

Employment Retention & Staffing: Roadmap to Compliant Compensation



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Jennifer Guerrero is a member of the Health Care Law and Privacy and Data Security Law practice groups in Buchalter’s Los Angeles office. Jennifer helps a variety of healthcare providers develop common-sense risk management strategies and navigate the complex healthcare legal landscape. Jennifer brings an insider’s perspective to her healthcare practice due to her real-world experience: she worked as in-house counsel at a Medi-Cal (Medicaid)/Medicare managed health care plan and also at a non-profit hospital system. Her experience and extensive knowledge gives her an edge in providing strategic and creative solutions to her clients — in regulatory, operational, compliance, and transactional matters for providers of any size.

Jennifer’s healthcare clients typically include:

- Medical and ancillary providers
- Telemedicine companies
- Hospital systems
- Life sciences companies
- Managed care organizations

Jennifer regularly advises clients regarding the oversight and compliance requirements unique to Medicare and Medi-Cal, managed care law, fraud and abuse compliance, value-based contracting, payor/health plan contracting, reimbursement, overpayments, pharmacy network issues, Knox-Keene license requirements and obligations, and other various other legal issues as they arise.

Roadmap

- Constraints in staffing & hiring
- Different Staffing Models to Meet Staffing Needs
- Trends in Legislation Related to Nurse Staffing
- Healthcare Practitioner Retention
 - Balancing Needs of the Employer and the Employee
 - Regulatory issues in Compensation
 - Contracting/compensation within the regulatory framework

Balancing Act in Urgent Care Staffing and Hiring

- Competing interests between Employer/Employee
- Tension with compensation and regulatory compliance
- Increase demand to hire due to minimum staffing laws
- Decrease in talent pool
- Managing burnout and turnover
- Increased legislation to regulate nurse staffing agencies

Trends to Mandate Increased Urgent Care Staffing

- California and Massachusetts have laws about nurse-to-patient ratios in hospitals.
- States that require public reporting of staffing ratios in hospitals: Illinois, New Jersey, New York, Rhode Island, and Vermont.
- States that participate in hospital based staffing committees include: Connecticut, Nevada, Illinois, New York, Oregon, Texas, Washington, Minnesota

How to Meet Staffing Needs?

- Hire more Employees
- Use Staffing Agencies
- Use Profession Employer Organization or Joint Employer Organization
- Hire Independent Contractors

Pros of Different Staffing Models

PEO

- Less liability for employee
- Time and money savings on recruitment costs
- Less administrative burden- PEO handles HR tasks, may administer benefits, payroll, employee claims, drug testing etc.

Staffing Agency

- Time savings
- Money savings long-term
- Less administrative burden
- Larger talent pool
- Less liability

Employee

- Loyalty
- Return on investment
- Long-term commitment
- Responsiveness
- Quality of work due to accountability
- More control

Independent Contractor

- Time savings
- Less administrative burden
- Less liability (if properly classified)
- Accountability for deliverables in the contract

Cons of Different Staffing Models

PEO

- Costs of benefits can fluctuate
- Lower quality of HR services
- Compliance is not guaranteed
- limited or delayed access to HR and data because third party
- High expenses of PEO services
- Can negatively impact culture, morale and engagement
- Loss of control over HR processes including benefits

Staffing Agency

- Lack of loyalty
- Loss of control over workforce
- Risk on quality of workers
- Agency costs
- Training costs for each replacement
- Risk of joint employer liability

Employee

- High costs related to documentation, taxes, employment laws
- Training and investment may not provide ROI
- Time to identify and hire candidates

Independent Contractor

- High costs
- Lack of control
- Risk of misclassification liability especially for NP, PA, RN, LVNs, MAs

How to Decide

- Look at the needs of your organization
- May be a multi-faceted approach
- Think about long-term goals to inspire organizational change

Legislation Regulating Staffing Agencies

- Nurse staffing requirements for registration or licensure
 - Oregon’s new law requires “temporary staffing agencies” to apply for an authorization and pay the applicable fee.
 - [Iowa passed a new law](#) requiring “health care employment agencies” to register with the Department of Inspections and Appeals (DIA) and pay an annual registration fee of \$500, effective July 1, 2022.
- Increase in costs on for compliance may indirectly increase staffing cost
- Increase price transparency
 - Connecticut passed a law requiring “temporary nursing services agencies” to submit annual cost reports, including revenues and costs, average number of nursing personnel, average fees charged by type of nursing personnel and health care facility, and the states in which the agency’s nursing personnel reside.
- Restrictions on recruiting
 - Most legislation restricts penalties related to “covenants not to compete”
 - Louisiana passed a new law effective August 1, 2022 that prohibits nurse staffing agencies from offering financial incentives to agency employees for recruiting permanent employees of health care facilities to be employees of the nurse staffing agency.

Healthcare Practitioner Retention

- There is not specific formula for retention: Different people have different motivating factors
- **Contracting should take into account Employer v. Employee needs**
- **Benefits plus pay = overall compensation**
 - Training
 - Benefits (i.e. PTO, flex work schedule, insurance)
 - \$\$\$\$\$
- Culture and Work Environment Matter
- **Know the regulatory landscape that applies**

Basic Contract Considerations

- Identify Employer needs v. Employee needs
- Terms should be clear- think “Simple Stupid = no misunderstanding”
 - Would a regulator understand what the services are and the compensation?
 - Are the terms clear to prevent future disputes
- Employment v. Independent Contractor Agreements
 - Some terms are ok in an independent contractor agreement
 - Some terms are illegal in an employment agreement- check state law!

Balancing Employer v. Employee Needs

Employee

- Compensation
- Flexibility, Work-life balance
- Schedule/PTO
- Benefits
- Future opportunities/training

Employer

- Compensation- limited budget, shrinking margin
- Leadership/supervisory roles
- Cross-coverage/ on-call availability
- Quality

Regulatory Considerations in Compensation

General State/Federal Employment Laws

- Wage and hour
- Employee benefits/ERISA
- Discrimination
- Workplace safety
- Workers compensation
- Restrictive covenants
- National Labor Relations Act
- Others

Healthcare Laws

- **State/Federal Anti-Kickback Statute**
- Stark Law/State Self-Referral Prohibition (physicians only)
- Fee-Splitting – varies by state
- False Claims Act
- Civil Monetary Penalty Law
- Tax Exemption Issues
- FCPA

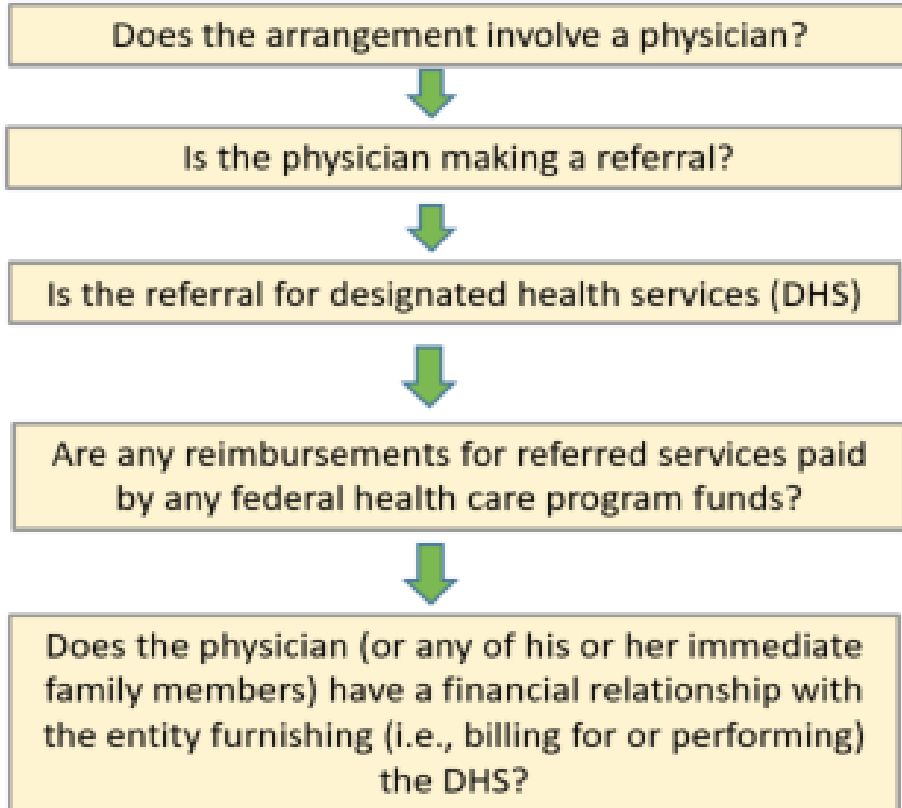
Regulatory Compensation Issues for Physicians

- Exposure for both Employer & Physician under Federal & State laws:
 - Self-Referral Laws (Stark and some state laws)
 - Stark is Strict Liability (I didn't know is not an excuse)
 - Anti-kickback statutes ("AKS") means you cannot pay for referrals
 - State fee-splitting prohibitions (percentage based payments related to patient care services)
 - States vary from strict prohibition (NY), explicit exceptions for some percentage compensation structures (CA, IL, FL), or no regulation at all

Is there a potential Anti-Kickback issue?

- Are you providing something of value to a person in a position to purchase, prescribe, refer or recommend your company's product?
- Does the arrangement involve Federal reimbursement (in whole or in part) for the product?
- Risk areas identified in HHS OIG Guidance (partial list):
 - Gifts and business courtesies (including meals, entertainment)
 - Discounts
 - Educational and research activities
 - PBM arrangements
 - Laboratory payments to referring physicians
 - Consulting and other fee-for-service arrangements
 - Sales and Marketing Agents

Is Stark implicated?



- Payments made for services at fair market value are not payments in exchange for a referral
- If the answer is yes to all, look for an exception
- Remember Stark is a strict liability statute
- one purpose is to induce referrals = illegal under Stark

Contract Limitations for Physicians

- Federal Stark/Federal AKS only apply where services are payable under a federal reimbursement program
- Stark only applies to "a doctor of medicine or osteopathy, a doctor of dental surgery or dental medicine, a doctor of podiatric medicine, a doctor of optometry, or a chiropractor.
- A financial relationship can be either an ownership interest or a compensation relationship, and includes indirect as well as direct relationships
- Stark referrals include employee physicians and IC Physicians
- State laws may be more restrictive (i.e. CA interprets kickbacks more broadly)
- Safe harbor requirements (i.e. bona fide employees under AKS)

Contract General Guidelines

- Contract should be in writing
- Compensation set in advance/FMV
- Does not take into account the volume or value of services or other business generated by the physician (AKS- federal program business)
- Commercially reasonable for a legitimate business purpose (not a disguise for payment for referrals)
- Look for an Exception and/or Safe Harbor
 - Note that the absence of an applicable exception/ safeharbor does not automatically mean it is prohibited

Group Practice Guidelines for Physicians

- Group practices compensation (stand alone facilities operating a group practice)
 - Groups may pay share of profits subject to certain limits.
 - Groups may pay physicians for services performed “incident to” the physician services.
- Contracts between the hospital and group may create additional issues, particularly for the group

Contract Considerations for Other Licensees

- Federal and State AKS still applies
- Limitations on employment classification
- Minimum wage in state/county/city

Compensation Considerations

- Salary

- Higher cost with less flexibility for employer
- Higher financial security

- Salary plus

- Minimum compensation with variable metrics
- Can align with employer profitability
- Less financial security, but incentivizes performance

- Independent contractor

- Not available for all licensees in all states (i.e. CA laws make it difficult for NP, PA, RN, etc to work as IC)
 - Higher costs with more risk of misclassification

Forms of Compensation

- RVU = Relative Value Unit
- Total RVU: Total value of service
 - $[(wRVU * wGPCI) + (peRVU * peGPCI) + (mRVU * mGPCI)] * \text{conversion factor}$
- Work RVU: Clinician value
 - “relative time, skill, training, and intensity”
- Base Salary: annual, hourly, per shift, per service
 - On-call time v. patient care services v. administrative time
- Billing or collections
- Value-Based Contracting
- Separate compensation based on types of services (i.e. patient care, call coverage)
- Combination of the above

Compensation Trends

- Value-Based Compensation modeled after payor contracts
 - Beneficial where you have objective metrics tied to payment
 - Can be used to focus on quality metrics
 - Review arrangements for compliance with exceptions under Stark and three safe harbors under AKS
 - vary in terms of flexibility based on the type of remuneration exchange, the degree of financial risk carried by the parties, as well as other criteria
- Combination of salary and productivity
 - Minimum base salary tied to productivity
- Time based- Most entities are moving towards production based

Compensation for Call Coverage

- Daily or hourly rate for “on-call time”
- Higher on-call rate when called in
- Minimum income guarantee for on-call coverage
- Higher on-call rate of after-hours or weekend shifts
- Higher compensation where agree to on-call time tiered by number of shifts per month or within one week

Other forms of compensation

- Bonuses not related to volume or value of referrals
 - Tied to metrics: i.e. quality (HEDIS etc.), cost reduction, clinical quality/patient safety/outcomes (e.g., patients with diabetes achieved certain standards), patient satisfaction, access to care, efficiency, use of health IT, citizenship (e.g., participation in committees, meetings, etc.)
 - Set in advance
- Additional Comp for Additional Duties (administrative, supervisory)
- Other compensation considerations
 - Insurance coverage
 - Stipend for professional requirements
 - Investment in training
 - Loan repayment
 - Relocation assistance

Key compensation considerations

- Understand Employee needs to structure the right compensation model
 - Salary + Incentive based payment (not tied to referrals) + benefits + Investment (training/promotion)
 - Each employee may value one factor more than another
- Include all compensation when determining FMV
- Not all volume based arrangements violate Stark or AKS (i.e. payment for services at FMV is not a referral)
- Contract considerations:
 - Bonus can be tied to time- consider repayment if they terminate for convenience or fail to give notice, prorate accordingly
 - Debt forgiveness should be memorialized (promissory note, security interest, commercially reasonable terms)
 - Consider tax consequences
- Anything that looks like a sweetheart deal will attract regulators!


Beware of Indirect Compensation

- Use of space/equipment
- Use of administrative services
- Other benefits that may “induce” referrals or provide a “free benefit” (i.e. paying for IC billing services, use of software)

Compensation to Recruit or Retain a Provider

- Stark and AKS is still implicated
- Limited to FMV
- Review employee or independent contractor safe harbor, group practice safe harbor or recruitment safe harbor under federal AKS
- Exceptions under Stark for retention payments (42 CFR 411.357(t))

Creative Payment Structures are possible to improve retention and recruitment

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- Understand the regulatory sandbox
 - Know the employees needs (one size doesn't fit all)
 - Be creative but stay within the sandbox when it comes to compensation

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