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HOME HEALTH AND HOSPICE NEWS

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PHYSICIAN IT ACCESS TO PROVIDER RECORDS RAISES POTENTIAL STARK LAW CONCERNS

When a health care provider furnishes IT equipment, software or related services to a referring physician, does it run afoul of the Stark law? This question has surfaced recently in recognition of the fact that providers are increasingly purchasing and passing along to physicians, at no charge, the capability to access the provider's records.

Many healthcare software companies now offer "physician portals" – mechanisms that allow physicians with approved login and identification information to remotely access the provider's records and specifically, patient records. The benefit of such access is that the providers are able to expedite record reviews and claims submission, and facilitate the execution or revision of plans of care, other orders, certifications and recertifications, etc. Providers also benefit by not having to mail or fax paper documents and wait to the physician to review and return them. Physicians can view the records at their convenience from their own PCs or laptops, and may enter orders for care and electronic signatures directly into the provider's medical records.

Providers typically pay software vendors an additional amount for physician access capability. This is where the federal Stark law concerns have been raised. Under the Stark Law, §1877 of the Social Security Act, a physician with a "financial relationship" with an entity may not refer patients to that entity for "designated health services" unless an exception is met. A "financial relationship" is defined broadly to include a "compensation arrangement" in which a benefit, or something of value, passes between a physician and an entity. "Designated health services" include home health agency services (but not hospice services). Thus, a physician who has a compensation arrangement with a home health agency may not refer patients to that agency unless an exception is met.

The question raised in the software context is whether the benefit conferred on the physician in the form of a remote access mechanism, for which the agency pays the software vendor, creates a "compensation arrangement" between the agency and the physician. The answer depends on the type of benefit conferred. It is unlikely that a compensation arrangement exists if all that is provided is a login and password for access to specific patient records. This is not substantively any different than a provider furnishing a physician with a paper copy of medical records or accepting orders via facsimile. Moreover, the primary benefit in the internet access scenario is to the home health agency, which is able to obtain and process physician information more quickly. CMS has taken this position with respect to hospitals furnishing physicians with IT that is "wholly dedicated to use in connection with the hospital services provided to the hospital's patients" because it is considered to be for the hospital's benefit and convenience.

This conclusion would not necessarily apply to all IT benefits conferred on a physician. For example, if a physician is provided access to a provider's records through a portal that also allows the physician to access certain other records or databases, perform other functions that the physician would normally pay for directly, access outside information, or perform separate functions that are unrelated to the provider's business or patients, or which are personal in nature, then the benefit conferred on the physician would arguably create a compensation arrangement. Likewise, to the extent a provider furnishes a physician with any additional software, hardware or equipment (such as a PC or laptop) or staffing, or pays for monthly internet or other service or connective software or hardware, a compensation arrangement would almost certainly be established.

If a compensation relationship is created, then the parties (the physician and the entity) would be required to meet all of the criteria included in the applicable exception for electronic health records items and services, which would include executing a written agreement relating to the IT items and services furnished, outlining the permitted and prohibited uses of any equipment or software, incorporating the requirements to allow for electronic prescribing (in accordance with Medicare Part D standards), and requiring the physicians to pay the entity for 15 percent of the cost of the items and services prior to receiving them, among other criteria.

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