

DOJ Files False Claims Act Suit against Public Health System Alleging Widespread Stark Law Violations for Excessive Physician Compensation

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The Department of Justice (DOJ) recently filed a [complaint](#) against Erlanger Health System (Erlanger), a county-owned public health system, and two of its Tennessee hospitals alleging that the health system systemically violated the Stark Law from 2014-2021 and “knowingly” submitted claims for hospital procedures in violation of the False Claims Act. The lawsuit was initially brought as a qui tam (whistleblower) lawsuit filed by a former Chief Compliance Officer and a former Chief Financial Officer of Erlanger. While fair market value compensation is a key criterion for most Stark Law exceptions, this lawsuit is one of the few enforcement actions initiated by the DOJ focused on fair market value compensation paid to employed physicians. This blog post covers three key takeaways from the DOJ’s allegations against Erlanger.

Background

In 2005, Erlanger paid \$40 million to resolve Stark-based False Claims allegations with DOJ, and entered into a 5-year corporate integrity agreement (CIA) with the Office of Inspector General. Under the recently-filed Complaint, the DOJ alleges that Erlanger’s compensation model shifted from the primarily base clinical compensation model used during the years that the CIA was in effect (2005-2010) to a model in which additional compensation was paid to revenue-generating physicians for “downstream” hospital services. The Complaint includes allegations of a “pattern and practice” of paying employed physicians in excess of fair market value, in the form of medical director and academic salaries; uncapped payments for on-call shifts; sign-on, retention, and program bonuses; and uncapped productivity incentives.

Key Takeaway #1 - Medical Directorships Are Often Under Increased Scrutiny

One focus of the Complaint is Erlanger’s use of medical directorships to attract and reward high-revenue generating physicians. In particular, the DOJ alleges that Erlanger failed to require medical directors to document their time spent serving as medical directors to substantiate that the payments made to the physicians were for services actually provided. This serves as a good reminder that

medical directorships are often under increased scrutiny. While the Stark Law does not require that health systems obligate medical directors to submit timesheets in order to be paid, documenting accurately the work done by medical directors to substantiate payments made reduces Stark Law risks.

Key Takeaway #2 - Physician Contracting Review Committees Serve as Important Tools to Ensure Stark Law Compliance

The DOJ's complaint against Erlanger is notable in that many allegations are premised on changes to compensation and compensation review procedures after the CIA expired. As is typical for CIAs imposed due to Stark Law allegations, Erlanger's CIA in effect from 2005 to 2010 required Erlanger to establish a formal written review and approval process for all arrangements with physicians and other referral sources to ensure that the arrangements do not violate the Anti-Kickback Statute and Stark Law. CIAs typically require a physician contracting review committee along with a process for documenting the business rationale, fair market value assessment, and legal review of all physician contracts. As part of its efforts to attract and retain physicians, Erlanger allegedly changed its physician contracting process implemented under the CIA shortly after the CIA expired. The allegations state that Erlanger stripped its physician contracting committee of much of its authority, including by making the Chief Compliance Officer a non-voting member of the physician contracting committee, allowing the committee to review contracts without a final fair market value assessment, and permitting the CEO to enter into contracts without the committee's recommendation. These sorts of requirements were not required after the CIA expired, but the former Chief Compliance Office, Chief Financial Officer, and DOJ allege that these changes led to decisions that resulted in physicians being compensated in excess of fair market value, in violation of the Stark Law. Specifically, DOJ alleged that Erlanger "relaxed or eliminated physician compensation oversight and controls in order to recruit and retain physicians with valuable downstream revenue.

This is a reminder to health care systems to consider carefully changes to their physician contracting procedures, and to ensure that sufficient controls are in place to protect against allegations of Stark Law noncompliance. Some health systems have voluntarily adopted physician contracting processes that mirror the standard physician contracting requirements in CIAs as a best practice to mitigate Stark Law noncompliance.

Key Takeaway #3 - Directed Referral Requirements are Permissible but Do Not Waive the Stark Law's Fair Market Value Requirements

The DOJ also raised Erlanger's efforts to combat "patient leakage" by tracking employed physicians' referrals outside of the system. Allegedly, Erlanger attempted to combat patient leakage by employing more physicians and expecting their employed physicians to treat their patients at Erlanger's facilities and to refer their patients to other medical providers employed by Erlanger. It should be noted that the Stark Law specifically permits health systems and other providers to contractually require employed physicians to refer exclusively within the network (otherwise known as [directed referral requirements](#)). Yet, this Complaint serves as a reminder that the Stark Law's requirements for directed referrals are technical, and compliance with the directed referral requirements do not waive the Stark Law's requirement that employed physicians' compensation must be consistent with fair market value.

Conclusion

The DOJ's Complaint included specific compensation information and allegations involving at least

six physicians identified in the Complaint, and alleges \$27.8 million in improper payments, subject to trebling and per-claim penalties, if FCA liability is established in the proceeding by DOJ.

This action is a reminder of the increased enforcement attention by DOJ on alleged Stark Law violations. The Complaint highlights the risks involved in changing physician compensation controls involving physician compensation, the many murky areas related to fair market value, the limits in DOJ's view of "productivity bonuses," the need for careful tracking with respect to medical director salaries, and the risks involved (in DOJ's view) of compensation exceeding the 75th or 90th percentiles.

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National Law Review, Volume XIV, Number 227

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