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Avoiding Risks with Referring Physician Compensation Arrangements

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Health Law Alert

The settlement described below highlights the importance of carefully structuring compensation arrangements with referring physicians, and the risk involved in trying to work backwards to achieve a desired level of compensation. Healthcare providers are encouraged to consult with qualified counsel and valuation experts when structuring compensation arrangements, and to put institutional protections in place to assure appropriate review and approval of such arrangements.

On May 18, 2017, Mercy Hospital Springfield and Mercy Clinic Springfield Communities, both located in Springfield, Missouri, agreed to a $34 million settlement with the U.S. Department of Justice stemming from allegations of violations of the Stark Law, the Anti-Kickback Statute, and consequently, the False Claims Act. Contemporaneously with the Settlement Agreement, the defendants – along with another affiliated entity – entered into a Corporate Integrity Agreement with the Office of Inspector General, imposing a five year period of compliance.

Allegations against Mercy Hospital Springfield and Mercy Clinic Springfield Communities originated with a *qui tam* action filed in June, 2015, by Dr. Viran Roger Holden, a physician previously employed by Mercy Clinic Springfield Communities. As is the case in whistleblower suits brought under the False Claims Act, Dr. Holden will receive a portion of the recovery, in the amount of over $5.4 million. Interestingly, Dr. Holden filed a separate action in federal court against his previous employer a month prior to the *qui tam* suit, alleging retaliation and wrongful termination based on his reporting and cooperation with authorities relating to *other* alleged potentially fraudulent activity.

The *qui tam* complaint alleges that the defendants' financial relationships with certain employed physicians violated both the Stark Law and the Anti-Kickback Statute, thereby resulting in the filing of false claims with Medicare for payment of services referred to the defendants by those physicians in violation of the False Claims Act. According to the complaint, Mercy Clinic Springfield Communities owned an infusion center and the physicians practicing at the infusion center shared in its profits under a collection compensation model. In 2009, Mercy Hospital Springfield took over ownership of the infusion center so that it could participate in the 340B Drug Pricing Program. Following the transfer of ownership, the complaint alleges that the physicians practicing in the infusion center expressed concerns about losing a substantial portion of income they

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had received under the collection compensation model. Allegedly, Mercy Hospital Springfield assured the defendants that they would be "made whole" for any loss of income relating to the transfer of ownership, ultimately acting on such promise through payment of a newly calculated work RVU for drug administration in the infusion center.

The complaint states that this new compensation component was "not calculated based on physician work, clinical expense, or malpractice overhead, but rather was 'solved for' by working backwards from a desired level of overall compensation." Although exact details are not set forth in the complaint, it is alleged that the physicians were able to earn the work RVU for the patients they referred to the infusion center. In addition, the work RVU was allegedly paid at the rate of 500% of the work RVU for in-clinic work, despite the latter requiring active involvement in patient care while the work RVU for drug administration required only that the physician be "immediately available."

The Stark Law generally restricts financial relationships between hospitals and doctors who refer Medicare patients to them for designated health services, unless the relationship meets the requirements of an enumerated exception. Common among the requirements of these exceptions is that the financial relationship be fair market and commercially reasonable. The complaint alleges that the compensation paid was neither of these things and that excess compensation was paid to induce the physicians to continue to refer patients to the infusion center.

Again, we encourage healthcare providers to consult with their counsel and valuation experts when structuring compensation arrangements in order to avoid what happened in this case. For further information about this case, or if you have any questions about financial arrangements between hospitals and referring physicians, please contact Stephen Moore or your regular Hinshaw attorney.