Overview

• Trends in physician compensation
  – Nonprofit health system physician compensation
  – For profit physician compensation
• Legal requirements pertaining to physician compensation
• Questions and Answers
Trends in Nonprofit Health System Physician Compensation

- Many health systems are moving away from paying per work RVU or a percentage of production.
- A higher percentage of compensation than before is being tied to quality incentives, such as patient outcomes, reduction in costs, and patient satisfaction.
- Health systems are also looking at “team” incentives designed to improve the quality of care for populations and promote team accountability.
- A significant portion of overall compensation is still paid based on wRVUs, however.
- Health systems see this as a way to differentiate themselves, attract new physicians and align incentives with future payer arrangements.
Examples of Health System Physician Compensation Incentives

• Of the total amount paid as compensation, 10 – 50% might be paid based on quality care incentives, with the remainder paid based on wRVUs.
• Wide variety in approaches being taken.
• Some health systems are approaching this slowly, with small portions of compensation tied to incentives.
• Example:
  – 90% of total compensation based on wRVUs
  – 10% based on incentives
    • One-half based on achievement of department of system quality measures.
    • One-half based on individual measures; e.g., patient satisfaction.
Examples, cont’d

• A few are making far bolder moves into new compensation arrangements:

• Example:
  – 40% of compensation based on achievement of clinic-level team goals; e.g., diabetes, vascular disease, depression, cancer screening and asthma (see www.mnhealthscores.org)
  – 10% of compensation based on size of the physician’s panel
  – 10% of compensated based on size of clinic panel
  – 20% based on number of physician's encounters (number of individual encounters a PCP had in 12 months x average value of encounter)
  – 10% based on patient experience
Examples, cont’d

• Translating performance into compensation:
  – Start with median market compensation
  – Median performance (50th percentile of measure) = median compensation for that incentive
  – Poor performance (below 10th percentile of measure) = no compensation for that incentive
  – Exceptional performance (at or over 90% percentile of measure) = compensation above median for that incentive

• E.g., total compensation if hit median for each measure = $200,000; total compensation if hit 90th percentage for each measure = $320,000 (50% over market median).
Early Results Mixed

- Moving away from wRVUs will be slow if most payors still paying based on production.
- Physicians unsure if they will make more, or less; communication and input is essential.
- For team-based models, being able to influence other team members to pull their weight can be challenging.
Trends in For Profit Physician Compensation

• Productivity remains the predominate factor in physician group practices and for profit employers.

• Compensation based on work RVUs performed still makes up 70% of more of most compensation formulas (except for practices that share equally.)
Factors other than wRVUs

• In addition to production, the other factors that remain common in physician compensation are:
  – Call: frequency & intensity of call requirements
  – Team Orientation
  – Ability to control work flow
  – Preventing “cherry picking”
Reimbursement & Compensation Are Interrelated

• Third party payor reimbursement remains primarily based on work RVUs with some pay for performance strategies – usually less than 20% of reimbursement.

• Performance measures include patient satisfaction, meeting specific targets, meeting goals like the community health measures, or other measures.
Transitioning to Pay for Performance

- Paying amounts received for performance incentives directly to the physicians who met the goal when measurable.
- Sharing amounts received for performance incentives equally or per FTE among all who participated.
- 50/50 Split of equal sharing of incentives and individual performance.
Integrative Approach

• Designate a compensation pool not limited to the funds it receives for performance incentives.

• Establish goals based on the group’s strategy and objectives for all patients, not just those in a plan with pay for performance reimbursement.
Individual or Group Performance Goals

• Clear, measurable, attainable and relevant.
• Typically patient focused care, resource utilization, clinical measures, use of technology, patient satisfaction or targeted actions.
• Group – same goals for all physicians and each earn the incentive if meet goals.
• Individual – physician paid based on meeting goals set for the individual.
Too Early to Tell

• Changing individual expectations – sense of fairness.
• Reimbursement is not currently aligned.
• Effort needed to develop the plan, measure performance, improve performance on continual cycle.
Legal Requirements Pertaining to Physician Compensation

- Stark
- Medicare Anti-kickback
- Federal and State tax laws
- False Claims Act
Stark Laws

• Prohibits an entity from billing Medicare or Medicaid for designated health services ("DHS") referred by a physician that has a financial relationship with the entity unless an exception applies.

• Physicians in physician-owned practices “stand-in-the-shoes” of financial relationships that their practices have with hospitals that bill Medicare for inpatient and outpatient services (included in DHS), necessitating an exception; e.g., a professional services agreement between a physician-owned practice and a hospital.

• Physicians who are employees of a health system have a direct compensation arrangement with the health system, necessitating an exception.

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Stark Laws, Cont’d

• Numerous Stark exceptions require that remuneration be consistent with FMV:
  – Bona fide employment
  – Personal service arrangements
  – Fair market value compensation
Stark Exception for Bona Fide Employment

• The employment must be for identifiable services.
• The amount of the remuneration must be:
  • Consistent with the fair market value of the services; and
  • Not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician for DHS.
• Productivity bonuses based on services personally performed by the physician are o.k.
• The remuneration is provided under an agreement that would be commercially reasonable even if no referrals were made to the employer.
Stark Exception for Personal Service Agreements

• The arrangement is set out in writing, is signed by the parties, and specifies the services covered by the arrangement.
• The arrangement covers all of the services to be furnished by the physician to the entity.
• The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement(s).
• The term of each arrangement is for at least 1 year.
• The compensation to be paid over the term of each arrangement is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
Common Elements: Fair Market Value and Commercial Reasonableness

• Separate requirements.
• Fair market value means the value in arm’s-length transactions, consistent with general market value.
• “General market value” means the price that an asset would bring as a result of bona fide bargaining between well-informed buyers and sellers, who are not otherwise in a position to generate business for the other.
• Usually, the fair market price is the price at which bona fide sales have been consummated for assets of like type, quality and quantity in a particular market at the time of acquisition, or compensation included in bona fide service agreements with comparable terms at the time of the agreement.
Commercial Reasonableness

- a “commercially reasonable” financial arrangement is an arrangement that would -
  - make commercial sense if entered into by
  - a reasonable healthcare provider entity of similar type and size, and
  - a reasonable physician (or group) of similar scope and specialty,
  - even if there were no potential business referrals between the parties.
CMS and Salary Surveys

• CMS believes that using multiple, objective, independently published salary surveys is a “prudent practice” for evaluating fair market value.

• Although good faith reliance on an independent valuation may be relevant to a party’s intent, “it does not establish the ultimate issue of the accuracy of the valuation figure itself.”

• Ultimately, the appropriate method for determining fair market value will depend on the nature of the transaction, its location (e.g., rural vs. urban), and other factors.
Medicare Anti-kickback Laws

• Prohibits payment of remuneration in exchange for referrals of persons for the furnishing of items or services paid for by a federal health care program.
• Requires intent.
• Courts and the Office of Inspector General (“OIG”) have said that if one purpose of a payment is to induce or pay for referrals, then the law is violated.
Medicare Anti-kickback, Cont’d

• OIG has said that if a health care provider gives or receives something of value that is not at FMV, an inference may be made that the exchange was intended to induce or reward referrals.

• “By ‘fair market value,’ we mean value for general commercial purposes. However, ‘fair market value’ must reflect an arm’s-length transaction which has not been adjusted to include the additional value which one or both of the parties has attributed to the referral of business between them.”
Medicare Anti-kickback Safe Harbors

• The anti-kickback laws have several “safe harbors” whereby if the relationship meets the requirements of the safe harbor, it generally will not violate the statute.

• Failing to fall within a safe harbor does not mean that the relationship violates the statute, but the arrangement can be reviewed to determine if there was any intent in the arrangement to pay for referrals.
Anti-kickback Safe Harbor for Employment

• Amounts paid by an employer to an employee who has a “bona fide” employment relationship.

• No specific requirement of FMV, but payments over FMV may call into question whether the employment relationship was truly “bona fide.”
Anti-kickback Safe Harbor for Personal Services and Management Contracts

The Agreement must:

• Be set forth in writing and signed by the parties;
• Cover all of the services the agent (physician) provides to the principal (hospital) and specifies the services to be provided;
• If part-time, specify exactly the schedule and the exact charge for the intervals;
• Have a Term of not less than 1 year;
• Set the aggregate compensation to be paid in advance, consistent with fair market value in arms length transactions and not be determined in a manner that takes into account the volume or value of referrals or other business generated between the parties paid for by a federal health care program.
Internal Revenue Code: Tax Exempt Entities

- Payments in excess of FMV may, in extreme cases, result in the IRS’ determination that the organization is no longer tax exempt.
- In less egregious cases, the IRS also has available tax penalties (intermediate sanctions) that apply to excess benefit transactions where an economic benefit is provided by an exempt organization to a disqualified person and the value provided exceeds the value of what was received.
Exempt Organizations – Cont’d

• Exempt organizations may establish a presumption that the arrangement is reasonable if:
  – objective, third party evidence (e.g., surveys or independent valuations) are obtained showing that the payment is FMV;
  – results are reviewed and approved by outside, independent members of the Board of Directors; and
  – the decision is well-documented.

• The IRS has issued guidance for physician/hospital arrangements.
Internal Revenue Code – Definition of Fair Market Value

• The price at which property or the right to use property would change hands between a willing buyer and a willing seller, neither being under any compulsion to buy, sell or transfer property or the right to use property, both having knowledge of relevant facts.
Relationship Between Legal Requirements and Compensation Trends for Non-Profit Systems

- Incentive payments should be set at FMV.
- Incentives should not be based on the volume or value of referrals.
- Compensation should still be tied to appropriate market and survey data, updated when appropriate.
- Design incentives around established quality measures (e.g., Medicare shared savings program measures).
- Measures should be reasonably related to the hospital’s mission and strategic plan (i.e., commercially reasonable).
Stark Restrictions on Compensation from DHS

• Group practice exception allows group to provide and bill for DHS as in office ancillary services.

• Group practice exception includes a restriction on the manner in which a group practice may pay its physicians relative to the DHS provided by the group.
Requirements for Compensation From Receipts for DHS

• The formula by which the amount of compensation will be paid must be set before the receipt of payment for the DHS.

• The formula must not relate directly to the volume or value of the DHS referrals by a physician.
Permitted Formulas

• May pay physicians DHS revenues:
  – On a per-capita basis (as long as there are at least 5 physicians in the group or department)
  – based on the revenues or charges for the physician’s personally performed professional services (non-DHS services)
  – based on the physician’s patient encounters, or
  – based upon wRVUs for services that are not DHS
Excess Compensation

• A for-profit entity may deduct a reasonable amount for salaries or other compensation for personal services rendered.

• If the compensation paid is in “excess” of “reasonable” compensation, the IRC treats it as a dividend. Applies to public companies, but most risk to a C corporation with a few shareholders (like most group practices.)
Reasonable Compensation

Facts & Circumstances Test

- Employee qualifications, prevailing rates of compensation for similar positions, comparison to compensation paid by similar companies, salary policy of taxpayer, internal consistency, character and condition of the company

- Free bargain between employer and individual made before services are rendered generally allowed even if amount exceeds what would ordinarily be paid
Contingent Compensation Invites Scrutiny

• “For Services Rendered” hot buttons
  – Ancillary services “profit”
  – Revenue from services performed by other practitioners

• Not Paying Dividends
  – May not be sole reason to disallow salary deductions
  – But is a factor in the “facts and circumstances” test
Balancing Compensation & Distributions in S Corporations and Limited Liability Companies

• Excess compensation is not an issue for S corps or LLCs, because they are taxed at the individual taxpayer level rather than corporation.

• But reasonable compensation can still be an issue – the balance between compensation and distributions is important.
Relationship Between Legal Requirements and Compensation Trends in For-Profit

• Emphasize physician involvement in patient care, when compensation is not based on production.
• Base allocations on services performed, i.e. supervision, professional services or meeting goals or targets.
• Benchmark total compensation against survey data.
• Be sure salary formula is set in advance and in writing, make changes prospectively.
• Avoid using words like “distribution” or “distributable income” that imply a dividend.
Questions?