

When Using a Management Services Organizations (MSO) Is the Right Choice for Your Medical Practice

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Seymour Heart, MD runs a successful medical practice and would like to expand to a second office. Dr. Heart is a renowned plastic surgeon (or functional medicine doctor specializing in helping patients with obesity, reverse diabetes, or autoimmune disorders, or something like that)—and it turns out he is also successful at building a brand.

Dr. Heart's brother, Samuel, is a marketing guru whose SEO strategies have placed Dr. Heart's medical group at the top of the search rankings for various treatments. Dr. Heart is looking for a way to collaborate more deeply with his brother and, share in the profits from the business side of his expanding medical ventures.

Dr. Heart also wants to brand a line of dietary supplements and cosmetics that will further establish him as the premiere authority for patients, and, add revenue streams so that he can spend more time with his family and less time doing medical procedures.

The MSO Advantage

Recently a medical doctor contacted our healthcare legal team with this kind of scenario, and reported that a senior medical colleague... who heard it from another senior medical colleague... was told by his lawyer ... that his compensation arrangements were violating Stark and anti-kickback laws... but... he thought MSOs were antiquated and no longer worked.

This is the kind of heard-it-from-a-friend who heard-it-from-a-friend strategy that is almost inevitably based on faulty hearsay like the old game of "telephone."

In fact, the MSO model is alive and well and deeply useful for healthcare clients like Dr. Heart.

Managed Service Organizations (MSOs) are designed to help physicians and other health providers with the non-clinical, administrative part of their medical practice—and to grow the business side of healthcare.

Often, MSOs supply the business side of the medical or healthcare practice with human resources, payroll and benefits, compliance, and other non-medical matters. While MSOs mainly provide services for physicians, MSOs can help hospitals and other medical ventures. MSOs can be owned by different entities including hospitals, physician groups, investors, and others.

According to [Healthlawyers.org](https://www.healthlawyers.org), MSOs can do more than provide management services. They can also buy the assets of a practice (to provide capital) and then offer the practice essentials such as equipment or space.

Generally, while the idea of an MSO owning of assets allows the physician or medical practice to focus more on the medical practice, MSO ownership also can carry more risk that the arrangement might violate federal or state laws. This depends a lot on the compensation arrangements, as we will discuss below.

The Healthcare Business Services an MSO can provide

According to [Physicians Practice](#), MSOs perform the following tasks:

- Educating and training medical staff – including compliance training and education about various diseases
- Medical coding for payment, billing, and collection actions – hiring coding personnel, making sure the billing doesn't violate the False Claims Act or other federal and state laws, filing claims in a timely manner, managing accounts receivable,

creating customize billing reports for the patients

- Managing and even providing office space – choosing the location, drafting and negotiating leases, and reviewing options to buy office space
- Managing equipment – determining what equipment is needed and where and how to acquire/lease the equipment
- 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
- Information technology – managing networks, evaluating and buying software and hardware, providing support services, document management, database management, scanning, and integration of technology
- Procurement of supplies and medications
- Auditing
- Financial management
- Payroll and benefits such as health and retirement benefits
- Scheduling
- Financial statements
- Transcription of medical records
- Marketing
- Sales
- Public relations
- Disaster management
- Quality assurance
- Negotiating and managing contracts
- Managing risks and insurance
- Managing inventory
- Maintenance of electronic health records (EHR)
- Managed care
- Strategic management

Legal Issues Involving MSOs – Stark Law

MSOs can be particularly effective at helping medical practices comply with various federal laws including Stark Law. This law covers self-referrals. Medical doctors, unless approved exceptions apply, cannot buy “designated health services (DHS)” for patients who use Medicare or Medicaid – if the physician (or an immediate family member) has a “financial relationship” with the DHS. Some financial arrangements may not violate Stark law.

Often, an experienced MSO healthcare lawyer will recommend using the MSO to meet one of the approved exceptions.

HOW TO HANDLE STARK AND ANTI-KICKBACK LEGAL BARRIERS WHEN PHYSICIANS INVEST IN AN MSO

This is a story about how Harry, a healthcare entrepreneur, worked through a proposed arrangement that was raising Stark

and Anti-Kickback issues.

Financial relationships include various ownership, investment, and compensation arrangements. Referrals are “the request or establishment of a plan of care by a physician which includes the provision of the designated health service.”

For an MSO arrangement to meet the financial relationship and self-referral definitions, it is crucial to create the MSO so that it meets one of the listed exceptions. These exceptions include:

- **Personal Service Arrangement.** This exception applies to physicians who are independent contractors and not employees. An MSO healthcare attorney can explain the requirements to meet the exception including reviewing that:
 - The agreement to provide services is in writing
 - The agreement covers all the medical services the doctor will provide to the DHS
 - The arrangement’s duration is for one year or longer
 - The total services aren’t more than are “reasonable and necessary for the legitimate business purposes of the arrangement.”
 - The compensation is set in advance, isn’t more than the fair market value, and isn’t based on the value or volume of the referrals or any other business between the physician and the entity
 - The services that will be provided can’t involve any business activity the violates federal or state law
- **The Fair Market Value Exception.** This exception applies to many different types of items and services (other than renting office space which has its own set of requirements to qualify for an exception). The key requirements that a Managed Service Organization lawyer will review to help show the compensation for providing these items and services meets the fair market value exception are:
 - The agreement is written down, signed by the parties, and covers specifically named items and services
 - The length of the agreement and means of termination are set forth – provided there is one agreement yearly – though agreements that are less than a year can be repeatedly renewed on the same terms
 - Any compensation must be preset, must meet the fair market value, and can’t take volume or value of referrals into account
 - The compensation for renting equipment cannot be based on:
 - “A percentage of the revenue raised, earned, billed, collected, or otherwise attributable to the services performed or business generated through the use of the equipment; or
 - Per-unit of service rental charges, to the extent that such charges reflect services provided to patients referred by the lessor to the lessee. “
 - The agreement is commercially reasonable
 - The arrangement doesn’t violate federal or state billing law including the Anti-Kickback statute – or any federal or state regulations.

This exception permits fair market value compensation to and from DHS entities by physicians.

- **Rental of Office Space and Equipment.** If an MSO leases property, equipment or office space to a physician so the doctors don’t need to locate or maintain these items – the MSO arrangement needs to meet the relevant Stark exceptions. The main exception requirements are that
 - The lease is put in writing, signed, identifies the property being leased, indicate that the property will be used only be the

lessee, and show that the lease term is at least one year.

- The office space should meet what is “reasonable and necessary” for the practice
- The common area payments should reflect the lessee’s pro rata share
- The rental amounts should be preset, conform with fair market value, and should not be based on the value or volume of referrals or other business generated between the parties

- **Payments by a Physician for Items and Services.** This is a catch-all exception that applies if no other exceptions apply

Other Stark exceptions may apply. Some of these exceptions that your managed service organization (MSO) lawyer will explain are:

- The isolated transaction exception – used when the MSO wants the medical practice’s practice assets. This can infuse the practice with needed capital. The isolated transaction exception can also be used for a sale of the practice provided additional terms are met.
- Indirect compensation.
- Certain hospital arrangements
- Group practice arrangements with a hospital
- Non-monetary compensation
- Medical staff incidental benefits
- Risk-sharing arrangements
- Compliance training
- Other exceptions

Legal Issues Involving MSOs – The Anti-Kickback Statute

The Federal Anti-kickback statute applies to individuals and entities that receive payments through any federal healthcare program including Medicare and Medicaid. The law makes it illegal to “willfully offer, solicit, pay, or receive compensation in return for referring business.” Compensation includes bribes, kickbacks, and rebates. There are civil and criminal penalties that can result in jail time for physicians and closure of the medical practice.

The payment method includes indirect payments as well as direct payments. The AKS covers cash and payments in kind.

“Prohibited conduct includes not only remuneration intended to induce referrals, but also remuneration intended to induce the purchasing, leasing, ordering, or arranging for any goods, facility, service or item paid for by a federal healthcare program. “

The AKS does provide for safe harbors which protect legitimate arrangements from both civil and criminal liability. Each arrangement is judged on a case-by-case basis. MSO arrangements need to comply with the Anti-Kickback Statute

Some of the safe harbors allowed by the Office of Inspector General which your MSO lawyer will review include the following:

- Space rental
- Equipment rental
- Personal service and management contracts

The common threads to these safe harbors are:

- The MSO relationship should be in writing
- The relationship term should be a year or more
- The total amount of payments including for the office space, equipment, and services, should be established in advance
- If the relationship contract doesn't anticipate "full-time services," the agreement must properly address the part-time arrangement.
- The payments should be based on the fair market value of the space, equipment, or services and can't change based on the value or volume of "Medicare or state health care program-covered referrals or business generated between the parties."

Another safe harbor your MSO healthcare attorney can explain is investment interest. He'll review how this safe harbor is used and what the requirements are when a medical practice and a hospital are considering a joint venture. This safer harbor applies to investment interests:

- In large, publicly held companies;
- In smaller healthcare companies;
- In healthcare entities that are located in Medically Underserved Areas.

Additional legal issues involving Managed Service Organizations

Some additional concerns your MSO healthcare attorney will review are:

- **The corporate practice of medicine.** States are concerned about the unauthorized practice of medicine including a non-licensed individual "owning, maintaining, or operating a place of business in which an individual is employed or otherwise engaged to practice medicine". MSOs should not be too involved in the daily practice of medicine.
- **Contract law.** At the heart of every MSO relationship is the written agreement. The terms need to be carefully negotiated and drafted. The rights and duties of the MSO and the medical practice need to be set forth in detail. The ability to terminate the contract should be precise. How disputes are handled should be identified. The consideration should be clearly identified. Compliance issues should be spelled out. Many other provisions need to be reviewed.

Your MSO lawyer may also need to review antitrust laws, tax exempt organization issues, and other matters

CORPORATE PRACTICE OF MEDICINE: MEDICAL MANAGEMENT ORGANIZATIONS AND PROFESSIONAL MEDICAL CORPORATION—WHO CONTROLS WHAT?

The Corporate Practice of Medicine (CPM) doctrine continues to befuddle, beleaguer, and bewilder healthcare companies seeking to venture with physicians and non-physician entrepreneurs.

Managed Services Organizations (MSOs) are a popular and useful tool for physician medical practices and other healthcare ventures.

The advantages of an MSO are that they assign administrative tasks such as billing, compliance issues, electronic health records, leasing of office space and equipment, training and other services and items to an outside agency.

There are numerous legal risks. MSO arrangements must be reviewed with an experienced management service organization lawyer. Most MSO arrangements will be considered violations of Stark anti-referral law and the Anti-Kickback statute unless the arrangements qualify for an exception or a safe harbor. MSO arrangements may also violate state laws on the corporate practice of medicine.

Creating an MSO requires thinking through a wide variety of business and medical terms and considerations. MSO arrangements need to be properly negotiated and set forth in writing so that the rights and duties of the medical practice and the MSO are clear, so that disputes can be addressed, and financial benefits are maximized. MSOs that violate federal or state law can result in civil and criminal penalties.

Contact Cohen Healthcare Law Group, PC. to speak with an experienced MSO healthcare lawyer. Our MSO attorneys have extensive experience drafting MSO arrangements with sensitivity to the business, financial, and legal needs of healthcare practices.

Contact our healthcare law and FDA attorneys for legal advice relevant to your healthcare venture.