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INSIDE

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Surgeon Sues Health System for 'Forced Referrals'

A Florida health system is facing a whistleblower lawsuit from a surgeon alleging the system violated federal law by requiring him to perform surgery and refer patients within its own facilities. The surgeon claims the health system fired him for not complying with the policy.

The mandatory self-referrals violate the Physician Self-Referral Law (Stark law), and other statutes, the lawsuit claims.

In the lawsuit, filed in January 2020, the orthopedic surgeon claims that he was fired for performing surgeries at a hospital unaffiliated with the health system that employed him, as well as for referring patients to radiologists outside of the health system. He is suing the health system, two physician groups, and an imaging center.

According to the lawsuit, the health system created "an unbroken chain of financial relationships that renders these referrals as violations" of Stark. The surgeon also claims that physicians benefitted financially from the arrangement.

> ACCORDING TO THE LAWSUIT, THE HEALTH SYSTEM CREATED "AN UNBROKEN CHAIN OF FINANCIAL RELATIONSHIPS THAT RENDERS THESE REFERRALS AS VIOLATIONS" OF STARK.

The lawsuit says the surgeon was employed by a physician group for three years before the group was acquired by the health system, at which point in-network referrals were strongly encouraged but not required. But over time, the surgeon claims, he and other physicians began to feel more pressure to stay within the network. He claims that at one point the health system CEO encouraged another doctor to "show some loyalty to the system."

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The orthopedic surgeon alleges that he was threatened with termination if he continued performing surgeries at other hospitals. When he resisted, the president of his physician group told him he was "sending a very negative message to [his] employer," according to the lawsuit.

The health system also encouraged physicians to send patients to its imaging center, but the surgeon disputed the quality of care, citing difficulties in scheduling and long wait times, according to the suit.

Prioritize Best Quality Care

Although the case has not been resolved, there already are lessons for risk managers, says **Callan G. Stein**, JD, partner with Pepper Hamilton in Boston.

The first lesson is that hospitals and healthcare systems should clearly state and routinely emphasize to their physicians that the top priority is always ensuring patients receive the best medical care, Stein says.

"When talking about in-network referrals, the message should focus on the benefits to the patient of staying within a single network to get all necessary treatment. For example, the ease with which care can be coordinated across multiple physician and specialties," he says. "In this case, some of the worst-sounding allegations are those concerning directions or suggestions from the defendants to the physician to make in-network referrals without any reference to patient care."

Hospitals and healthcare systems also should avoid broad directions that referrals "need to be" or "must" be made within network, Stein says. When making a referral, each patient's situation must be evaluated individually to determine the best course.

"Blanket directions for in-network referrals can appear to deprioritize the patient's needs when, in fact, the in-network referral is often what is best. Imposing broad directives also deprioritizes the patient's right to choose his or her own care, which is imperative and must be emphasized," he says. "Physicians must be made to feel confident in discussing what the patient's preference is, so any statements concerning in-network referrals must include allowances when patients indicate a preference for an out-of-network provider."

Do Not Punish Out of Network

Hospitals and healthcare systems should not punish or take negative

EXECUTIVE SUMMARY

A surgeon is suing a health system for allegedly requiring him to operate and refer patients within the network. The lawsuit claims violations of the Stark law.

- Hospitals and health systems should never explicitly require in-network referrals.
- The patient's quality of care always should be the priority.
- It is possible to establish expectations of in-network referrals without violating Stark.

actions against physicians for referring patients out of network, Stein says. Often, there are valid reasons for doing so, such as complying with patient preference, a necessary specialist is out of network, or a piece of specialty equipment is only available at an out-of-network facility.

Hospitals and healthcare systems should endeavor to avoid even the appearance of taking negative action against physicians for out of network referrals, he says. For example, hospitals and healthcare systems should avoid overtly tracking individual physicians' in-network vs. out-of-network referral rates. They should never widely discuss or publish that information, he says.

Hospitals and healthcare systems can — and arguably should — ask physicians, in a nonthreatening way, why a particular referral was made out of network, Stein notes.

The information gathered from those discussions can be a valuable tool for identifying areas of the network that need strengthening, or geographic areas that need additional resources, he says. If physicians are hesitant to provide information in this manner, the facility might consider setting up an anonymous mechanism to report such information.

"Under no circumstances should a physician's compensation or job security ever be tied, directly or indirectly, to the number of in-network referrals he or she makes," Stein says. "Such conduct could result in liability under the Anti-Kickback Statute, Stark law, or other laws. Again, hospitals and health systems should avoid even the appearance that this could be a possibility."

Possible to Encourage In-Network Referrals

Depending on the circumstances, it is possible for the health system to expect that employed physicians will refer within the network, says **Geoffrey R. Kaiser**, JD, partner in the compliance, investigations, and white collar group with Rivkin Radler in Uniondale, NY.

If the surgeon is an employee of the health system, conditioning his continued employment on his agreement to refer his patients to the health system is not necessarily a violation of the Anti-Kickback Statute or the Stark law, he says, notwithstanding that employment has remunerative value and might otherwise be viewed as an improper inducement to refer.

For example, Kaiser cites *United States ex rel. Obert-Hong v. Advocate Health Care*, 211 F. Supp. 2d 1045, 1050 (N.D. Ill. 2002), in which the court held that these statutes were not designed "to regulate typical hospital-physician employment relationships" and that "[t]here is nothing in either statute that prohibits hospitals from requiring that employee physicians refer patients to that hospital."

"Outside the employee context, in a case involving an independent contractor, for example, the analysis would be different because the bona fide employee exceptions that exist in both statutes, and that protect such arrangements where the employee compensation formula is not directly based on referrals, would not apply," Kaiser says. ■

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HHS, CMS Easing Some Abuse Rules, Will Reduce Compliance Burden

The Department of Health and Human Services (HHS) and the Centers for Medicare & Medicaid Services (CMS) are continuing their plan to ease burdens on healthcare providers by amending the Stark law, the Anti-Kickback Statute (AKS), and the Civil Monetary Penalties Law.

The HHS Office of Inspector General has proposed revisions to ease requirements under existing AKS safe harbors. The proposed changes involve electronic health records (EHRs), warranties, local transportation, and personal services and management contracts.

This effort to reduce regulatory burdens is part of the HHS Regulatory Sprint to Coordinated Care, says **Jayme R. Matchinski**, JD, an officer with Greensfelder in Chicago. That program aims to encourage value-based arrangements and patient care coordination, allowing some activities that otherwise might be considered forbidden by current law.

"This is good news for healthcare organizations," she says. "This is an opportunity to pursue quality healthcare without having to face obstacles