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Hospitals Risk Stark Violation With Free PEs; FCA Case Survives

By Nina Youngstrom

Hospitals might want to think twice about supplying physician extenders (PEs) free to physicians—employed or otherwise—because it could run afoul of the Stark Law, depending on the circumstances. This has emerged as a risk across the country as many hospitals loan their employed PEs/advanced practice providers (APPs) to physicians, who may bill Medicare for their services and, in the case of employed physicians, get credit for the work relative value units (RVUs) of PEs, attorneys say. Including the work RVUs of PEs in neurosurgeons' compensation is at the heart of a revised False Claims Act (FCA) lawsuit against Lee Memorial Health System in Florida, which allegedly provided a free PE to a neurosurgery group.

"Hospitals should recognize this is a compliance hot spot," says attorney Charles Oppenheim, with Hooper, Lundy & Bookman in Los Angeles. "They should be very thoughtful and careful in looking at the arrangements they have in this regard and make sure they aren't allowing doctors to pretend in one way or another that the services of hospital-employed physician extenders are the physicians' services."

An amended FCA complaint filed Aug. 8 against Lee Memorial Health System (known as Lee Health) alleges the hospital's compensation arrangements with four employed neurosurgeons violated the Stark Law because they were above fair market value and commercially unreasonable. The case almost died on the vine after it was filed last year ("FCA Lawsuit Against Hospital Alleges M.D. Compensation Included NPPs," *RMC* 27, no. 34).

In the first complaint, whistleblower Angela D'Anna, who was system director of internal audit at Lee Health from 2003 to 2014, alleged that Lee Health overpaid employed cardiologists and pulmonologists as well. Lee Health filed a motion to dismiss, which was granted by Judge Sheri Polster Chappell of the U.S. District Court for the Middle District of Florida with permission to amend. She said in part that the complaint didn't satisfy 9(b) of the Federal Rules of Civil Procedure, which "requires a party to 'state with particularity the circumstances constituting fraud.'" D'Anna filed a second complaint with specific data about the neurosurgeons and the judge gave it the green light to proceed on July 30, but only with respect to allegations about the neurosurgeons' compensation. "Unlike its previous iterations, the Complaint now provides four representative claims that show the submission of false claims for the neurosurgeons," the judge said. "Reading two exhibits together, D'Anna explains four instances when Medicare paid for [designated health services] referred by neurosurgeons with Stark-prohibited compensation." The judge won't let the whistleblower move forward, for now, with the allegations about the cardiologists and pulmonologists, and said a third complaint would have to be filed with allegations about the neurosurgeons only.

The Department of Justice declined to intervene in the case last year. One of the whistleblower's attorneys, Marlan Wilbanks, says he will appeal the judge's decision not to allow the allegations against the cardiologists and pulmonologists.

According to the third amended complaint, the Stark Law was violated because certain employment arrangements with four neurosurgeons didn't qualify for a Stark exception. They were paid too generously and for services they didn't personally perform.

The complaint alleged that Lee Health compensated the neurosurgeons for personally performed services based on work RVUs that sharply rose with the annual total of work RVUs credited to each neurosurgeon. The hospital also credited neurosurgeons with the work RVUs of hospital-employed physician extenders (e.g., nurse practitioners and physician assistants) at the higher work RVU rate of the neurosurgeons, and paid 100% shares of bonus pools "based on production of physician extenders to the extent such production was not already added" to the neurosurgeons' work RVUs and paid at the neurosurgeons' work RVU rates, the complaint alleged.

"As a result of these Neurosurgeon Illegal Compensation Arrangements, the total compensation Lee Health paid to the Neurosurgeons violated the Stark Law because it grossly exceeded fair market value and was not commercially reasonable in the absence of referrals," the complaint alleged.

Whistleblower Says She Was 'Ignored'

D'Anna reviewed compensation and supporting documentation, and wrote a draft audit report in 2014 that's now an exhibit to the false claims lawsuit. She gave the report to the chief compliance officer, and the results were discussed in a meeting with other senior executives, the complaint alleged. In the report, D'Anna suggests they review the fair market value compensation of numerous specialists. With respect to neurosurgery, she noted, "The procedures performed by the extenders and billed by the physicians were added to the [work RVU] productivity of the physicians for compensation purposes. Providing [work RVUs] to the physicians for services performed by the extenders creates compliance risk since the services were not personally performed by the physicians as stated in the contracts." In fact, she alleged, "one extender was provided to the group at no cost."

But nothing came of the audit report, the whistleblower alleged. "Lee Health ignored Relator and the 2014 Audit Report because reducing those physicians' compensation to make it compliant with the Stark Law would likely reduce Lee Health's referrals from those physician[s] and resulting revenues from inpatient and outpatient hospital services," she contended.

An attorney representing Lee Health didn't respond to *RMC*'s request for comment.

Free PEs Are Risky Business

It's pretty common for hospitals to provide the services of employed PEs to employed physicians and/or independent physicians, who bill Medicare directly or get credit under an employment arrangement, attorneys say. "You are seeing this all over the country right now," says attorney Scott Withrow, who also represents the whistleblower. Whether it crosses the line depends on how this plays out.

With physicians employed by the hospital on a work RVU model, it's a Stark problem, Withrow says. "That's a financial benefit unrelated to the physician's personally performed services," he contends. "Valuation experts and plaintiffs' attorneys agree if [physicians] get all the credit but bear none of the expense, it is an inducement."

It isn't necessarily so, Oppenheim says. What matters is whether the physician's total compensation is fair market value. "I don't know that the production of physician extenders being attributed to the physician automatically makes the doctor overpaid. You have to look at the amount the doctor is compensated," he says. "It may or may not be excessive. I don't think it's quite that simple."

Whether there's a Stark violation when hospitals gift PEs to independent physicians for services provided to inpatients "depends on the facts and circumstances," Oppenheim says. "The devil is in the details." He sees a "a tremendous amount" of hospitals lending their employed APPs to independent physician practices, so compliance officers may want to look at how the arrangements are structured and monitored.

The rule of thumb: When PEs perform services in lieu of physicians (e.g., rounding), "that might be a red flag,"

Oppenheim says. Is the physician only doing a cursory exam because he or she knows the PE will take over? That's different from PEs who provide complementary services that improve the quality of care.

An attorney representing Lee Health did not respond to *RMC*'s request for comment.

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