Independent contractor physician – kickback or compensation?

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If you're a successful physician, chiropractor, acupuncturist, or other licensed healthcare provider, and you want to provide overflow patients to another practitioner you hire, is it a kickback if you pay that second practitioner as an independent contractor?

Are payments to an independent contractor physician a kickback?

Kickback Basics

Let's review some kickback basics, to start.

Stark (or self-referral) arises when the physician refers patients to an entity in which the physician has a financial interest (for example, the physician refers patients to a clinical lab that the physician owns).

Stark only involves certain "**designated health services**." For example, the physician refers the patient to a clinical lab that the physician owns. That does not sound like the situation here, where the physician simply refers to another doc in the physician's office.

Kickbacks can arise in a variety of contexts; a key definition is that if compensation depends on value or volume of referrals, as opposed to for the work itself, then there is a kickback.

If there is a self-referral problem, then you must find an exception. On the other hand, if there is a kickback problem, then the arrangement is not necessarily illegal, but we look to a safe harbor and see if there is a fit, and evaluate the arrangement as a whole.

Employee and Personal Services Arrangement Safe Harbors

The safe harbors that one uses with respect to anti-kickback prohibitions, in this kind of situation of overflow patients, typically involve either:

(1) A **bona fide employee** (i.e., the employer can pay the employee a salary, yet profit from the employee's services), or

(2) if an independent contractor, **a personal services arrangement**, in which the aggregate compensation is set in advance (as opposed to being a percentage of collections).

A kickback issue potentially can arise when the independent contractor physician is paid on a **net collections basis**, which means that essentially, compensation varies by value or volume of patients. Although potentially, the independent contractor agreement can be drafted so that compensation is based on a percentage of **gross collections** and it becomes clear that the independent contractor is paying a fee for management and administrative services.

For this reason, we typically prefer to use the MSO model. The MSO model is very clean. The MSO (management services organization) provides management and administrative services, and in exchange collects a fee.

The physician either wears two hats – clinician and MSO – or, preferably, has a professional medical corporation for the clinical role, and creates a separate corporation or LLC to serve as the MSO.

See our prior posts:

- **CORPORATE PRACTICE OF MEDICINE & ANTI-KICKBACK / FEE-SPLITTING RULES …**
- **IS IT FEE-SPLITTING TO SHARE REVENUES WITH MEDICAL DOCTORS?**
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The MSO model tries to use to the personal services and management safe harbor.
Under California law, the equivalent is the more amorphous, Business & Professions Code Section 650(b).

The Independent Contractor Arrangement—Kickback?

The independent contractor arrangement is very common, and we've reviewed many such agreements. It is somewhat problematic as mentioned above but very pervasive.

From an anti-kickback perspective, the key is that the net collections reflect **fair market value** (FMV) for the services the independent contractor physicians provide, and that the balance (which gets retained by the hiring physician) **also represent fair market value** for the services that the hiring physician provides back to the independent contractor doctor.

For example, these services could involve overhead, staffing, a medical assistant, and space.

These are essentially MSO functions, only here they are provided by the hiring physician or his professional medical enterprise.

If the independent contractor is being underpaid for his medical services and the hiring physician is being overpaid, then a regulator could argue that the differential against fair market value, represents an illegal inducement or compensation for the hiring physician to refer patients to the independent contractor physician—and is therefore an illegal kickback.

Conversely, if the independent contractor is being overpaid for his medical services and the hiring physician is being underpaid, then a regulator could argue that the differential against fair market value, represents an illegal inducement or compensation for the independent contractor refer patients to the hiring physician—and is therefore an illegal kickback.

Note that the risks are exacerbated in a multidisciplinary clinical center where, for example, you have an MD and a chiropractor (DC), acupuncturist (LAc), physical therapist (PT), or other provider. Payment based on gross collections is not uncommon in arrangements between a hiring physician and the MD who is hired. If other healthcare providers are involved such as DC, LAc, or PT, this could be seen as an illegal joint venture or a scheme, or, a kickback arrangement in which the MD leverages off other providers by paying for referrals received or paying for referrals being given.

This is why, in the multi-disciplinary center, collaborative clinical center, integrative medicine center, or center that includes say

an MD and a DC collaborating on pain management, the MSO model is, in our view preferable.

Medical Marketing Services

Where marketing services for medical practices are involved, we recommend that those services be explicitly called out in the agreement (or in a separate marketing services agreement), and be designated for a flat fee. The reason is that marketing services can generate enforcement scrutiny on kickback grounds.

This is different than management services such as rental of space and the all the admin functions that the underlying practice provides.

Important Independent Contractor Provisions

It is important that both sides have legal review of the independent contract provisions themselves to be sure nothing vital is missing.

For example:

- There should be a provision about the timing for paying the independent contract physician, as well as timing for billing and collection from the patient – and what will happen if the hiring physician neglects to perform these functions. Failure to specify these details in writing can lead to collections disputes, and litigation.
- Who is responsible for whose negligence? What if the hiring physician makes billing errors? Some thought should be given to indemnification.
- The agreement should be readable. The more readable the agreement, the less likely to generate litigation in case of a later disagreement.
- Non-competition language may or may not be enforceable, depending on the state. Certainly both parties should pay attention to related provisions, such as prohibitions against solicitation and those safeguarding confidentiality (trade secret provisions).

The MSO is almost always a more compliant solution, or at least one that is well recognized and often stands up well against enforcement scrutiny.