Recent Stark Law Changes Impact Physician Group Compensation Models – Be Sure to Reexamine Compensation Before 2022

Many health care providers are generally aware that the Centers for Medicare and Medicaid Services (CMS) recently implemented major changes to the Stark Law regulations. Most of the changes are already in effect. However, some providers may be less aware of the changes to the "special rule for productivity bonuses and profit shares" within Stark's "group practice" definition at 45 C.F.R. § 411.352(i), which become effective January 1, 2022. The discussion that follows focuses on changes to Stark's requirements related to the distribution of physician profit shares.

Among other prohibitions, the Stark Law generally prohibits physician owners or employees of medical practices from referring patients to their own practices for the furnishing of certain "designated health services" (DHS) (i.e., clinical laboratory services, certain therapy services, imaging services, and certain other categories of medical services) payable by Medicare, unless an exception applies. In order to make in-office referrals of DHS without violating Stark, physicians commonly rely on Stark's "in-office ancillary services" (IOAS) exception. However, to utilize the IOAS exception, physicians must practice within a group that meets Stark's "group practice" definition. Among many other things, that definition requires the practice to distribute DHS profits in a manner that satisfies the "special rule for productivity bonuses and profit shares" (the Special Rule).

In its recent regulatory update, CMS made several clarifying changes to the Special Rule and issued a number of clarifying comments in its accompanying commentary. The Special Rule covers both distributions of overall profits and productivity bonuses. Of particular note are some important CMS clarifications concerning distributions of overall profits. For purposes of establishing profit distribution pools, the Special Rule will continue to allow groups to aggregate either (i) overall DHS profits of an entire group or (ii) overall DHS profits of any component of a group comprised of at least five physicians, provided that the distribution methodology meets the other specific requirements of the Special Rule.

Very importantly, however, CMS has now clarified that it will not allow groups to establish distribution pools based on service lines — a practice some physician groups have historically referred to as "split-pooling." In one example CMS provides to explain this position, it states that groups cannot pool and distribute profits from clinical laboratory services to one subset of its physicians and pool and distribute profits from diagnostic imaging to a different subset of physicians. Rather, when creating distribution pools, groups must place all of the profits from DHS referred by particular physicians into the distribution pool to which those physicians have been assigned. In addition to clarifying that groups cannot create separate profit distribution pools based upon service lines, CMS is also necessarily implying that a physician cannot receive distributions of overall profits from multiple distribution pools. In its commentary, CMS recognized that some physician groups have been conducting "split-pooling" based on their interpretation of the existing Special Rule language and CMS's prior commentary. Because CMS's new express prohibition on service-by-service pooling of DHS profits will require these groups to revise their compensation methodologies, CMS has provided groups with additional time to implement changes by making the Special Rule revisions effective January 1, 2022.

Other clarifications CMS provided with respect to the Special Rule in its rule updates and commentary are as follows:

- For the purpose of pooling overall profits prior to distribution, a group may still establish components of a group consisting of at least five physicians using a wide variety of means. This includes dividing physicians up by specialty, location, practice experience, tenure, or other criteria — provided that the share of overall profits received by a physician is not determined in a manner directly related to the volume or value of referrals.
- Groups are not required to distribute all DHS profits of a group or a group component of at least five physicians. Moreover, groups are not required to treat components the same. A group may choose to distribute all of the DHS profits of one component and retain some or all DHS profits of another component.
- Groups are able to utilize eligibility standards (e.g., full-time versus part-time status, length of service with the group, etc.) in determining which physicians in a group or component of at least five physicians are eligible to receive a profit share, so long as the pooling methodology used does not result in the payment of any profit share that is determined in a manner directly related to the volume or value of a physician's referrals.
- Once distribution pools are established, a group is not required to use the same distribution method for every component of at least five physicians. For example, a group could distribute the DHS profits of one component per capita and distribute the DHS profits of another component using a compliant personal productivity methodology. However, a group must use the same distribution methodology for all physicians within a particular component.
- CMS has now expressly clarified that a group can distribute overall DHS profits to its physicians (provided that it meets other Special Rule requirements) if the group has less than five physicians. To do so, the group must first aggregate the overall DHS profits of the entire group.

Based on CMS's Special Rule changes and clarifications, we recommend that physician groups — and particularly those that pool DHS profits for distribution based on "split-pooling" methods — reevaluate their physician compensation models to ensure Stark compliance prior to January 1, 2022. Should you have questions about compliance with Stark or other laws, please contact Cal Marshall or another Health Care team member.