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Defensibility of a fair market value analysis

by Bob Wade

Fair market value (FMV) is a pinnacle issue with respect to healthcare regulatory compliance and compensation agreements. This article will analyze the issues related to an FMV defensibility analysis of compensation agreements. It will explain that having what appears to be an FMV in your file is insufficient. The FMV review or opinions need to assess if the compensation arrangement was ever challenged by the government or a qui tam relator to defend the compensation agreement sufficiently.

FMV is a material component with compliance with the following exceptions in the Stark Law, 42 U.S.C. § 1395nn:

- Academic medical centers
- Rental of office space
- Rental of equipment
- Bona fide employment relationships
- Personal service arrangements
- Isolated transactions
- Payments by a physician
- FMV compensation
- Indirect compensation arrangements
- Limited remuneration to a physician

FMV is also a material component of compliance with the following safe harbors of the Anti-Kickback Statute, 42 U.S.C. § 1320a-7b (b):

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

FMV opinions and benchmark data

Typical FMV opinions extensively analyze various benchmark data such as the total cash compensation (TCC) benchmarks and production benchmarks.^[1] A typical FMV analysis applies the TCC to productivity, described as any of the following: work relative value units (wRVU), patient encounters, collections, charges, and hours worked. A typical FMV opinion attempts to align TCC with productivity based on benchmark data. This is a perfectly acceptable process assuming both the TCC and production.

From a defensibility perspective, the Stark Law final rule was published by the Centers for Medicare & Medicaid Services (CMS) on December 2, 2020, with an effective date of January 19, 2021.^[2] The final rule contributed a material part of the regulations related to FMV and commercial reasonableness. The basic analysis under the final rules was that the application of benchmark data is not the sole source, from a defensibility perspective, to analyze the TCC being paid to a referring physician.

When analyzing the TCC, it is important to understand the following for a defensibility analysis:

- For employment agreements to comply with the bona fide employment arrangements, if any component of the compensation is based on production, are the wRVUs personally performed and being credited to the physician, or are they being performed by a non-physician practitioner?
- Are the wRVUs being credited to the physician medically necessary? This analysis should be based on the designated health service (DHS) entity employer, a medical necessity audit, or review.
- Are the wRVUs credited to the physician documented in the medical record? Again, this can be based on the employer's representation of medical record audit.
- If the physician is paid based on hours worked, is there a process to document the hours worked? For example, if the compensation arrangement is a medical directorship, are there time sheets or a representation from an officer of the DHS entity?
- If the physician is stating that there are competing offers, does documentation regarding the competing offers exist, or is the physician willing to provide an affidavit, by way of example?
- If national benchmark data does not support the TCC, is there reliable benchmark data from the local service area?

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