacity while other hospital and clinic services such as elective surgery, imaging and other routine procedures have been shut down for the foreseeable future. While some physician specialties may be working round the clock, others may be underutilized and possibly redeployed to support those areas in greatest need. A hospital's contracts with employed and independent contractor physicians contain compensation models that may not address the current circumstances and may merit review and amendment.

A common physician compensation methodology pays based on a physician's work relative value unit ("wRVU") production. For an orthopedic surgeon whose case load is primarily elective (non-emergent) procedures, their wRVU production may have dropped dramatically since the outbreak began. Can the hospital amend the physician's compensation plan to continue to pay the physician based on their historical wRVU production? What about an ER physician or hospitalist who is paid on salary but is currently working many additional shifts and overtime hours? Can these physicians' compensation be increased to reflect the current workload and hazardous conditions?

On March 30, 2020, the Centers for Medicare & Medicaid Services ("CMS") recognized the need for flexibility in hospital and physician financial relationships in the battle against COVID-19 and issued blanket waivers of sanctions under the Stark physician self-referral law ("Stark"). The waivers are retroactive to March 1, 2020, and apply to financial relationships and referrals that are related to the national emergency for purposes of COVID-19. Those purposes are broadly defined in the waiver to include securing the services of physicians and

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other health care practitioners to furnish or be available to furnish medically necessary patient care, including services not related to the diagnosis and treatment of COVID-19, in response to the COVID-19 outbreak. The CMS waivers permit payment to health care providers for items and services, and waive sanctions for noncompliance, in the event of payment to a physician from an entity such as a hospital that is above or below the fair market value for the physician's services. Under this waiver, for example, a hospital could pay a physician above his or her previously contracted rate for serving COVID-19 patients due to the hazardous or challenging environment.

The waivers temporarily permit a number of other types of financial arrangements that may not otherwise be permissible under Stark. Examples include a hospital's provision of multiple daily meals to medical staff members and child care services while physicians are working at the hospital. A copy of the CMS announcement and list of waivers can be found here.

The flexibility granted in the waivers is a welcome reprieve from regulatory standards that may have hampered hospitals and physicians efforts to battle the novel coronavirus. CMS also recognized that properly documenting changes to financial relationships and use of the waivers may be difficult to achieve during the crisis. Submission of documentation or any form of notice to CMS in advance of using a waiver is not required. Please note, however, that records addressing the use of the waivers must be made available to the Secretary upon request. Hospitals should, therefore, take action as soon as reasonably possible to document the changes it makes to its financial relationships with physicians.

An additional consideration for public hospital districts beyond the Stark waivers described above is the constitutional prohibition against the gift of public funds. The prohibition generally prohibits any local government entity, such as a public hospital district, from providing a gift of money to a private party, except as necessary to support the poor and infirm. Generally speaking, we advise public hospital districts against retroactively amending agreements to increase compensation. The Washington Attorney General recently issued a memo to state and local governments about the prohibition against gifting public funds. While the memo does not specifically address retroactive adjustments, it clarifies that during the COVID-19 crisis, public funds may be spent for the primary purpose of promoting public health, which may incidentally benefit private citizens or entities.

Ideally, public hospital districts should act early if amendments to compensation or benefits are needed so that retroactive changes can be avoided. If retroactive changes are necessary, however, an argument can be made that such changes are essential to ensure the availability of heath care professionals, that these expenditures are being made to protect the public health and welfare and support the infirm, and the benefit to private parties is incidental.

For assistance developing or documenting changes to compensation arrangements with physicians or other health care providers, please contact Brad Berg, Lori Nomura or Mikaela Louie.