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# MEDICARE COMPLIANCE

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## **Compensation, Investment Interests Converge In Montana Hospital's \$21.2M FCA Settlement**

Allegations of excessive physician compensation and conflicts of interest have converged in a new hospital false claims settlement. Kalispell Regional Healthcare (KRH) and related entities in Montana agreed to pay \$21.2 million over compensation for 63 employed specialists that allegedly was out of whack for their workload, the Department of Justice (DOJ) said Sept. 28. KRH swallowed losses on the compensation because of its gains from the physicians' referrals to its hospitals, and in the process allegedly violated the Stark Law and Anti-Kickback Statute. KRH also settled allegations that HealthCenter Northwest, its joint-venture hospital, created an "improper investment arrangement for certain physicians," DOJ alleged. The Flathead Physicians Group, which owned part of the hospital, will pay \$2.8 million to settle the false claims allegations, according to KRH.

The settlement resolves two whistleblower lawsuits filed in May 2017 and April 2018 by Jon Mohatt, the former CFO of KRH's physician network. DOJ consolidated the cases, with the resolution coming fast for the false claims world. The defendants said they "disagree with the allegations." This is the second major Stark-related false claims settlement over physician compensation in two months. In August, William Beaumont Hospital in Detroit, Michigan, agreed to pay \$84.5 million to settle false claims allegations over sweetheart deals with eight referring physicians, including above-fair-market-value compensation and below-fair-market-value rent (*RMC* 8/20/18, p. 4).

It's crucial for hospitals to ensure physicians are being paid fair-market value and to focus on their work relative value units (wRVUs), which measure their professional productivity, rather than their technical referrals for the facility component, says Houston attorney Adam Robison, with King & Spalding. He's also leery of tracking referrals and discussing them in board minutes and emails, which can create "bad facts" for executives. But the connection between practice losses and physicians' referrals would be hard for prosecutors to establish if hospitals defend false claims allegations at trial, says former federal prosecutor Melissa Jampol, with Epstein Becker & Green in New York City. "It's more complicated than meets the eye," she says. However, compensation arrangements that would be fine outside health care could run afoul of fraud and abuse laws and require careful vetting for fair-market value and commercial reasonableness, the attorneys say.

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In the 2017 complaint, Mohatt alleged that KRH paid part-time employed specialists, including gastroenterologists, surgeons and cardiologists, without regard to their wRVUs. Instead, they allegedly were paid in part on the volume or value of their referrals. "In one meeting with physician leaders, the former CEO of Kalispell Regional openly stated that she 'hate[d] wRVUs' and only tracked them because 'the Feds make me,'" the complaint alleged.

KRH lost money on a subset of physicians from fiscal year 2014 to 2016, but more than made up for it with admissions, procedures, surgeries, imaging studies, tests, and other ancillary medical services. "For example, in FY 2015, the \$29.7 million in losses were offset by hospital profits from referrals by employed physicians in the amount of \$41 million," according to the complaint.

KRH's financial strategists tracked the value and volume of referrals from the physicians and used the information to determine their compensation, the complaint alleged. "The reason for this scheme is economics: the hospital system profits from increased referrals, and the physicians are highly paid despite minimal personal productivity," the complaint alleged.

In FY 2016, KRH paid 38 employed physicians above the 90th percentile for their specialty even though they generally had minimal or moderate productivity and

minimal collections, the complaint alleged. They generated \$10.5 million, yet KRH paid them \$15.6 million. Only three of them worked full time under their employment contracts; the rest worked much less. "The collective annualized collections for these 38 physicians were just above the national 10th percentile. Their collective wRVUs were below the national 10th percentile," the complaint alleged.

### Investors Must Be Forthcoming

Because the compensation allegedly took into account the volume or value of the physicians' referrals or exceeded fair-market value, the claims for services they referred allegedly violated the Stark Law, according to the settlement.

In the second complaint, the whistleblower alleged dubious investment and compensation deals by HealthCenter Northwest, a hospital partly owned by KRH, and several other entities, including Flathead Physicians Group LLC, Northwest Horizons LLC, Northwest Orthopedics & Sports Medicine LLC and Applied Health Services Inc.

Northwest Horizons, a subsidiary of KRH, owns 60.1% of HealthCenter Northwest, and Flathead Physicians Group, which has 50 investor physicians, owns the rest. In the previous six years, the investor physicians referred thousands of Medicare and Medicaid patients to HealthCenter Northwest for surgery, imaging and other services, the complaint alleged, and in the past five years, they got about \$24.6 million in profit distributions from HealthCenter. "A substantial part of these profits arose from the investor physicians referring Medicare and Medicaid patients to HealthCenter," the complaint alleged.

Northwest Orthopedics & Sports Medicine is owned by HealthCenter (49%) and Applied Health Services (51%), a for-profit subsidiary of KRH. Some of the orthopedic surgeons performed procedures at HealthCenter, and they have referred thousands of patients to the hospital, "from which they have profited as investors," the complaint alleged.

The Stark Law prohibits Medicare payments to entities (e.g., hospitals) for designated health services (e.g., inpatient and outpatient services) if they were ordered by physicians who have a financial relationship (e.g., compensation, ownership and investment) with the entities, unless an exception applies. In 2010, the Affordable Care Act limited the expansion of hospitals where investor physicians also practice and required the hospitals to report potential conflicts of interest to HHS. The hospitals must identify every owner and investor and put in place procedures to require referring owner/investor physicians to inform patients of their ownership interests and

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to disclose the physician's ownership on the hospital's website and advertising.

The whistleblower alleged the defendants didn't bother. Mohatt said he "encountered a scheme of secrecy surrounding the identities of the physician investors in HealthCenter." The goal was "to avoid public controversy about their conflicts of interest in referring patients to a hospital in which they are investors and to continue a lucrative business arrangement without exposing their violations of federal Stark laws."

### **Bottom Line May Drown Out Concerns**

Compensation also came up in the second complaint. HealthCenter allegedly overpaid five employed gynecological surgeons. Four of the surgeons only had to work every other week. The five surgeons produced wRVUs near or under the national 10th percentile, but HealthCenter paid four of them the national 90th percentile and one surgeon the national 75th percentile, the complaint alleged. The hospital took a \$1.3 million hit per year from the surgeons' compensation, but in September 2017, the CEO allegedly told them it was OK "because the revenues from their referrals more than offset the losses," according to the complaint.

Stark violations continue at hospitals partly because people are disregarded when they raise concerns, Robison says. "If you don't have a culture of compliance, and you're focused on the bottom line, [complaints] tend not

to be heard," he says. Executives also may not fully absorb the repercussions of a false claims settlement—the reputational hit, fines, legal fees and corporate integrity agreement. "Those are the farm type of issues," he says. It's preferable to self-disclose Stark violations to CMS or the HHS Office of Inspector General because "the ability to reduce damages is substantial," Robison says.

Jampol says hospitals shouldn't drop their guard about the Stark Law even though its burdens were scaled back in the 2016 Medicare Physician Fee Schedule regulation (*RMC 2/1/16, p. 1*) and CMS has put out a request for information on how to reduce them further. "A theme throughout all of the investigations and prosecution is they want to prevent overutilization, and that issue has not been taken off the table," she says.

In a statement, KRH said all the providers "strongly disagree with the allegations" but "are relieved to put this issue behind us." KRH said, "We are immensely proud of our physicians and employees who are devoted to serving our patients and have helped health care in northwest Montana take a giant leap forward. During the government's review, the quality of care our physicians and staff provide was never questioned nor was overutilization an issue. Our mission is and always has been to improve the health, comfort and lives of the people we serve."

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