

## Third Circuit Reaffirms Need for Healthcare Organizations to Substantiate "Fair Market Value" of Personal Service Arrangements In Order to Avoid Potential Liability Under Stark Law and Anti-Kickback Statute

- Do your arrangements for personal services provided by third-parties, such as contracts between hospitals and physician groups, involve compensation that reflects the "fair market value" of such services?
- Can you document such fair market value, and substantiate that your arrangements otherwise comply with requirements under the Stark Law and Anti-Kickback Statute?
- Are your arrangements reduced to writing, and do your contracts address all of the important and current aspects of each arrangement?

On January 21, 2009, in a precedential opinion, *United States ex rel. Kosenkse v. Carlisle HMA, Inc.*, the U.S. Court of Appeals for the Third Circuit underscored the importance of these questions by ruling that the defendant hospital and its parent company were potentially liable for damages because they had failed to show the fair market value of the compensation under their arrangement with a physicians' group for providing anesthesia services and pain management at an outpatient pain clinic.

In *Kosenske*, the plaintiff (a former member of the physicians' group) brought a *qui tam* lawsuit against the defendants under the Federal False Claims Act, alleging that they had submitted outpatient hospital claims for reimbursement to federal healthcare programs which falsely certified that the claims complied with the Stark Law and the Anti-Kickback Statute. The arrangement under scrutiny provided the physicians' group with the exclusive right to provide all anesthesia and pain management services to the hospital, and also gave the physicians office space, medical equipment, and personnel. The physicians then would refer their patients to the hospital for diagnostic tests and other services, a practice which the *Kosenske* Court described as raising concerns that the hospital was paying the physicians to induce them to send business to the hospital.

The *Kosenske* Court found that the hospital had failed to substantiate that the arrangement was entitled to the "personal service" exception under the Stark Law and the Anti-Kickback Statute, noting that the simple fact that there had been a 1992 contract did not demonstrate that compensation was paid at fair market value.

The Third Circuit faulted the hospital for not submitting evidence regarding the fair market value of the space, equipment, staff, and exclusive rights received by the physicians' group. Indeed, because the 1992 contract did not address pain management services at all, or the physicians' use of a pain clinic which had been built in 1998, there were no written contract terms regarding this major aspect of the group's business. More generally, the *Kosenske* Court noted that the Stark Law insists on transparency and the verifiability of an express agreement, reduced to writing, which specifies the terms of all of the relevant services and remuneration.

Arrangements for personal services in the health care industry are both common and necessary. However, as the *Kosenske* case highlights, such arrangements must be documented, be structured properly and receive ongoing oversight, lest they run afoul of the law or catch the interest of would-be litigants. Further, the *Kosenske* case provides a reminder that personal service arrangements continue to be the subject of government scrutiny, particularly whether such arrangements are documented, arms-length transactions which involve compensation representing fair market value.

Not surprisingly, the Government is finding new ways to investigate potentially suspect hospital-physician relationships. On December 19, 2008, the Centers for Medicare and Medicaid Services ("CMS"), an agency of the U.S. Department of Health and Human Services, requested federal authorization to collect from

approximately 400 community hospitals detailed information regarding their financial relationships. The comprehensive reporting form which CMA intends to use, accessible through this link, [Disclosure of Financial Relationship Report](#), requires hospitals to report the very types of arrangements at issue in *Kosenske*, and to provide documents relevant to such arrangements. The reporting form also contains a certification which must be signed by the Chief Executive officer, Chief Financial Officer, or comparable officer of the hospital.

If you are a party to arrangements for personal services, you should at a minimum:

- Review the content of your arrangements, and how they were entered;
- Ensure that your arrangements are reduced to writing;
- Establish a program for the on-going review of your arrangements; and
- Document the appropriateness of the compensation and benefits provided by the arrangements, as well as the services provided under them.

You should be prepared to justify your arrangements to outsiders, including the government and would-be litigants.

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If you have any questions or comments about this E-Flash, please contact Peter Hardy at (215) 587-1001 or at [p Hardy@postschell.com](mailto:p Hardy@postschell.com); John Joseph at (215) 587-1191 or at [jjoseph@postschell.com](mailto:jjoseph@postschell.com); Ron Levine at (215) 587-1071 or at [rlevine@postschell.com](mailto:rlevine@postschell.com); or Paula Sanders at (717) 612- 6027 or at [psanders@postschell.com](mailto:psanders@postschell.com).

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