

### Physician Recruitment Deals:

#### Is It Back to the Drawing Board?

Physician recruitment assistance has always been a bit of a nail biter for hospital administrators and lawyers, but has been a widely used tool for hospitals to recruit much-needed physicians to care for their patient population. However, with the recent criminal indictment of Alvarado Hospital Medical Center, a Tenet Healthsystems Hospital facility, and its CEO over its physician recruitment deals, hospital administrators and their lawyers may want to reevaluate their recruitment deals. Depending on the outcome of the indictment, hospital administrators and their lawyers may be forced to go back to the drawing board.

On July 17<sup>th</sup>, a federal grand jury returned a criminal indictment charging the Medical Center with paying illegal kickbacks, in the form of relocation agreements, to induce physicians to refer to the hospital. Barry Weinbaum, the Medical Center's CEO, was previously indicted on similar charges. The indictment alleges that over a 10-year period the Medical Center entered into more than 100 recruitment and relocation agreements with physicians who agreed to join existing practices. The agreements resulted in more than \$10 million in payments to more than 100 recruited physicians. The numbers on average would mean assistance totaling \$100,000 for each physician — not an exorbitant amount of money. However, 100 recruitment deals, even over a 10-year period, seems rather voluminous.

The government alleges that the Medical Center and its CEO entered into these recruitment deals to induce physicians to refer patients to the hospital. This argument stems from allegations that the

financial support paid by the Medical Center passed through the recruited physician to the existing practice; i.e., the recruitment deals benefited already existing practices that are admitters to the Medical Center.

Tenet has denied the charges, stating that it is confident its policy on physician recruitment is consistent with the law. Tenet's policy, incidentally, can be found on its website at [www.tenethealthcare.com](http://www.tenethealthcare.com) under "Investor Center."

The indictment, of course, tells only the government's side of the story and may have its own credibility problems. The government's allegations are based upon testimony of Paul Ver Hoeve, a physician formerly affiliated with Tenet who was himself indicted on a number of Medicare fraud charges several years ago. Reportedly, Dr. Ver Hoeve agreed to cooperate with government prosecutors in order to avoid a possible jail sentence. The indictment generates concern in part because it does not tell us the specific details of Tenet's actions and so we are unable to determine if such actions are, in fact, egregious in relation to industry standards, or if they are representative of common hospital practices.

#### **INDIVIDUAL ASSISTANCE OR ASSISTANCE THROUGH AN ESTABLISHED GROUP – WHY SHOULD IT MATTER?**

While not expressly authorized by applicable regulations governing recruitment, hospitals commonly enter into recruitment assistance packages not with the recruited physician, but

with the practice group he or she is joining. These practice groups are, almost invariably, established referral sources for the hospital. The decision to enter into recruitment deals for physicians who join an existing practice may be largely due to the fact that physicians are not as likely to become sole practitioners. New physicians derive many administrative and cost-effective benefits in joining an existing practice.

Why is it that providing recruiting assistance through a group rather than directly to the recruited physician generates such governmental angst in this instance? The monetary assistance is the same. If the payments to the practice group do not exceed the costs attributable to the recruited physician, the group is not financially benefiting from the payments. What possible difference can it make whether the hospital provides the assistance to the physician directly or indirectly through the group he or she joins? In fact, it will be easier for the hospital to enforce its remedies against the group if the recruitment agreement is breached. If the agreement is directly with the recruited physician and he or she leaves town, the hospital has a mess on its hands trying to track down the physician and execute on a judgment filed in a faraway town or another state.

Does the government have an argument? Hospitals generally offer recruitment assistance to practice groups that are loyal admitters to the hospital. Providing recruitment assistance arguably strengthens those ties and enhances physician loyalty. The practice benefits by having the hospital finance its increase in capacity, its revenues, and its profits. The practice still retains some financial risk associated with the recruited physician, but the hospital bears the direct front-end costs.

While the primary benefit of recruiting accrues to the community having an unmet medical need filled, hospitals and the physician groups housing the new recruits would be hard pressed to argue that they enjoy no incremental benefit from the transaction. The real question, unanswered at the moment, is whether that incremental benefit is inappropriate.

These same benefits would accrue to the group if the hospital supported the physician directly and

the physician joined the group on his own, bringing the hospital's assistance as though it was a school voucher. Even if the hospital deals directly with the individual, as often as not, the group will have approached the hospital at some point in the process.

If the court concludes that it is per se illegal for hospitals to provide recruiting assistance through established groups, irrespective of whether the practice group actually receives any funds in excess of the costs attributable to the recruited physician, hospitals will be scrambling to restructure and unwind arrangements. If the court determines that the key to a legitimate recruiting arrangement with an established group lies in the ability to demonstrate that the hospital only made payments to cover actual costs attributable to the recruited physician, restructuring should be minimal. If this is the result, hospitals should be able to breathe easier as long as the hospital's recruiting arrangements are well documented, the method of monitoring compliance is effective; and there are enforcement mechanisms in place, then the hospital could continue to use recruitment deals as a method for meeting patients' needs.

#### **I DON'T WANT TO GO TO JAIL – WHAT DO I DO?**

1. **Document, Monitor, & Enforce Your Recruitment Agreements.** Until we know how the Tenet indictment turns out, it does not make sense to unwind and restructure existing recruitment arrangements simply because they are with established practice groups and not directly with the recruited physician. It does, however, make sense to do the following:
  - (a) Monitor existing arrangements to ensure that they are operating in accordance with the terms of the recruitment agreement. To the extent that a recruitment arrangement is in violation of one or more of its terms, the breach needs to be cured or remedies need to be enforced.
  - (b) If you provide income guarantee assistance through established practices that refer to the hospital, be certain that:
    - the practice performs periodic reconciliations;

- the practice provides documentation to the hospital so that the hospital can assure itself that it is not providing funds to the practice in excess of the practice costs attributable to the recruited physician;
  - the allocation of costs, especially overhead allocations, to the recruited physician is reasonable and defensible;
  - if warranted, the hospital should audit the practice's calculations;
  - if the reconciliation shows that funds were paid in excess of costs, make certain that the practice repays the excess funds (or future installments are offset); and
  - the hospital needs to retain the reconciliation and repayment documentation so that if it needs to, it can produce evidence that funds were only provided to offset the costs of the recruited physician.
- (c) If you provide payments to offset the costs of office start-up expenses (supplies, leasehold improvements, rent subsidies, relocation costs, marketing, etc.), do so only in accordance with an approved budget and then reconcile to actual costs to ensure that payments are being made to reimburse actual expenses incurred.
- (d) If you provide loan forgiveness to practice groups relating to physician recruitment, ideally, the loan should be secured by the practice group's revenues to ensure repayment in the event the recruited physician breaches his agreement to provide services in the area. If the arrangement is breached, you need to enforce your remedies.

Tenet representatives have indicated that the recruitment funds it provided to the physician practices were paid to cover expenses associated with the recruited physician. This response is the one every hospital that recruits through established groups would make. The success of this defense is dependent upon having (i) good

documentation evidencing the actual costs of the practice attributable to the recruited physician (including a budget and periodic reconciliations of the actual costs against the budgeted amounts); and (ii) good procedures, which include follow-up by the hospital to monitor the arrangement and evidence of repayment of any funds paid by the hospital in excess of actual costs. Without documentation and monitoring, these payments, at best, make the hospital look like it was not concerned with making sure it only paid for costs associated with the recruited physician. At worst, they look like payments for referrals.

2. **Recruit in Accordance with Community Needs.** If you have not already done so, conduct a community needs assessment and establish a medical staff development plan that reflects the community's need for physician services. Recruit only in accordance with the medical staff development plan. This is one way to evidence that physician recruitment is not undertaken by the hospital because a valued practice group requests support, but rather because the hospital has identified an unmet community need. The validity of your recruitment assistance is heavily reliant on being able to demonstrate community need. In this regard, the needs assessment must be able to stand up as an objective valid assessment, and it may be worthwhile to engage an independent third party to assist in the development of the needs assessment to provide the imprimatur of objectivity.
3. **Evaluate Individually and Globally.** Have the compliance committee periodically target several physician practices per year and review the recruitment arrangements that the hospital has in place with those groups, reporting to the hospital board or executive committee on the results of its audit. Make certain that on both an individual and on a global basis your recruitment arrangements are reasonable – in terms of the type of assistance, the amount of assistance and the duration of the assistance. Looking at the “big picture” sometimes offers a different perspective and reveals vulnerabilities that you

cannot see when evaluating each agreement on its own. For example, a global review may reveal that the hospital has entered into a substantial number of recruitment deals over the years with one particular group that is a significant referral source and those deals, overall, appear richer than other recruitment arrangements with other groups or physicians.

4. **Comply with Your Compliance Policy.** If you have a corporate compliance policy that includes physician recruitment guidelines, make sure your organization follows that policy. Having a policy, putting it on the shelf, and then not following it can be worse than having no policy at all. The policy will (presumably) demonstrate that the hospital understands how to comply with the law, and the failure to do so could be used as evidence of an intentional disregard of the law.
5. **Keep the Written Rationale for the Recruitment Arrangement.** Every recruiting arrangement should be undertaken only with a written evaluation and determination (supported by board action or otherwise in accordance with board-approved policies and procedures) detailing the rationale for entering into the agreement. This documentation, which should be completed contemporaneously with the transaction, should be retained in the file containing the recruiting agreement, back-up documentation (budgets, receipts, etc.) and compliance information (reconciliations, etc.). Hospital administrators leave and memories fade. The written rationale should stand on its own, as an explanation for the transaction. In light of the next point, have your counsel review each rationale before finalizing it and filing it.

6. **Watch Your Documentation.** Among the things the government relies on for its argument that Tenet engaged in illegal referral inducement is internal documentation of a Medical Center employee's performance goal to (a) strengthen the Medical Center's alliance with an existing community physician practice (that received recruitment funds) and (b) increase hospital admissions from that physician group. Hospital administrators need to be careful what they document. Written information stays in files for a long time – long after the context of the document is forgotten. An innocent document can take on illegal connotations when linked (appropriately or not) to hospital actions.

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