Board Members Face Responsibilities to Oversee Medical Director Agreements

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HOSPITAL AND HEALTH SYSTEM boards, executives, and medical staff leaders are exploring bolder strategies for enhanced patient centered care, improved patient safety and quality, service line growth, and stronger economic vitality. The result is more healthcare organizations are contracting with physicians to perform a variety of leadership roles—engaged and aligned physician leaders are more critical for success than ever before.

However, such financial relationships with physicians have significant potential for government scrutiny under a number of regulatory provisions (e.g., federal and state physician self-referral and anti-kickback laws). In fact, examples of recent settlements and investigations related to certain financial relationships with physicians include:

- In November 2006, the federal monitor assigned to the University of Medicine and Dentistry of New Jersey, under the system's Deferred Prosecution Agreement, reported that improper financial relationships with cardiologists might result in over $80 million in fines and penalties.
- In 2005, Erlanger Medical Center (owned by the Chattanooga-Hamilton County Hospital Authority) paid a $40 million settlement related to financial relationships with physicians.
- Consequently, improper medical director arrangements not only risk ineffective physician engagement for better services, weak cost effectiveness for the hospital, and eroding medical staff morale, but can also result in significant liability to the organization. Too many boards and executives do not know the number nor nature of their current physician leader contract obligations, and with the heightened attention being given to the responsibilities of corporate directors, enhanced oversight of an organization's financial relationships with physicians (and in particular an organization's medical director agreements) is consistent with and essential to ongoing federal and state corporate responsibility initiatives.

> "I'm a volunteer board member. I'm not sure whether: 1) our medical director agreements are legal; 2) if we're getting good value for what we're paying; 3) how much in total we paid last year for these arrangements; and 4) I'm not even sure how many of these agreements we have."
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> —Board Chairman, New England Hospital

Given the potential magnitude of and complexity to effectively diagnose the hospital's risk from confused or improper medical director contracting/employment, set forth below are a number of key principles related to medical director agreements and a list of questions board members should ask the organization's management team.

Key Principles for Compliant Medical Director Agreements

While it is not the responsibility of the board to oversee the specifics of each medical director agreement an organization enters into, the board is responsible for ensuring that the organization has established a systematic and standardized process for analyzing, approving, and reviewing, on an ongoing basis, its medical director agreements. The following are a number of principles the board should be aware of in reviewing an organization's policies and procedures for entering into medical director agreements.

Principle 1: Written agreement signed by the parties. All medical director arrangements should be reflected in a written, signed agreement.

Principle 2: Description of services to be provided. It is critical that the written agreement reflects a clear understanding of the medical director's duties and responsibilities. All medical director services should be legitimate services that are important for the facility to carry out its clinical functions, and such services must be actually performed by the medical director. If a form agreement format is used, an exhibit should be attached to identify the specific services the physician is providing. If time is to be divided between organization duties and providing direct patient care, there should be some detail as to how the time is to be allocated.

Principle 3: Aggregate compensation may not exceed fair market value. The amount of compensation paid to a medical director should be set in advance, consistent with fair market value in an arms-length transaction and not determined in a manner that takes into account the volume of value of any patient referrals or other business generated between the parties. Any compensation in excess of the fair market value could be labeled a kickback if referrals are involved.

"I'm feeling pressure from my board and medical staff for more, bigger, and more complex physician leader compensation arrangements. I'd like to know how other CEOs are managing this growing issue."

—CEO, Illinois Health System

"Our board would like to avoid the embarrassment in the press from any improper medical director deals. How can we get inoculated from this risk?"

—Board Member, California Hospital

Principle 4: Specified term and grounds for termination of the agreement. Dates marking the beginning and ending of the agreement period as well as the date of execution should be specified. The agreement period should be for at least one year, and the agreement can be terminated before one year only for good cause. A provision should be included in the agreement to allow for termination in the event the organization determines the physician is not fulfilling his or her obligations under the contract.

Principle 5: Schedule when services will be provided. If the services are to be provided on less than a full-time basis, the medical director agreement must specify when the services will be provided, for how long, and the rates charged for each service interval.

Principle 6: Qualifications for the medical director position. The agreement should include a summary of the physician's special expertise and/or qualifications for the medical director position and a provision requiring the physician to maintain appropriate licensure and credentials for the duration of the agreement. Furthermore, the agreement should also require that the physician not be under any federal or state sanction or exclusion (e.g., on the OIG's Cumulative Sanction Report).

Principle 7: Documentation of services provided. The agreement should require the physician to maintain appropriate time records demonstrating fulfillment of the duties outlined. It should specifically define the documentation required by the physician unless it is otherwise apparent in separate records (e.g., in a patient's chart that was reviewed by the medical director). This will provide the parties to the agreement tangible evidence that the services are being provided.

Principle 8: Compliance program. The agreement should include an assurance that the physician will abide by all applicable policies and procedures as well as the organization's standards of conduct and corporate compliance program.

Principle 9: Ongoing monitoring. Periodic monitoring of all medical director arrangements should be undertaken to ensure that in each case the medical director is actually providing the services required and is being paid the compensation set forth in his or her agreement. This type of review may be part of the ongoing auditing and monitoring effort related to the overall compliance program.

Key Questions Boards Should Ask Management

1. **Does the organization have a policy and procedure in place for entering into medical director agreements?** If not, the board should insist that these are developed.
2. **What is the process for reviewing and approving medical director agreements?** Even though an organization may standardize its medical director agreements, it is advisable to ensure that competent legal counsel has provided final approval for any such agreements.
3. **How does the organization determine the number of medical director agreements and how are the medical directors selected?** The board should ensure that medical directors are not chosen based upon a desire to purchase or induce referrals but are for legitimate services for which the physician is qualified to provide.
4. **How does the organization determine the fair market value of the services being rendered by the medical director?** It is advisable (but not necessarily required) to obtain a written analysis from an independent third party consultant with expertise in the healthcare field to confirm that the payments are fair market value for the services being provided. However, even if an outside consultant is not retained, the board should insist that the organization has documentation in its file setting forth comparable data relied upon to support the fair market value of the compensation.
5. **What is the format for time records medical directors must maintain?** The board should also ensure that the completion of time records is a prerequisite to payment being made to the medical directors.
6. **Has the organization ever terminated any medical director agreements and if so, why?**
7. **Who is responsible for auditing medical director services and compliance with the medical director policies and procedures?** If no such auditing is occurring, the board should request that future audits occur and that reports on the results of those audits are provided to the relevant committee(s) of the board. Moreover, even if internal audits are being conducted—and especially if internal audits are identifying problems—the board should insist that the organization engage an outside reviewer (through legal counsel in order to protect the findings through the applicable legal privileges) to identify ways to ensure the agreements are compliant.