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## Leveraging the Value-Based Exceptions to Retain Physicians and Advance Hospital Goals

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Health systems are under increasing pressure to improve quality, reduce costs, and enhance patient outcomes—all while navigating complex regulatory frameworks. Physician retention is critical to achieving these goals as physicians are instrumental in maintaining continuity in care delivery, preserving institutional knowledge, and ensuring alignment with hospital quality and cost goals. Failure to retain physicians can disrupt care coordination and undermine performance on value-based metrics, which can directly impact a hospital's reimbursement under alternative payment models. By leveraging the Stark law value-based exceptions at 42 C.F.R. § 411.357(aa), in-house counsel can assist their clients in the hospital setting with compliantly structuring physician compensation arrangements that reward physicians for achieving the hospital's quality and cost objectives.

### Overview of Value-Based Exceptions

There are three value-based exceptions based on the level of financial risk assumed. Set forth below are some high level requirements related to each exception.

1. *Full Financial Risk (42 CFR § 411.357(aa)(1))*

- Applies when a value-based enterprise (VBE) assumes prospective responsibility for all patient care costs for a target population (e.g., global capitation or total cost-of-care contracts).
- The VBE must be financially responsible or contractually obligated to assume risk within 12 months of the arrangement's start.
- This structure offers maximum flexibility because the risk itself mitigates overutilization concerns.

## 2. *Meaningful Downside Financial Risk (42 CFR § 411.357(aa)(2))*

- Protects arrangements where physicians are at meaningful downside financial risk—defined as being responsible to repay or forgo at least 10% of the total remuneration under the arrangement.
- Risk must be tied to achieving the VBE’s value-based purposes, such as reducing readmissions or improving quality scores.
- Requires written documentation of the risk terms and prospective setting of remuneration methodology.

## 3. *Limited Risk Arrangements (42 CFR § 411.357(aa)(3))*

- Applies even when neither party assumes financial risk.
- Requires detailed safeguards: signed written agreements; objective, measurable, and clinically supportable outcome measures (if any); monitoring at least annually; and termination of ineffective value-based activities within a set period of time.
- The arrangement must be commercially reasonable.
- Designed to encourage participation by smaller practices and rural providers not ready for risk-bearing models.

In addition to the above requirements, all value-based remuneration must (i) result from the value-based activities undertaken by the recipient for the target population; (ii) not be an inducement to reduce or limit medically necessary care; or (iii) not be conditioned on referrals of patients who are not part of the target population or business not covered under the arrangement.

## **Strategic Application of the Value-Based Exceptions for Physician Retention**

Hospitals facing retention issues can leverage any value-based exception to align physician performance with institutional goals. This flexibility can be used to create incentives that encourage long term physician engagement. Some potential value-based arrangements that in-house counsel could consider when advising their clients in the hospital setting on how to structure arrangements to meet the hospital’s performance goals while also retaining physicians include the following:

### • **Multi-Year Value-Based Agreements**

- Structure value-based arrangements with performance metrics tied to multi-year goals (e.g., reducing readmissions by 15% over three years).
- Include progressive bonuses or shared savings pools that vest over time, incentivizing physicians to stay through the performance cycle.

### • **Risk-Sharing as a Retention Tool**

- Full risk arrangements involving the VBE or downside risk arrangements ( $\geq 10\%$  financial exposure) involving the physician can be paired with upside potential, creating a sense of partnership between the hospital and the physician.
- Physicians who invest effort in meeting targets are less likely to leave mid-cycle, as doing so could trigger repayment obligations.

### • **Team-Based Incentives**

- VBEs often involve multiple providers. Linking rewards to team performance fosters collaboration and discourages attrition, as leaving could jeopardize group bonuses.

### • **Career Development Through Value-Based Roles**

- Offer leadership positions within VBEs (e.g., care coordination lead) that are tied to value-based performance. These roles provide a physician with opportunities for professional growth and a financial upside.

By structuring arrangements tailored to achieve value-based goals supported by documented metrics and oversight, in-house counsel can help their clients harness the flexibility of the value-based exceptions to retain physicians, advance care quality, and maintain compliance. When structuring these arrangements, in-house counsel should ensure that the incentives are tied to value-based purposes and not referral volume.

## **Anti-Kickback Statute Considerations**

Although the Centers for Medicare and Medicaid Services (CMS) and the Office of Inspector General (OIG) collaborated to develop the new exceptions and safe harbors that provided providers with greater flexibility to participate in alternative payment models, there are some differences between CMS' value-based exceptions and the analogous OIG safe harbors. It's important to note that while every requirement of an applicable Stark law exception must be followed to prevent overpayment obligations, not every requirement of the Anti-Kickback Statute (AKS) safe harbor must be followed to prevent liability. When evaluating an arrangement under AKS, for those arrangements not falling entirely within a safe harbor, the OIG will use a facts and circumstances approach to determine whether the arrangement is subject to liability. If the hospital is entering into a value-based arrangement with a physician it directly employs, then the arrangement may be able to fall within the employment safe harbor, which protects any amount paid by an employer to a bona fide employee for furnishing any items or services reimbursable by a federal health care program.

## **Conclusion**

The value-based exceptions represent a significant opportunity for hospitals to align physician incentives with quality and cost objectives while maintaining regulatory compliance. By structuring arrangements to leverage the flexibility of a value-based exception while implementing safeguards that withstand regulatory scrutiny, in-house counsel can help their clients in the hospital setting to advance their strategic goals, improve patient care, and retain top physicians in an increasingly competitive environment. While this article focused on federal law, it is important to note that state fraud and abuse laws should be reviewed prior to implementing any value-based arrangements between hospitals and physicians to ensure compliance with such laws.

### **ARTICLE TAGS**

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