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Time out: Personal accountability in hospital-physician payments

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Looking back in 2019, it seems every day there was a new headline highlighting bad behavior in healthcare, particularly around Stark Law and the Anti-Kickback Statute (AKS) violations. There were the blatant crime stories, but also multiple cases of personal behavior that somehow crossed a line. Reading these articles reminded me of how I felt in grade school, when as children, we all learned a few key lessons that, unfortunately, were somehow forgotten among many of those same kids who are now adults. Here are some of my favorites:

- Respect and listen to your teachers.
- Keep your hands to yourself.
- Be nice to everyone and treat others as you want them to treat you.

But of course, nothing is ever as simple as it was in childhood, when our biggest worries seemed to be centered around who we were going to sit next to on the bus or if we felt prepared for a pop quiz in math class. In fact, the healthcare world today is quite a far reach from all of that uncomplicated bliss, especially when you factor in the fraudulent activities and crimes that occur. So, how did we get here?

In a nutshell, there are regulatory areas in the hospital industry in particular that fall into a proverbial gray zone, which, in turn, cause people to commit technical violations they never actually intended (e.g., miscalculating the amount of time a physician worked). But intent is not a good enough excuse when the Office of Inspector General (OIG) comes knocking. And given that there have already been millions of dollars spent in regulatory enforcements in 2019 alone (and we still have a few months to go!), these purposeful or non-purposeful violations are equally expensive. Now more than ever as we move into 2020, what is certain is that hospital executives—not just the hospital organization itself—must be willing to take personal accountability for anything that goes wrong. And the truth is, there is much that can and will go wrong in one specific area of hospital management: physician contracts.

Physician and hospital relationships

Since the 1980s when the Stark Law[1] (aka, the Physician Self-Referral Law) went into effect, it has been illegal for hospitals to pay physicians unless seven rules (i.e., safe harbors) are met. Specifically, physicians are referral sources to hospitals, so the government gets very involved in ensuring that, at all times, the physician is acting on behalf of the patient first, and not being motivated by some financial relationship or personal benefit.

This rule has been the same for decades now, and yet we find multiple recent examples where the line has been crossed. In fact, sometimes it is quite obvious that all parties had crossed the line in a certain case, as in paying

physicians a bonus to send lab tests to a specific lab. Other times, pointing the finger is a bit harder.

When caught, some executives act as if they were unaware of the rules. But, increasingly, that defense is being met with skepticism from the OIG—and for good reason. You can expect more of that kind of distrust from the government in 2020 and beyond.

2015 was a pivotal year in providing guidance on personal accountability. When the OIG releases a fraud alert, it is for one of two reasons. First, there is a risk to the healthcare provider and the OIG wants to make them aware of this risk before it's too late. The second reason is that the OIG believes that the provider is ignoring previous guidance the government had provided. On June 9, 2015, the Department of Justice (DOJ) released a fraud alert to physicians: Physician Compensation Arrangements May Result in Significant Liability.[2] While the OIG had been advising hospitals to ensure all physician payments are within fair market value and always appropriate, the number of Stark Law settlements and self-reported protocol disclosures around physician payments continued to grow and still does today.

The good news is that the fraud alert advises physicians in three, easy-to-read paragraphs and states that any type of physician payment (e.g., a medical directorship) needs to reflect fair market value for services the physician actually provides. In other words, if a hospital gives a physician money for a directorship and they did not perform that work, the physician is also held accountable—financially and (potentially) criminally.

2015 also brought another key piece of guidance from the DOJ related to the notion of personal accountability. On September 15, 2015, the Yates Memo[3] 3 was released. The memo put all organizations and executives on alert, stating that if you are involved in a scheme to defraud the United States government, you will be personally pursued, both in the civil and criminal realm. In fact, if the organization is indicted on wrongdoing, in order to settle the case, the organization cannot protect the individuals involved. This was a switch from prior settlements, where the organization's attorneys acted on behalf of both the organization and the individuals. In other words, no more hiding behind the corporate checkbook.

Beginning in 2015, we began to see multiple instances of physicians and executives being punished; that is, personally paying fines and even going to jail. Today we know where the boundaries are, yet we still see multiple examples of that behavior. Of the $2.8 billion recovered by the government in 2018 fraud cases, $2.5 billion involved healthcare. It is a target-rich environment.