Filling Vacancies During the Great Resignation – Special Considerations for Health Care Entities

Labor & Employment Law Update

By Suzannah Wilson Overholt on May 24, 2022

As employers continue to face staffing issues posed by the "great resignation," using independent contractors has become more common. However, health care entities need to be mindful of the special requirements that apply to such arrangements if the entity receives reimbursement from Medicare, Medicaid or any other federal health care program.

Both the federal Anti-Kickback Statute (AKS), 42 U.S.C. § 1320a-7b(b), and the Physician Self-Referral or Stark Law, 42 U.S.C. § 1395nn, prohibit rewarding referrals for services paid by federal health care programs. However, both laws have protections for independent contractor arrangements that will help health care entities avoid liability.

The AKS prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs. The AKS covers the payers of kickbacks (e.g. the health care entity) as well as the recipients of kickbacks (e.g. the independent contractor), regardless of the role of the recipient.

The Stark Law prohibits physicians from referring patients to receive "designated health services" payable by Medicare or Medicaid from entities with which the physician or an immediate family member has a financial relationship. "Designated health services" are:

- clinical laboratory services;
- physical therapy, occupational therapy, and outpatient speech-language pathology services;
- radiology and certain other imaging services;
- radiation therapy services and supplies;
- DME and supplies;
- parenteral and enteral nutrients, equipment, and supplies;

- prosthetics, orthotics, and prosthetic devices and supplies;
- home health services;
- outpatient prescription drugs; and
- inpatient and outpatient hospital services.

The AKS has a voluntary safe harbor and the Stark Law has a mandatory exception for personal service arrangements (e.g. independent contractor agreements) that meet the following specific criteria:

1. Each arrangement must be in writing, signed by the parties, and specify the services covered;
2. The arrangement covers all of the services to be furnished to the entity;
3. The aggregate services covered by the arrangement do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement;
4. The duration of each arrangement is at least 1 year (for physician agreements, if an arrangement is terminated within the first year, the parties may not enter into the same or substantially the same arrangement during the first year of the original arrangement);
5. The compensation to be paid is set in advance, does not exceed fair market value, and, except in the case of a qualified physician incentive plan, is not determined in any manner that takes into account the volume or value of referrals or other business generated between the parties; and
6. The services to be furnished do not involve the counseling or promotion of a business arrangement or other activity that violates any Federal or State law.

Because the Stark Law is a strict liability statute, in order to avoid liability an independent contractor agreement with a physician has to meet all of the foregoing requirements. Under the AKS, which requires intentional conduct, an agreement does not have to meet the requirements to avoid liability, but having a compliant agreement is advisable.

Any agreement entered between a health care entity and an independent contractor should comply with the AKS or Stark Law, as applicable, in order to avoid unnecessary exposure. Health care entities contemplating such arrangements should consult counsel for assistance in drafting compliant arrangements.