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Three Ascension Hospitals Pay \$20M in CMP Settlement; One Allegation Is Free APPs

By Nina Youngstrom

In a settlement that covers a variety of common hospital arrangements with physicians, Dell Seton Medical Center (DSMC) at The University of Texas, Ascension Seton Medical Center Austin (ASMCA), and Ascension Seton Williamson (ASW) agreed to pay \$20 million to settle a civil monetary penalty (CMP) case. The settlement stems from Ascension's self-disclosure to the HHS Office of Inspector General (OIG).

OIG alleged the arrangements violated Civil Monetary Penalties Law provisions applicable to the Physician Self-Referral Law and Anti-Kickback Statute. For example, ASMCA paid more than fair market value to an Austin physician practice for administrative services provided in connection with a thoracic surgery program, and ASMCA-employed physician assistants provided services free to the practice, according to the allegations in the settlement and on OIG's website. Payments for on-call coverage also figure prominently in the settlement, which was obtained through the Freedom of Information Act.

This is the second time in a year that a hospital has settled a CMP case over free advanced practice providers (APPs), which is considered a big compliance risk if physicians use their services to increase reimbursement. Last year, St. Vincent's Medical Center in Bridgeport, Connecticut, agreed to pay \$747,973.^[1] OIG alleged that from June 1, 2012, through Feb. 8, 2019, the hospital paid remuneration to certain physicians through APP staffing arrangements. The remuneration was "in the form of providing clinical staff without cost, or at a reduced cost, to the physicians to assist them in treating inpatients at the hospital respondent formerly owned and operated until Oct. 1, 2019," the settlement states.

Hospitals often provide APP services free to physicians on the medical staff because it facilitates higher quality of care and moves patients through faster. But they may run afoul of the Stark Law if APPs perform services in place of the physicians. "They can't take anything physician assistants do into account when they charge for their professional services," said attorney Bob Wade, with Barnes & Thornburg LLP in South Bend, Indiana.

He said compliance officers should consider sending a notice to medical-staff physicians about the compliance risks of incorporating the free services of APPs into their billing. There's also a kickback risk if hospital APPs provide free services to benefit physicians financially. "If the hospital is providing that service free of charge and physicians are taking that into consideration when billing the professional component with the intent to induce referrals, that's a kickback," he noted. However, there's nothing wrong with providing APPs free to help physicians care for inpatients as long as it doesn't figure into the physicians' billing.

The Ascension respondents' \$20 million settlement, which is strikingly high for a CMP case, may stem from the fact that the allegations involve some top-dollar specialties, including thoracic surgery, Wade said.

According to the settlement, the Ascension respondents self-disclosed to OIG and were accepted into OIG's Self-Disclosure Protocol on Feb. 25, 2021. OIG alleged noncompliance with the following arrangements with physicians mostly at an Austin physician practice:

- DSMC and ASW paid remuneration to a physician group, which was acquired by another physician group, in the form of above fair market value (FMV) payments for on-call coverage between April 1, 2013, and June 30, 2019. This was an orthopedic surgery group.
- ASMCA paid remuneration to an Austin physician practice in the form of free physician assistants employed by ASMCA for which the practice should have compensated ASMCA from May 10, 2015, to April 23, 2016, and from Nov. 6, 2016, to Aug. 17, 2020.
- ASMCA paid remuneration in the form of above-FMV payments for administrative services in connection with its thoracic surgery program between Oct. 6, 2014, and Sept. 3, 2020.
- DSMC paid remuneration in the form of more-than-FMV payments for on-call coverage between July 27, 2015, and Dec. 19, 2019.
- ASMCA paid remuneration in the form of above-FMV payments for transplant on-call coverage and administrative services between Aug. 15, 2014, and Dec. 31, 2019.
- “ASW paid remuneration to the Austin physician practice in the form of above FMV payments to lease the practice’s employed registered nurses and surgical technologists that [participate] in surgeries performed by the Austin physician practice’s physicians at ASW,” the OIG explained on its website.^[2]
- ASMCA paid remuneration “in the form of free office space in a medical office building and related staff, service and supply support for half a day per week to perform clinical services” from Jan. 1, 2015, through Feb. 26, 2020.

Ascension didn’t respond to a request for comment and didn’t admit liability in the settlement.

‘Systemthink’ Is a Risk With On-Call Agreements

On-call coverage is a theme in the allegations, and it has been the subject of a number of recent CMP settlements. Although Wade is not speaking directly to what happened with the Ascension respondents, he said health systems generally may run into Stark problems with payments for on-call coverage if hospitals in the same health system have cookie-cutter agreements. Even if the service areas of Hospital A and Hospital B overlap, their financial relationships require separate reviews for fair market value and commercial reasonableness “because the facts and circumstances may be different,” Wade said. “A lot of times, people think the same deal can be replicated,” but he calls this kind of “systemthink” a compliance peril. Suppose Hospital A is in an affluent suburb with a favorable payer mix (i.e., heavy on private payers), where physicians might be willing to take call for free because they will be paid for treating most patients, while Hospital B is in an underserved area, and physicians will demand a good hourly rate for call coverage because they may not get paid much or at all for treating most patients. “You have to look at the facts and circumstances when deciding whether to pay and how much,” Wade said.

There’s also an FMV issue with physicians providing call coverage at multiple facilities at the same time, Wade said. Suppose Dr. Smith, an interventional cardiologist, takes call at Hospital A and Hospital B, which are part of the same health system, and they both pay her \$1,000 per 24 hours of call coverage. That amount may be fine in isolation, but together it could exceed fair market value. “Each hospital may need to pay less to the physician so that the aggregate for each night of coverage is fair market value,” he said.

Is Compliance Committee Looking at All Deals?

From a compliance perspective, the overarching issue is that even when an arrangement is FMV in isolation, a

physician could have multiple arrangements that together may run afoul of the Stark Law and/or Anti-Kickback Statute, Wade said. “Heightened compliance oversight is needed from various hospital departments,” he said. Otherwise, people are operating in a silo, with executives negotiating administrative agreements with physicians independently. “You could have one physician group receiving multiple benefits from the hospital,” he noted. “This is where compliance is key to ensure everything provided to the physician is compliant, both individually and in the aggregate.”

The compliance committee also is critical here. “I have been involved with multiple calls with compliance committees where they bring up one financial arrangement,” such as on-call coverage, but also should be asking whether the hospital provides anything else to the physician group, Wade said. Maybe it’s also leasing half a day per week of an office suite to the physician, who is a medical director. Wade said the committee should pose this question: “How is this financial arrangement defended in the context of everything provided to this physician or physician group?”

He noted that CMS has clarified the definition of FMV in the new Stark Law regulation that took effect Jan. 19.^[3]

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1 Nina Youngstrom, “Hospital Settles CMP Case Over Free APP Services for Physicians,” *Report on Medicare Compliance* 29, no. 22 (June 15, 2020), <https://bit.ly/3hZVvCF>.

2 HHS, “Three Ascension Texas Hospitals Agreed to Pay \$20.9 Million for Allegedly Violating the Civil Monetary Penalties Law by Paying Remuneration to Physician Groups Inconsistent with Fair Market Value Services,” enforcement action, April 30, 2021, <https://bit.ly/3u7GtQc>.

3 Medicare Program; Modernizing and Clarifying the Physician Self-Referral Regulations, 85 Fed. Reg. 77,492 (December 2, 2020), <https://bit.ly/3g3eprL>.

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