



Why Physician Contracts Are Like Icebergs

The hidden risks and how to find them.



Physician Relationships. **Simplified.**



Agenda

1. A look at the way Anti-Kickback Statute, Stark Law and False Claims Act affect physicians and hospital arrangements
2. Elements of Safe Harbor to consider for your contracts and processes
3. Why things can go wrong – the hidden risks
4. Lessons learned from recent settlements
5. Summary and takeaways



Anti-Kickback Statute (AKS) applies to everyone and requires intent



- **Prohibition** – It is a **felony** to knowingly and willfully offer, pay, solicit, or receive anything of value to induce or reward referrals or generate Federal health care program business
- **The AKS applies to everyone, not just providers or physicians.** Examples include vendors, manufacturers, GPOs, marketers and directors, all who can be held liable
 - This statute is often used in cases against physician recruiters
- **Knowing and willful misconduct**, intent is required
- Civil monetary penalties up to 3x per kickback and \$50,000 per violation may be awarded

¹ See 42 U.S.C. § 1320a-7b.



Stark Law applies to physicians only and does not require intent



- **Prohibition** – it prohibits referral to a facility “if a **physician**, or a member of the physician’s immediate family, has a **financial relationship** with an **entity**, then the physician is prohibited from making a **referral** to the entity for the provision of a **designated health service** paid for by Medicare, and the entity is prohibited from billing for such service, unless an **exception** is satisfied in its entirety”¹
- Stark Law only applies to physicians
- **Strict liability statute** – **No** margin for error!
- Penalties of \$15,000 per penalty and \$100,00 per arrangement found to be fraudulent

² See 42 U.S.C. § 1395nn and 42 C.F.R. 411.350 through 411.389



False Claims Act (FCA)



- Recover of funds from anyone who knowingly presents or causes a fraudulent claim for payment to the government
- Need not be entirely fraudulent, a false statement or document in support of a claim that is fraudulent can be the tie
- Includes financial recovery with penalties, \$5,500 to \$11,000 per claim plus **3x** government damages
- Civil and criminal punishments both apply
- Qui tam provision of FCA allows individuals to file enforcement action on behalf of the government
- Whistleblowers, “relators”, may receive up to 30% of any successful recovery

³ See 31 U.S.C. § 3729



7 elements of safe harbor to confirm for physician arrangement compliance

- 1 Term of at least one year
- 2 In writing by both parties
- 3 Specify aggregate payment and set in advance
- 4 Payment is reasonable and fair market value
- 5 Compensation not related to volume or value of business
- 6 Exact services to be performed must be outlined
- 7 Services are commercially reasonable



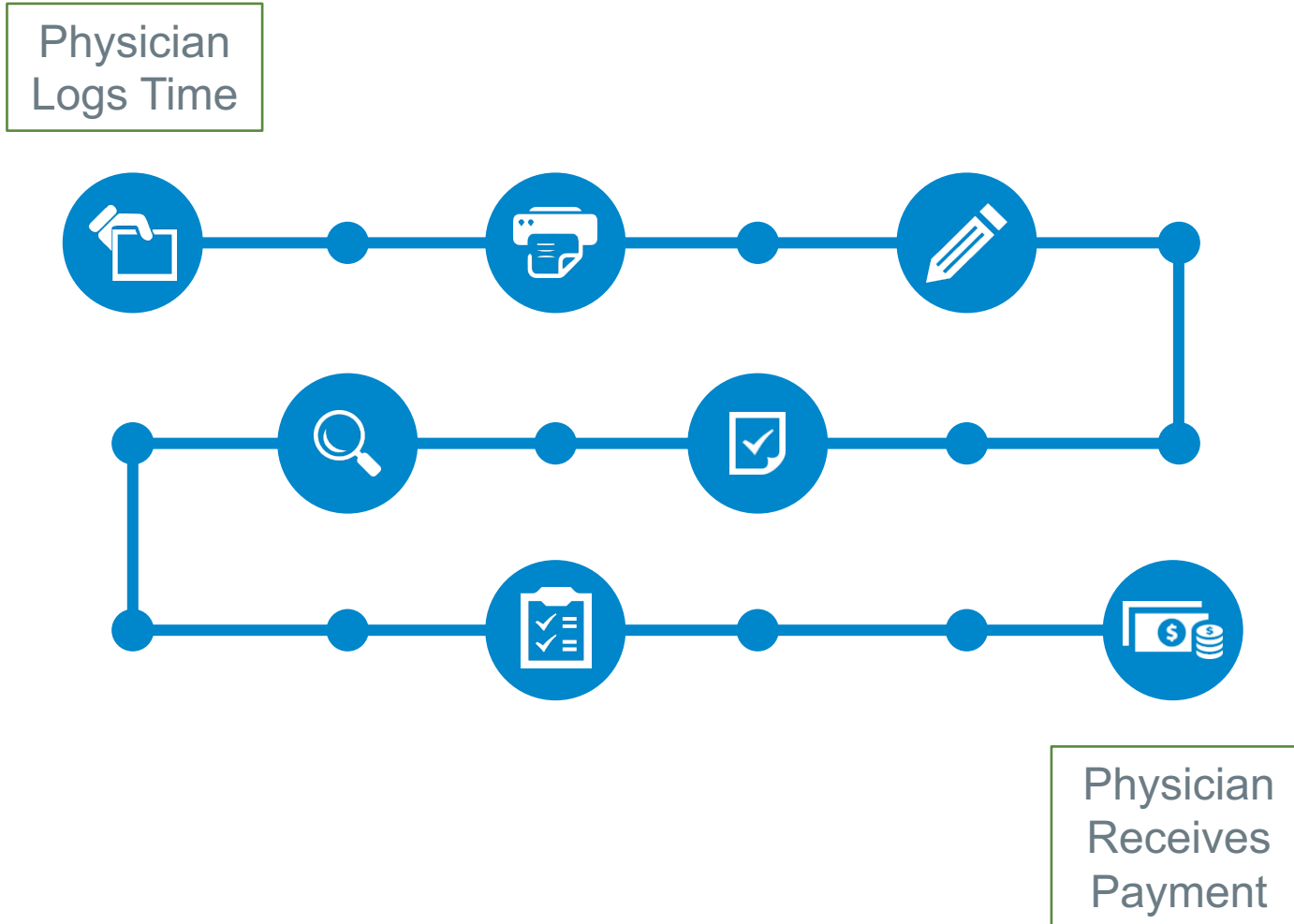


WHY THINGS GO WRONG





Organizations manage complicated physician agreements with paper time logs and manual approvals





Even when setup correctly, first handwritten time log may be deemed non-compliant

. . . As a result the paper-based documentation is often lacking necessary details to be compliant.



Payment mechanisms are too complex for manual systems

1 Select the frequency of time log submissions

Billing cycles | Monthly Bimonthly (24) Bimonthly (26) Weekly

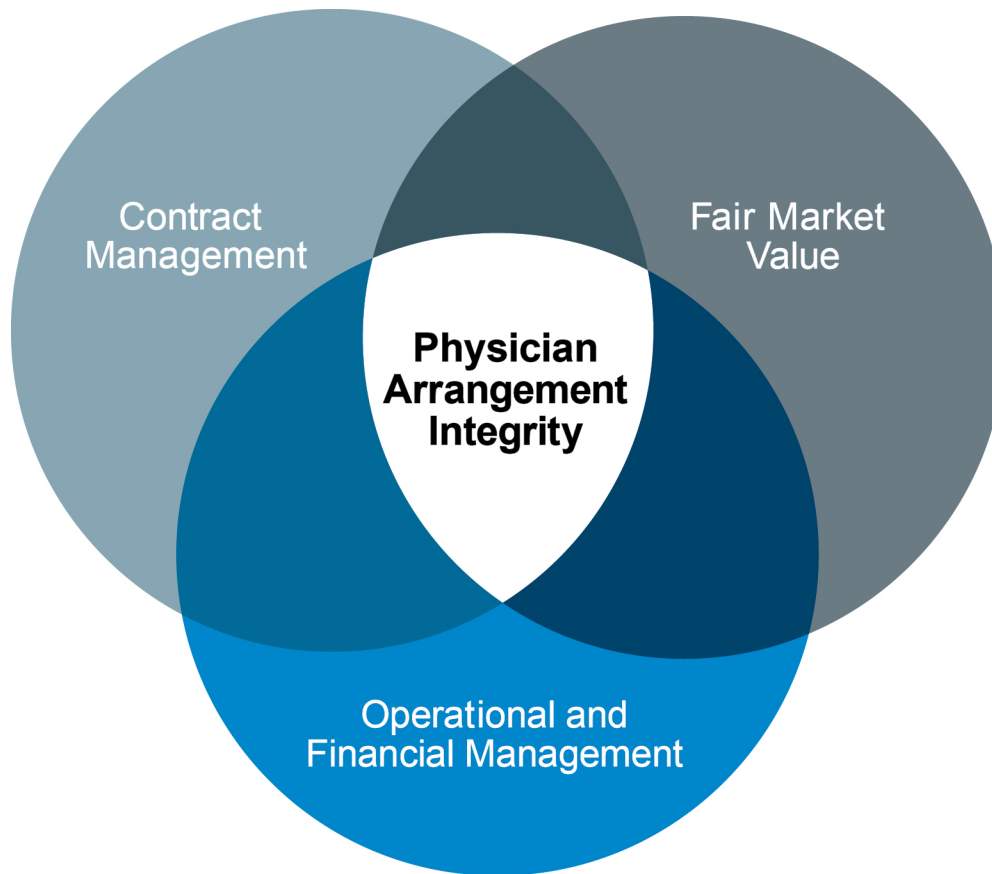
2 Automated payment behaviors

One physician		Shared: Group payment		Shared: Individual payment	
1	Hourly rate min/max	1	Hourly shared min/max	1	Hourly shared min/max
2	Hourly rate min/max with annual max	2	Hourly shared min/max with annual max	2	Hourly shared min/max with annual max
3	Unit of service	3	Shared unit of service	3	Shared unit of service
4	Unit of service with annual max	4	Shared unite of service with annual max	4	Shared unit of service with annual max
5	Unit of service min/max	5	Shared unit of service	5	Shared unit of service
6	Unit of service min/max with annual max	6	Shared unit of service min/max	6	Shared unit of service min/max
7	Annual maximum	7	min/max with annual max	7	Shared unit of service min/max with annual max
8	Stipend	7	Shared annual maximum	7	Shared annual maximum
		8	Shared stipend	8	Shared stipend

3 Payment overrides and incentive payments can also be performed



Technical violations occur after the agreement is setup – related to payments



- Technical violations are operational problems
- Fall out of compliance on 2 of Safe Harbors
 1. Physician writes non-compensable duty on time log
 2. FMV is breached because a payment is incorrect



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Organizations are not structured to handle the complexities of arrangements yet they carry great risk

Hidden process related problems

- Contracts are in silos, hidden throughout organization
- Physicians turn in late or multiple time log submissions for same period
- Duties are not checked against the contract itself
- Illegible
- Lost time logs



Hidden parameter related problems

- Written duties are either too vague or simply not in contract
- Doctor has 2 agreements with overlapping duties
- Joinders are missing connecting physicians to group agreements
- Time to submit time is not clearly defined in contract



Contract is simply not followed as written

- Contract has a monthly or annual maximum that is not caught
- Time logs are not collected
- Errors are made in payment mechanisms
- Math is so complex it is not followed as written





It is difficult to identify a problem...you don't see the iceberg



Room for error



Frustrating for physicians



Compliance risks



Expensive



People, process and structure do not exist to identify problems with very complex agreements until it is too late



SETTLEMENT LANDSCAPE



Why settlements are so large and why no end in sight

- 2015 the Affordable Care Act (ACA) broadened the statutory basis of False Claims
- Referred to as the 3 headed monster: FCA, Stark and AKS
- Stark Law violation, might be AKS violation *and* False Claims violation
- New link to FCA is driving total settlement dollars. Pay Cardiology Group inappropriately on Medical Directorship in December of 2013, surfaces in June of 2016. Starting in December of 2013, every government payer referral from that group goes into the negotiation bucket.
- Example: Halifax. Settlement in March of 2014 for \$85M. Alleged 6 medical oncologists incentive payment included component of value of business and 3 neurosurgeons were paid more than Fair Market Value violating Stark.





Guidance identifies referral relationships a hot risk area

Identifying and Auditing Potential Risk Areas

Some regulatory risk areas are common to all health care providers. Compliance in health care requires monitoring of activities that are highly vulnerable to fraud or other violations. Areas of particular interest include **referral relationships and arrangements** billing problems (e.g., upcoding, submitting claims for services not rendered and/or medically unnecessary services), privacy breaches, and quality-related events.

Source: Practical guidance for Health Care Boards on Compliance Oversight, AHIA, AHLA, HCCA and OIG, April 20, 2015



Later that same year the OIG issues fraud alert



DEPARTMENT OF HEALTH AND HUMAN SERVICES

OFFICE OF INSPECTOR GENERAL

WASHINGTON, DC 20201



**Fraud Alert: Physician Compensation Arrangements
May Result in Significant Liability**

June 9, 2015

Physicians who enter into compensation arrangements such as medical directorships must ensure that those arrangements reflect fair market value for bona fide services the physicians actually provide. Although many compensation arrangements are legitimate, a compensation arrangement may violate the anti-kickback statute if even one purpose of the arrangement is to compensate a physician for his or her past or future referrals of Federal health care program business. OIG encourages physicians to carefully consider the terms and conditions of medical directorships and other compensation arrangements before entering into them.



Yates Memo Released September 15, 2015

- 1 Individuals are no longer protected under the corporate umbrella
- 2 Any investigations should include the individual from the beginning of the case
- 3 Individuals can no longer be exempt from punishment for wrongdoing even if the corporation is part of the investigation
- 4 Corporations and individuals are now seen as being on an even playing field
- 5 Because individuals were clearly put 'on notice' they will be held responsible, their punishment does not take into consideration ability to pay



Sally Yates Comments for Bar Association

INDIVIDUAL ACCOUNTABILITY

“[H]olding accountable the people who committed the wrongdoing is essential if we are truly going to deter corporate misdeeds, have a real impact on corporate culture and ensure that the public has confidence in our justice system. We cannot have a different system of justice – or the perception of a different system of justice – for corporate executives than we do for everyone else.”

*Deputy Attorney General Sally Q. Yates
Remarks at the New York City Bar Association White Collar Crime Conference
Tuesday, May 10, 2016*



Settlements are now playing out with personal accountability

Settlement of OIG Lawsuits

▪ Settlements of Note in DOJ Settlements

- Columbus Regional Healthcare System, \$35,000,000 and Dr. Pappas settles for \$425,000
- North Broward settles for \$69,500,000, CEO fired
- Sacred Heart Hospital in Chicago, closed, 3 executives and 4 physicians prosecuted
- Tuomey settles in September of 2015 for \$72,400,000 M plus CIA. One year later, CEO fined \$1,000,000
- Personal fines, criminal punishment and exclusion from Medicare are part of future cases



SUMMARY AND TAKEAWAYS



Takeaways

- Stark Law technical violations are the same as those with intent – don't think it won't happen to your hospital
- Whistleblowers stand to gain, fueling activity
- Engage organization in training about Stark Law as part of the compliance program
- If you find something, address it
- Assign a business owner of physician agreements
- Streamline current processes
- Audit 100% of physician payments
- Review all contracts annually
- Automate where possible





Summary of lessons from recent settlements to consider in 2017

1.

Employment is not a safe harbor

2.

Physicians and executives are on notice with Fraud Alert and Yates Memo

3.

SRDP is always significantly less than cases that surface from relators (see OIG website for specifics: <http://www.oig.hhs.gov/compliance/self-disclosure-info/protocol.asp>)

4.

Find all your contracts, assign an executive and audit



Thank you!



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Look out for an invitation in May for the next webinar in our series
Most Hospitals Are Making These 3 Compliance Mistakes