

Report on Medicare Compliance Volume 28, Number 29. August 19, 2019 Hospitals Risk Stark Violation With Free PEs; FCA Case Survives

By Nina Youngstrom

Hospitals might want to think twice about supplying physician extenders (PEs) free to physicians—employed or otherwise—because it could run afoul of the Stark Law, depending on the circumstances. This has emerged as a risk across the country as many hospitals loan their employed PEs/advanced practice providers (APPs) to physicians, who may bill Medicare for their services and, in the case of employed physicians, get credit for the work relative value units (RVUs) of PEs, attorneys say. Including the work RVUs of PEs in neurosurgeons' compensation is at the heart of a revised False Claims Act (FCA) lawsuit against Lee Memorial Health System in Florida, which allegedly provided a free PE to a neurosurgery group.

"Hospitals should recognize this is a compliance hot spot," says attorney Charles Oppenheim, with Hooper, Lundy & Bookman in Los Angeles. "They should be very thoughtful and careful in looking at the arrangements they have in this regard and make sure they aren't allowing doctors to pretend in one way or another that the services of hospital-employed physician extenders are the physicians' services."

An amended FCA complaint filed Aug. 8 against Lee Memorial Health System (known as Lee Health) alleges the hospital's compensation arrangements with four employed neurosurgeons violated the Stark Law because they were above fair market value and commercially unreasonable. The case almost died on the vine after it was filed last year ("FCA Lawsuit Against Hospital Alleges M.D. Compensation Included NPPs," *RMC* 27, no. 34).

In the first complaint, whistleblower Angela D'Anna, who was system director of internal audit at Lee Health from 2003 to 2014, alleged that Lee Health overpaid employed cardiologists and pulmonologists as well. Lee Health filed a motion to dismiss, which was granted by Judge Sheri Polster Chappell of the U.S. District Court for the Middle District of Florida with permission to amend. She said in part that the complaint didn't satisfy 9(b) of the Federal Rules of Civil Procedure, which "requires a party to 'state with particularity the circumstances constituting fraud.'" D'Anna filed a second complaint with specific data about the neurosurgeons and the judge gave it the green light to proceed on July 30, but only with respect to allegations about the neurosurgeons' compensation. "Unlike its previous iterations, the Complaint now provides four representative claims that show the submission of false claims for the neurosurgeons," the judge said. "Reading two exhibits together, D'Anna explains four instances when Medicare paid for [designated health services] referred by neurosurgeons with Stark-prohibited compensation." The judge won't let the whistleblower move forward, for now, with the allegations about the cardiologists and pulmonologists, and said a third complaint would have to be filed with allegations about the neurosurgeons only.

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