Navigating physician employment during COVID-19: Understand employer flexibilities

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This is first article of a of three-part series on physician employment during COVID-19. Read the next articles from the series Navigating Physician Employment during COVID-19.

Compensation during and after the COVID-19 emergency is, of course, central to many employment related discussions. Compensation related decisions start with the terms of the written agreement, but they are also influenced by regulatory compliance considerations.

In the normal course, hospitals and health systems are limited by federal laws, such as the Stark law or Federal Anti-Kickback Statute, which preclude compensating physicians above “fair market value.” Fortunately, the federal government has recently created waivers for or expressed that they will not enforce these laws to some extent during the public health emergency (PHE) due to the COVID-19 outbreak.

These waivers permit arrangements during the period of the COVID-19 emergency that could not otherwise be undertaken. For example, hospitals or health systems and their employees may execute compensation arrangements that are above or below fair market value, or arrangements that are designed to help retain physicians and other clinicians in a community. These COVID-specific flexibilities provide opportunities for physicians and their employers to negotiate agreeable terms relative to compensation and, as applicable, financial and other support if the employment relationship terminates.

Select examples of compensation related terms that might be considered by physicians and their employers and would fit within the waivers include:

- A physician’s negotiation of a higher rate of compensation per hour or per RVU for work performed outside of his/her normal duties to address COVID-19 patient care needs in the form of “hazard pay.”
- A hospital’s agreement to guarantee compensation at historical levels for physicians who are compensated based on their productivity, but whose production has decreased due to the inability to perform elective surgeries, inability to engage in a normal clinic or other reasons.

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A health system’s agreement to provide physicians departing the health system’s employment with access to and use of electronic health record and other technology and resources (e.g., space, equipment) for free or on other below fair market value terms during the duration of the COVID-19 emergency.

An agreement by a hospital and physician to enter into a one-time “severance” agreement whereby the hospital agrees to pay the physician a defined amount of compensation in connection with terminating his/her employment relationship.

Importantly, the waivers relieve physicians and employers from complying with provisions of federal law under certain circumstances, but similar state-law provisions will not always be waived automatically, so physicians may need to consult with health care regulatory and employment counsel to obtain a full evaluation and understanding of limits that may apply under applicable state law.

Beyond cash compensation, other regulatory provisions of federal and state law will define what rights and obligations will apply to employers and employees. These include state laws governing final payments of compensation, rights to continue health insurance and others.

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