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Hospitals May Have to Be Flexible With FMV as COVID-19 Worsens

By Nina Youngstrom

When hospitalists and primary care physicians are tapped to work in emergency departments (EDs) as demand intensifies during the coronavirus crisis, hospitals may have to pay them more. To obtain necessary services, compensation may be required to match ED physicians, which is raising questions about fair market value and how far hospitals can push the Stark Law envelope in the pandemic, an attorney said. Other specialists, such as orthopedic surgeons, who help in the emergency room (ER) may expect to continue to collect their big paychecks while providing emergency services. The atypical wages may not be fair market value in normal times, but these are anything but normal times, and there's room to maneuver under the Stark Law.

"Hospitals can't print money" and give it to physicians, but there are ways to meet the emergency demand and comply with the Stark Law requirement for fair market value compensation, said attorney Bob Wade, with Barnes & Thornburg in South Bend, Indiana. Hospitals must have clinical and business reasons for paying physicians above the percentile on compensation surveys for their specialty and productivity level, he said, and "I don't think you can throw fair market value out the window."

Meanwhile, some hospitals are individually requesting waivers from certain Stark Law requirements during the pandemic, said attorney Jacob Harper, with Morgan Lewis in Washington, D.C. For example, because of the disruption to many physician practices, hospitals might seek CMS's permission to forgo office lease payments from physicians without putting Medicare reimbursement for services ordered by the physicians at risk. Harper said some hospitals also want the green light to exceed the cap on nonmonetary compensation, which is now $423 per physician annually. One reason is hospitals may want the freedom to feed physicians round the clock or donate equipment, masks and other resources to community physicians to help them as they battle COVID-19.

Harper anticipates CMS probably will issue a blanket waiver for Stark financial relationships, which means it applies to all hospitals and other entities that provide designated health services, because CMS "will be overwhelmed from the deluge of requests for individual waivers, which have to be analyzed and responded to on an individual basis."[1] Without a blanket waiver, almost every DHS entity, including hospitals, will either submit an individual waiver request now or a self-disclosure of Stark noncompliance to CMS's Self-Referral Disclosure Protocol after the pandemic ends—"for very basic stuff," Harper said. That would be an administrative nightmare for CMS, which already takes years to resolve self-disclosures.

'Fair-Market Value Is Still a Local Issue'

As different kinds of physicians are deployed to the emergency room or to "stand in the shoes" of physicians who are now in the ER, hospitals may stop worrying quite as much about fair market value, Wade said. "What I'm concerned about is hospitals and health systems that think this is a crisis and they can do anything they want, and I am telling them, they can't," Wade said. "Fair market value is still a local issue." Hospitals at the epicenter —in New York City, for example—probably can pay physicians double time to work in the ED because they have no alternative, he said. "It's not like the sky is the limit, but you have greater flexibility," Wade said.

Hospitals shouldn't approach top referral sources with offers to fatten compensation on the assumption they won't be questioned because of the chaos, Wade said. They must do it for the right reasons and not to reward past and future referrals, he explained.

Hospitals that use the national emergency as an excuse to reward physicians for referrals may face a reckoning with the Department of Justice two years from now. But he said there are three ways hospitals may be able to adjust physician compensation through the duration of the coronavirus emergency without running afoul of the Stark Law:

- **Use ER benchmark data from Medical Group Management Association and/or other national surveys**. When internal medicine, primary care physicians and hospitalists bring their skills to the emergency room, hospitals should be able to compensate them consistent with their wearing an ED physician's hat, Wade said. "I think it's a safe approach to use ER benchmark data," he said. "It's an increased payment because it's more akin to ER services during a pandemic than primary care services." Wade added that the higher compensation is analogous to hazard pay the federal government gives physicians who perform services in a hazardous environment. "I'm not saying everybody should pay an enhanced payment. I'm saying it's defensible to pay an enhanced payment if that's what you have to do to get the number of physicians you need to service everyone during the pandemic," Wade explained.

  On the other end of the spectrum are specialists who may demand their usual compensation when asked to work in the ER, he said. For example, an orthopedic surgeon might expect to continue to receive $400 an hour. Normally that would be untenable, but if the hospital desperately needs the orthopedic surgeon's help in the ED, Wade thinks it's defensible. "It's just if you are very desperate and you have no other alternative," he said. The arrangement would have to be the fruit of an arm's-length negotiation and documented.

- **Use ER benchmark data to determine what to pay physicians who take over for other physicians who have moved to the front lines to treat COVID-19 patients**. Maybe they came out of retirement to help with a practice that's down one physician, or they will treat non-COVID-19 patients in the emergency room because there still will be plenty of heart attacks and car accidents, for example. "Depending on your market, you may have to pay a premium to have those doctors stand in the shoes," he said.

- **Consider continuing the same level of compensation for physicians whose practices are less productive than they were before COVID-19**, Wade said. Obviously, patients are not seeing physicians at the same rate, and many elective procedures are canceled. If compensation is based on work relative value units, it won't be fair market value for a while for many physicians. But Wade said guaranteeing the compensation based on historical productivity is defensible while there's a crisis in your service area.

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1 "Stark Law and Waivers: The Bird's-Eye View," *Report on Medicare Compliance* 29, no. 12 (March 30, 2020).