

Modifications to Stark Law Rules for Ancillary Income Distribution Within Physician Group Practices

The Stark Law permits qualifying physician group practices to distribute designated health services profits to physicians in the group under certain conditions. Specifically, the Stark Law special rules for productivity bonuses and profit shares permit the group to pay a physician a share of the “overall profits” of the group derived from designated health services payable by Medicare or Medicaid. The current rules define “overall profits” to mean either (1) the group’s entire profits derived from designated health services or (2) the profits derived from designated health services of any component of the group practice that consists of at least five physicians. Some have taken the position that this permitted groups to allocate different streams of DHS revenue (e.g., imaging profits vs. physical therapy profits) differently to group practice physicians. The final rule clarifies that such a service line-by-service line approach is not allowed. Rather, the new rule requires that “overall profits” means the profits derived from *all* of the group’s DHS. Thus, if there are fewer than five physicians in the group, “overall profits” means the profits derived from all the designated health services of the group. If there are more than five physicians in the group, the group may allocate DHS profits to qualifying components of the group, but *all* of the profits derived from DHS for each such component must be included in such allocation(s). However, CMS also clarified that the method of allocating DHS profits to different components of the group need not be the same across the group. Thus, for instance, one (at least 5-physician) component may allocate all of its DHS profits equally among eligible physicians, while a different (at least 5-physician) component might allocate all of its DHS profits according to the relative productivity of the eligible physicians.

In addition, in a move that harmonizes the group practice rules with the various other provisions of the new rules that offer flexibility for providers to enter into and implement value-based arrangements, the new CMS rule clarifies that a group practice may allocate and distribute directly to a physician in the group the profits from designated health services furnished by the group that are derived from the physician’s participation in a value-based enterprise. Compensation relating to such allocation and distribution of VBE-related DHS profits will be deemed not to be based on (or take into account) the volume or value of the physician’s referrals.

These new and revised Stark Law rules regarding group practices will not become effective until January 1, 2022.