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Consider Three-Step Process to Pivot to Post-PHE Loss of Stark Waivers

By Nina Youngstrom

As an example of the way the Stark waivers in place during the COVID-19 public health emergency (PHE) have given hospitals a wide berth in their compensation relationships, they may have been able to pay hospitalists a higher hourly rate than they paid before the pandemic. But with the PHE ending May 11, hospitals may have to reduce hospitalist compensation, depending on the circumstances.

"If a portion is because of COVID, that has to be taken off the table," said attorney Bob Wade, with Nelson Mullins in Nashville, Tennessee. But if hospitals are able to justify continuing the above fair market value compensation for other reasons, it may go back on the table even though it's no longer considered a COVID-19 differential, he said. Other reasons it could be justified include a demand for the specialty that exceeds supply "or ancillary issues impacting this physician," Wade said. This could be their experience, leadership and productivity.

That's the kind of analysis hospitals face with the PHE expiring and the waivers along with it. During the PHE, the analysis of Stark compliance focuses largely on whether an arrangement is fair market value and commercially reasonable—total cash compensation—"with an overlay of COVID-19," Wade said. "Now we have to take away the factor of the COVID impact on total cash compensation."

CMS announced blanket Stark waivers on March 30, 2020, to allow certain financial relationships and referrals that otherwise would invite sanctions, said Lyle Oelrich, a principal at PYA in Knoxville, Tennessee.[1] There are 18 waivers, half of which permitted compensation that was greater or less than fair market value, he said at a March 28 webinar sponsored by PYA. "They are also bidirectional," which means the waivers apply to compensation from an entity to a physician and vice versa. Other waivers allow arrangements that were not memorialized in writing.