

THE Stark Law:

By Rachel Stewart

What's at Stake for Healthcare Marketers



As a healthcare marketer, you want to ensure the best services of your hospital are fairly represented, whether in print or on the Internet. However, if marketing is used incorrectly or outside the Stark law boundaries, it could lead to legal troubles for the hospital and healthcare providers you represent. Read on for insight from several attorneys who practice in healthcare law.

THE STARK LAW prohibits a physician with a direct or indirect financial relationship with an entity, such as a hospital, from referring Medicare patients for designated health services (DHS) to that hospital. DHS can cover a variety of medical services, such as clinical diagnostic tests, physical therapy, or inpatient and outpatient hospital services.

To comply with the Stark law, marketing professionals must balance how physicians are advertised within publications, Web sites, or other mediums. While a simple listing of specialists or physicians on staff at a specific facility is considered an incidental—and acceptable—benefit, marketers should carefully consider the usage of individual physicians in hospital marketing pieces, including community magazines.

“Since marketing has a financial value to individual physicians, this inclusion can implicate the Stark law and result in illegal referrals to the hospital and related illegal claims by the hospital for referred services, if an applicable Stark law exception is not met,” says Lynn Gordon, JD, Esquire, partner with the Healthcare Department of Ungaretti & Harris LLP. “Marketing departments need to understand the Stark law so the hospital or an implicated physician are not subjected to penalties under Stark.”

In considering the extent to which an individual physician can be included in hospital marketing, the first guideline to consider is whether the physician is an employee of the hospital. If so, the marketing can be argued to be for the sole benefit of the employer or to be part of the fair market value compensation for the employed physician's services under the employment exception to Stark. If he or she is not a hospital or health system employee, then any marketing beyond basic incidental listing of all physicians on staff must meet a different Stark exception.

The non-monetary compensation exception will most often apply to the utilization of individual physicians or practices within hospital marketing materials and includes three conditions that must be satisfied—the compensation (marketing) cannot be determined in a way that takes into account the volume or value of referrals generated by the physician; the compensation may not be solicited by the physician or the physician's practice (including all staff members); and the compensation cannot violate the anti-kickback statute or any other federal or state law. (For more information about non-monetary compensation, see “Reading the Small Print.”)

When in Doubt, Ask

If you are unsure whether your marketing plans fall within the limits of Stark law, it's a good idea to find an attorney who can look over your plans before you proceed.

“It is important for healthcare marketers to consult attorneys who specialize in Stark law and regulatory issues to ensure their marketing programs are not creating unnecessary risk for their clients,” says Alicia Chandler, JD, BBA, attorney at Wachler & Associates, P.C. “Because of the monetary penalties and the possibility of licensing issues and potential criminal sanctions, these issues cannot be ignored. Marketers should also understand there can be issues with the federal anti-kickback statute and state laws that apply to gifts or rewards for physicians. Even if something complies with Stark law, it may still create a violation.”

BEYOND MARKETING MATERIALS

Even if a particular physician is not included in a healthcare publication or media advertisement, the Stark law can also apply to any payments or gifts of monetary value, such as trips or meals.

Each calendar year, an individual physician may receive up to a certain amount in non-monetary compensation, and this amount is adjusted annually for inflation. It's vital that marketing professionals keep track of any items a physician might receive, whether it's tickets to a sporting event or even a lab coat. This also includes any gifts given to employees

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in a physician's practice. However, under the regulations of Phase III of the Stark law, hospitals and healthcare systems are allowed to sponsor one local medical staff appreciation event per year, and such costs are not included in the non-monetary compensation annual cap.

READING THE SMALL PRINT

Since the Stark law is very involved, healthcare marketers need to take time to read over it carefully before initiating a new

Exceptions to the Rule

While the Stark law strictly regulates the benefits hospitals and healthcare systems can give to referring physicians, there are a number of incidental benefits that are explicitly permitted, under the following circumstances:

- The item or service is provided and utilized only on the healthcare entity's campus.
- The benefit is offered to all members of the medical staff during their rounds or while performing other duties that benefit the hospital or its patients.
- The compensation is related to the provision of medical services at the hospital.
- The benefit is consistent with benefits offered to medical staff by other hospitals in the region or comparable hospitals in comparable regions.
- Each occurrence of the benefit is worth less than \$30.
- The compensation doesn't violate the anti-kickback provision.
- The benefit is not predicated on the volume or value of referrals.

marketing campaign.

"Stark's definition of a compensation arrangement is very broad," says Chris M.

Morrison, attorney in the Health Law Group of GrayRobinson, P.A. "Any kind of marketing activity performed or funded by a DHS entity that benefits a referring physician potentially creates a financial relationship between the entity and the physician."

When marketing to current and potential patients, it's important that healthcare marketers use legal resources available to them within their hospital to ensure their plans are well within the limits of the Stark law.

"Marketing professionals who work for larger DHS entities, such as hospitals, may already have resources readily available to them that can help with these issues," says Morrison. "For example, there may be policies and procedures in place to provide guidance on marketing activities in order to reduce the risk of causing Stark violations. The entity's compliance department or general counsel's office should be able to assist if there is a question about a particular activity."

Whether you are working for a large health system or a private practice, it's important to become familiar with the variety of exceptions related to Stark law. Exceptions can include non-monetary compensation not exceeding the annual cap (\$355 in 2010); benefits provided for the sole purpose of use on the hospital campus; and items for which physicians reimburse the hospital or health system fair market value.

"Other exceptions may be available for activities involving employed or recruited physicians," says Morrison. "Again, these have a number of conditions that must be met in order for these exceptions to apply."

THE COST OF VIOLATIONS

If it is determined that the Stark law has been violated, it could cost your hospital thousands, if not millions of dollars.

"Sanctions for a prohibited referral under the Stark law include denial of payments from Medicare or a recall of payment that has been made for any related services that are delivered under the Medicare program," says Gordon. "The government may also assess civil monetary penalties of up to \$15,000 for each service at issue."

Additionally, if a physician knowingly enters into an agreement that he or she could financially benefit from, he or she could be fined \$100,000 for each agreement.

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