

Physician Recruitment Compliance Issues, Stark Law Exceptions, and MSOs

February 15, 2024
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When hospitals and medical practices hire new doctors, they must consider various balances — the need for doctors capable of providing essential medical care to patients, the doctor's capacity to attract new patients, and the imperative to comply with federal and state laws governing physician recruitment. The fundamental requirement of these laws is that patient care must always take precedence.

Our experienced healthcare lawyers are prepared to elucidate how these balances operate. We strive to assist hospitals, medical practices, and doctors in delivering high-quality medical care, fostering business growth, all while adhering to legal requirements.

Two key legal issues we help healthcare professionals address are compliance with Stark Law and the Anti-Kickback Statute (AKS). We excel in negotiating and drafting contracts that not only demonstrate compliance with Stark, the AKS, and other legal obligations but also ensure that all parties prioritize patient care and financial success. Additionally, we can explain how a Managed Service Organization (MSO) can assist medical practices in managing the business side of their practice once a new physician is hired.

Stark Law generally provides exceptions that aid hospitals and medical practices in hiring qualified physicians. Violations of Stark Law and the AKS can lead to civil and criminal actions, potentially resulting in the loss of a medical license.

While MSOs can offer administrative support, such as credential verification, it's important to note that they cannot provide recruitment support, as MSOs are not authorized to practice medicine.

As we've previously discussed, hospitals and medical practices regularly find the need to hire physicians who fulfill specific specialty requirements and engage in research. Newly graduated talent from medical school requires training, while experienced professionals often undergo an adjustment period and address practical issues, such as the new doctor's preference to practice in a specific geographical area. Often, hospitals, which grant the right to practice within their facilities, collaborate with medical practices to recruit new physicians.

Ideally, from the hospital's perspective, the physician will "refer" patients to the hospital for surgeries and specialized care, with such referrals needing to comply with Stark Law, the Anti-Kickback Statute (AKS), and state laws. From the medical practice's standpoint, the goal is for the practice to receive fees for the services the doctor provides both at the hospital and within the practice, while the physician also refers patients to the medical practice. The ideal scenario involves the doctor earning a base fee until their medical practice can be expanded.

Each of the three participants—the hospital, the medical practice, and the doctor—has their own set of concerns during the

physician recruitment process. These concerns include:

- The geographical area where the doctor will practice, including the potential need for relocation.
- The amount of compensation.
- The duties of the physician.
- The length of the employment contract.
- The loan – *“The agreement by the hospital to pay the salary or part of the salary is considered a loan.”*
- Covenants not to compete – where legally applicable. It’s important to note that covenants not to compete are generally not enforceable in California.
- Other contract terms.

Useful Stark Law exceptions for physician recruitment

Hospitals and medical practices offering inducements to attract doctors to work within their facilities must ascertain whether such inducements or the working relationship violate anti-referral laws, namely Stark Law and the Anti-Kickback Statute (AKS). Generally, recruitment arrangements that meet specific criteria may be deemed valid under the following Stark Law exceptions:

Bona Fide Employment Exception: Applicable to medical practices, organizations, and hospitals hiring physicians. The physician has a bona fide employment relationship if:

- The employment services are clearly identified.
- The remuneration paid to the physicians is consistent with the fair market value of the services.
- Unless an exception applies, the remuneration is not based on the volume or value of any referrals by the referring physician (the newly hired physician).
- The remuneration is provided under an arrangement that would be commercially reasonable even if no referrals were made to the employer.
- Productivity bonuses based on services personally performed by the physician (or an immediate family member of the physician) may be permissible.
- If the physician’s remuneration is conditioned on referrals to a particular provider, practitioner, or supplier, the referral arrangement must meet other Stark Law exceptions.

Hiring the Physician as an Independent Contractor: The contract or services should be in writing, identify all the services the physician will perform, be for specific time periods, contain a termination clause, specify the terms of payment in advance, and be consistent with the fair market value of the services. The arrangement should not factor in the volume or value of any referrals or business generation. The arrangement should be commercially reasonable (even if there were no referrals) and further the legitimate business purposes of the employer and the contractor-physicians.

Physician Recruitment Exception: Remuneration provided by a hospital to recruit a physician that is paid directly to the physician may meet this Stark Law exception if certain conditions are met:

- The agreement is placed in writing and signed by the hospital, the physician, and the medical practice if all three are involved.
- The agreement is not conditioned on the referral of patients by the physician to the hospital.
- The amount of remuneration under the arrangement is not determined in any manner that takes into account the volume or value of actual or anticipated referrals by the physician or other business generated between the parties.

- The physician is allowed to establish staff privileges at any other hospital(s) and to refer business to any other entities (some exceptions may apply).
- The terms of the employment contract generally can't be altered once the contract is signed.
- The medical practice must also sign the agreement if the doctor is going to work for the medical practice and not full-time at the hospital.
- Other conditions may apply depending on the terms of the agreement.

As previously mentioned, our healthcare lawyers elucidate the additional conditions that must be met (to comply with a Stark Law exception) for a medical practice (without using a hospital) to be able to hire a doctor as an employee or as an independent contractor. Generally, payment should be based on fair market value and not on the amount or worth of any referrals.

The AKS may provide safe harbors for certain physician employment relationships and recruitment efforts if specific conditions are met. Notably, the AKS uses the term "practitioner recruitment" instead of "physician recruitment." Physician recruitment agreements must also adhere to any IRS 501(c)(3) requirements.

In addition to hiring physicians, hospitals, and medical practices must understand whether Stark Law, the AKS, and other federal or state laws regulate the hiring of non-physician healthcare providers. Our experienced lawyers represent one of the three participants in physician recruitment, with the signer we represent varying depending on our client. We work diligently to address all other relevant legal, business, and medical issues.

PHYSICIAN RECRUITMENT AGREEMENTS OBLIGATE THE HOSPITAL, MEDICAL PRACTICE AND THE PHYSICIAN – MAKE SURE YOU KNOW WHAT YOUR OBLIGATIONS ARE

Physician recruitment agreements involve the rights and duties of three parties. Experienced healthcare lawyers craft the proper exceptions to the Anti-Kickback Statute and Stark Law

What is a managed service organization (MSO)?

An MSO is often utilized to manage the administrative and marketing aspects of a medical practice. In California, physicians typically own the medical corporation, while ownership interest in an MSO is open to anyone. An agreement outlining the duties and obligations of each party to the agreement should be established between the medical corporation and the MSO.

Beyond addressing a state's corporate practice of medicine (CPM) laws, MSOs are employed to demonstrate the medical practice's compliance with Stark Law and the Anti-Kickback Statute (AKS). The medical practice's primary focus should be on providing healthcare, with the MSO supporting the business side of the medical practice.

Our healthcare lawyers comprehend how MSOs can benefit a medical practice and identify tasks exclusive to the medical practice. Generally, the MSO cannot participate in the recruitment of physicians, as decisions regarding physician employment pertain to the physician's ability to provide healthcare to patients.

The MSO may be able to assist with several issues when a medical practice is considering hiring (or has hired) new physicians or other medical staff who must be under the supervision of appropriate medical personnel, such as nurses, physician assistants, medical assistants, and other healthcare staff requiring supervision.

These issues include:

- Scheduling appointments
- Leasing office space or equipment to the medical practice

- Billing and collection on behalf of the medical practice
- Checking the credentials of the physician, such as their medical licenses and their status
- Educating and training medical staff on topics such as compliance training, various diseases, office software systems, and other non-medical issues.

MSOs can also perform additional tasks, including:

- Educating and training medical staff on compliance and various diseases
- Medical coding
- Regulatory compliance with federal and state laws, such as [HIPAA \(Health Insurance Portability and Accountability Act\)](#), OSHA (Occupational Safety and Health Administration) regulations, FMLA (Family and Medical Leave Act), CLIA (Clinical Laboratory Improvement Amendments of 1988), and state laws
- Credentialing staff and hiring clinical and administrative staff, credentialing health plans, and managing enrollment
- Public relations
- Disaster management

Hospitals and medical practices require physicians and other healthcare providers to attend to their patients, especially when expanding to other locations or offering additional services. In the process of recruiting or hiring physicians, hospitals, medical practices, and the physicians involved must seek guidance from experienced healthcare lawyers. This consultation is essential for understanding employment incentives, conditions, and duties that align with Stark Law, the Anti-Kickback Statute (AKS), and other pertinent federal and state laws. Utilizing Stark Law exceptions during the drafting of employment contracts can be beneficial. Employing an MSO is an effective method for ensuring that a newly hired physician can concentrate on practicing medicine while leaving the administrative side to the MSO.

Ensure Legal Compliance in Physician Recruitment

Hospitals, medical practices, and physicians, are you navigating the recruitment of new physicians? [Consult with Cohen Healthcare Law Group](#), where our [experienced healthcare attorneys](#) provide guidance on compliance with healthcare laws and regulations.

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