

## Trends to Come

### Reflecting on a Recent Settlement of Employed Physicians Compensation

Covenant Medical Center in Waterloo, Iowa a 231-bed hospital recently agreed to pay the U.S. government \$4.5 million<sup>1</sup> to settle allegations that its compensation to five specialists violated the Stark restrictions on physician self-referral, and therefore also violated the False Claims Act with the related Medicare claims. The government alleged that the physicians' compensation exceeded fair market value (FMV) and was not commercially reasonable.

Financial relationships between hospitals and *non-employed* physicians (*i.e.*, independent contractors) have historically been the focus of most health care fraud and abuse enforcement, but this settlement may be an example of enforcement actions *to come* as the federal government continues to focus on health care fraud and increases its enforcement activity.

Stark is a strict liability statute, therefore the government does *not* have to prove the hospital compensated physicians with the intent to induce referrals. This means the government has a low burden to prove in pursuing these cases. If the government can show evidence that the hospital intended to pay for an increase in referrals, the case then erupts into an anti-kickback case, which is criminal.

The Covenant case is a cause for concern for hospital executives as it now appears the government is willing to challenge a hospital's determination that a particular physician's salary meets the fair market value test.

The appropriate compensation value for employment arrangements from a FMV perspective should consider the following factors (i) the experience, training and productivity of the employee candidate (ii) the expected results from operations of the practice; and (iii) certain other factors related to the hospital and its marketplace.

Employment compensation arrangements can be designed whereby the physician's compensation model is "*self governing*" and thus there are appropriate checks and balances in place to ensure compensation is within FMV.

In light of this case hospitals should review all their financial relationships with employed physicians (as well as non-employed physicians) to ensure their compensation arrangements constitute fair market value.

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<sup>1</sup> [www.usdoj.gov](http://www.usdoj.gov)