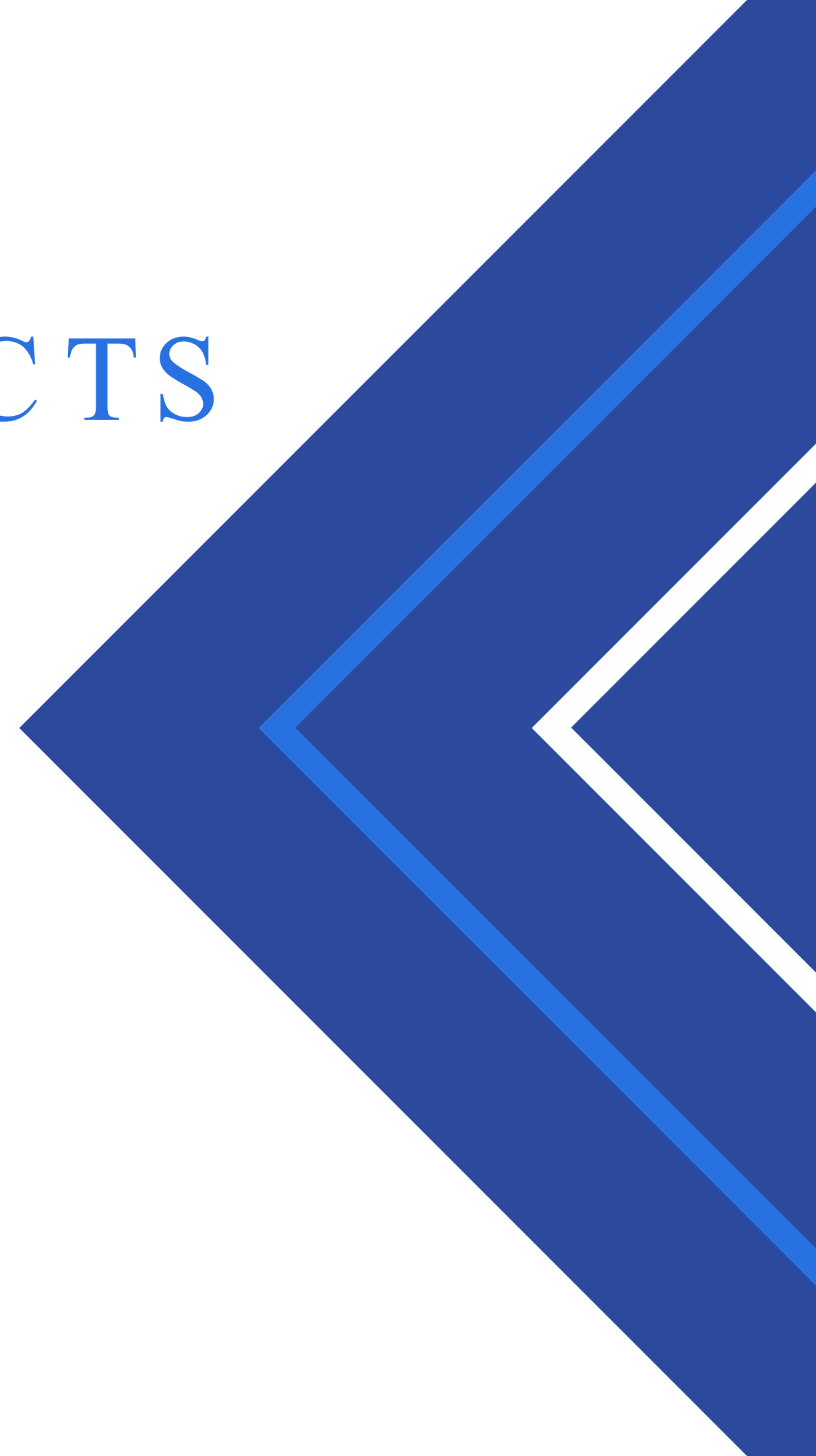


EMPLOYMENT CONTRACTS
READ BETWEEN
THE LINES

HOSTED BY KELLY M. JOLLEY

South Carolina Infectious Disease Specialists

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AGENDA

ESSENTIAL ELEMENTS OF THE AGREEMENT

BOILER PLATE

INCENTIVE PITFALLS

FAIR MARKET VALUE & COMMERCIALLY REASONABLE

ANCILLARY SERVICES

ROCK STAR PHYSICIANS

THE AGREEMENT

DUTIES AND RESPONSIBILITIES

AUTONOMY

TERM AND TERMINATION

COMPENSATION AND BENEFITS

RESTRICTIVE COVENANTS

"BOILER PLATE"

INCENTIVE PITFALLS

DUTIES AND RESPONSIBILITIES

HOURS (PATIENT/ CLINICAL HOURS); FTA, PTE

SERVICES

ADMINISTRATIVE RESPONSIBILITIES

BILLING AND COMPLIANCE

COMPLIANCE WITH PROFESSIONAL STANDARDS, EMPLOYER'S POLICIES,
RULES AND REGULATIONS

NON-EMPLOYER BASED ACTIVITIES

PATIENT SELECTION

FACILITIES; LOCATION; REFERRALS

OFFICE AND EQUIPMENT

AUTONOMY

WHAT DOES "AUTONOMY" ENCOMPASS?

AT THE HOSPITAL - DURING "OFF HOURS"?

CLINICAL?

ADMINISTRATIVE?

TERM AND TERMINATION

TERM - 1, 3, OR 5 YEAR TERMS

CONDITIONS TO EFFECTIVE DATE

PATIENT CARE OBLIGATIONS CONTEMPORANEOUS WITH EFFECTIVE DATE?

RENEWALS - AUTOMATIC

NOTICE REQUIREMENTS

TIES TO OTHER OBLIGATIONS

TERMINATION

FOR CAUSE - BY THE EMPLOYER

LICENSING AND CERTIFICATION ISSUES: Revocation, suspension, or limitation of medical, prescribing, or board certifications.

PROFESSIONAL MISCONDUCT: Conviction of crimes, professional misconduct, or ineligibility for Medicare/Medicaid.

HOSPITAL PRIVILEGES AND COMPLIANCE: Loss or restriction of clinical privileges or failure to follow agreement provisions.

BEHAVIORAL AND ETHICAL STANDARDS: Substance abuse or any act detrimental to patient care or the employer.

COMMENCEMENT AND INSURANCE: Failure to begin duties or obtain malpractice insurance coverage.

TERMINATION

CHANGE IN CONTROL - BY THE EMPLOYER OR EMPLOYEE

FOR CAUSE - BY EMPLOYEE

LICENSING AND ACCREDITATION: EXPIRATION, REVOCATION, OR SUSPENSION OF EMPLOYER'S LICENSURE OR ACCREDITATION.

MEDICARE/MEDICAID EXCLUSION: EMPLOYER BECOMES INELIGIBLE TO PARTICIPATE IN GOVERNMENT HEALTHCARE PROGRAMS.

FAILURE TO PERFORM OR BANKRUPTCY: EMPLOYER FAILS OBLIGATIONS UNDER THE AGREEMENT OR FILES FOR BANKRUPTCY.

TERMINATION

TERMINATION - WITHOUT CAUSE

Mutual?

Might this change during a renewal period?

What notice?

Accelerated Removal by the Employer?

DEATH OR DISABILITY

IMPACT OF TERMINATION

TAIL COVERAGE

BONUS PAYMENTS

RESTRICTIVE COVENANTS

SEVERANCE PAY

ANY UNWIND OF A RELATED PURCHASE TRANSACTION

ACCESS TO MEDICAL RECORDS

RETURN TO PROPERTY

DUE PROCESS

COMPENSATION

TYPICAL ARRANGEMENTS

- Base for the entire term
- Base + Productivity
- Productivity, fewer expenses (periodic reconciliation)

COMPENSATION FOR ADMINISTRATIVE DUTIES, RESEARCH?

TYPICAL ADJUSTMENTS

- Base adjustments if there is a failure to meet a minimum productivity threshold
- Conversion Factors
- “Soft” factors – patient satisfaction, quality measures
- Outside income?

COMPENSATION ISSUES

FAIR MARKET VALUE MEASUREMENT

BASE SALARY OR PURE PRODUCTION - WHEN DOES IT SHIFT?

SOME MEASURE OTHER THAN WRVUS (WHAT ABOUT QUALITY?)

CREDIT FOR "OTHER SERVICES" AT THE HOSPITAL? CASH OR CREDIT?

ANCILLARIES - HOW / WHEN DOES THE FORMULA ADJUST?

AUDIT RIGHTS

BENEFITS

ALL STANDARD BENEFITS PROVIDED TO SIMILARLY SITUATED EMPLOYEES

RETIREMENT

PAID TIME OFF (OFTEN NONE)

MEDICAL INSURANCE

SIGNING BONUS - MOVING EXPENSES

HOUSING ALLOWANCE

PROFESSIONAL SOCIETY FEES AND DUES

PROFESSIONAL LIABILITY INSURANCE

CME (TIME AND MONEY)

BUSINESS EXPENSES

PAYMENT OF STUDENT LOANS

RESTRICTIVE COVENANTS

NOT TO COMPETE

- Generally valid during the term of the employment agreement (e.g., moonlighting, teaching, research)
- In SC, Court will not blue-pencil
- Consider the reasonableness of the term, scope, and duration
- Matter if in conjunction with the purchase of the Practice
- To which of the specific duties might the restrictive covenant apply? (e.g., patient care, ownership in competing ancillary?)
- Variances based upon termination
- Sunset provisions
- Liquidated Damages

RESTRICTIVE COVENANTS

NON-SOLICITATION - GENERALLY ENFORCEABLE

- Patients
- Employees

CONFIDENTIALITY - GENERALLY ENFORCEABLE

INTELLECTUAL PROPERTY

- Who owns what?
- Does the participation terminate with the Agreement?
- Sunsets, carve-outs, and limited exceptions are less prevalent

BOILER PLATE

OFTEN OVERLOOKED, BUT STILL IMPORTANT

ENTIRE AGREEMENT

SEVERABILITY

ASSIGNMENTS (NOT SAME AS SUCCESSORS AND
ASSIGNS)

INDEMNIFICATIONS

REMEDIES

CHOICE OF LAW

REPRESENTATIONS AND WARRANTIES

EVERYTHING EACH PARTY REPRESENTS AND WARRANTS TO THE OTHER MUST BE TRUE IN ALL RESPECTS (OTHER THAN DE MINIMIS INACCURACIES AND THOSE NOT EXPECTED TO RESULT IN A MATERIAL ADVERSE EFFECT); IN ALL MATERIAL ASPECTS

FUNDAMENTAL REPRESENTATIONS: ORGANIZATION, AUTHORITY, AND NO CONFLICTS [OF INTEREST]

GENERAL REPRESENTATIONS: OWNERSHIP OF SHARES, TITLE TO ASSETS, TAXES, IP, EMPLOYEE BENEFITS

IMPORTANT HEALTHCARE REPRESENTATIONS:

- Party has all necessary permits, licenses, certifications, and accreditations
- Ensure there is compliance with the anti-kickback statutes
- Medicare participation and accreditations
- Medicare cost reports
- All necessary compliance programs in place

FORCE MAJEURE CLAUSE

FOUR ELEMENTS:

- Was there a force majeure event, as defined by the contract? (Must be unforeseen)
- Was the event reasonably beyond the party invoking the clause's control?
- Does it excuse or relieve performance?
- Were procedural requirements, like notice, satisfied?

COVID-19 IS NO LONGER AN UNFORESEEN EVENT!

NON-FORCE MAJEURE EVENTS INCLUDE – MARKET CHANGES IN PRICE; IMPRACTICABILITY DUE TO ENVIRONMENTAL OR OPERATIONAL ISSUES; OR HUMAN EVENTS CAUSED A PARTY'S OWN NEGLIGENCE

TIP

INCLUDE A 'MITIGATION AND RESUMPTION OF OBLIGATIONS' CLAUSE TO ENSURE THAT PARTIES DO RESUME THEIR OBLIGATIONS UPON THE COMPLETION OF THE FORCE MAJEURE EVENT



CONFIDENTIALITY

DEFINE WHAT IS CONSIDERED “CONFIDENTIAL INFORMATION”

- Usually excludes information available to the public or received from third parties

REQUIRE PROTECTION OF OTHER PARTY’S CONFIDENTIAL INFORMATION– SPECIFIC TIME PERIOD TO REPORT ANY MISAPPROPRIATION OF THAT INFORMATION (I.E., 6 BUSINESS DAYS)

DEFINE SCOPE OF USE AND DISCLOSURE PROHIBITION FOR OTHER PARTY’S CONFIDENTIAL INFORMATION (INCLUDE EXCEPTIONS TO THE DISCLOSURE PROHIBITION: AS REQUIRED BY LAW/COURT ORDERS; TO SPECIFIC THIRD PARTIES OR ACCOUNTANTS/ATTORNEYS)

- Duration of confidentiality obligations
- Return/destruction of confidential information
- Damages or injunctive relief for breaches
- Define the scope for public statements

DISPUTE RESOLUTION

THIS CLAUSE SPECIFIES THE MANNER OF ALTERNATIVE DISPUTE RESOLUTION PRIOR TO OR IN LIEU OF LITIGATION (I.E., GOOD FAITH INFORMAL NEGOTIATIONS; MEDIATION; OR ARBITRATION)

SPECIFY IN THIS PROVISION:

- Will dispute resolution be a mandatory step prior to litigation?
- Will the process be applicable to all disputes or claims?
- Remedies available – equitable, consequential, or punitive damages?
- Location, costs, attorney’s fees, and expertise level required for mediation/arbitration
- Number of arbitrators required and how they are selected
- Which entity will run the mediation/arbitration & which rules will apply (AHLA, AAA)
- Will the decision be binding or non-binding?
- Which discovery and evidentiary rights will be necessary to ensure a proper arbitration/mediation takes place?
- Consider how this will work with the choice of law provisions – ensure that they are compatible

INCENTIVE PITFALLS

COMMERCIALLY REASONABLY?

OVERNIGHT SUCCESSES (65TH TO 95TH PERCENTILE)

$1 + 1 = 1.5$

NO TIES TO PRODUCTIVITY + A LONG "NO CUT" TERM

FAILURE TO OBTAIN A FAIR MARKET VALUE ANALYSIS OF
THE COMPENSATION

FAILURE TO RECONCILE AND COLLECT SHORTFALLS OR OFFSET
AGAINST FUTURE PAYMENTS

STARK

FEDERAL STARK LAW STATUTE: 42 U.S.C. 1395.NN.

CIVIL FEDERAL STATUTE WHICH PROHIBITS REFERRALS OF CERTAIN “DESIGNATED HEALTH SERVICES” BY PHYSICIANS TO PROVIDERS WITH WHICH THEY HAVE A “FINANCIAL RELATIONSHIP” UNLESS AN EXCEPTION IS SATISFIED

- Compensation Relationship
- Ownership Relationship

STRICT LIABILITY STATUTE: INTENT IS IRRELEVANT. PENALTIES FOR VIOLATION INCLUDE HEAVY FINES AND POSSIBLE EXCLUSION FROM PARTICIPATION IN FEDERAL PROGRAMS

STARK

STARK LAW EXCEPTIONS APPLICABLE TO COMPENSATION RELATIONSHIPS:

- Bona Fide Employment Relationships - 42 CFR 411.357(c)
- Personal Services Arrangements - 42 CFR § 411.357(d) §

FEDERAL ANTI-KICKBACK STATUTE

FEDERAL ANTI-KICKBACK STATUTE: 42 U.S.C. 1320A-7B.

CRIMINAL STATUTE WHICH PROVIDES FOR THE IMPOSITION OF SEVERE FINES AND POSSIBLE IMPRISONMENT IF “ILLEGAL REMUNERATION” IS PAID OR RECEIVED IN EXCHANGE FOR THE REFERRAL OF SERVICES COVERED BY MEDICARE OR MEDICAID. INTENT BASED STATUTE BUT THRESHOLD FOR INTENT IS VERY LOW.

STATUTE MAY BE VIOLATED IF ONLY ONE PURPOSE OF THE PAYMENT IS TO STEER REFERRALS

SAFE HARBORS EXIST, WHICH WILL ENSURE PARTICIPANTS IN A TRANSACTION THAT THEY WILL NOT BE PROSECUTED IF ALL ELEMENTS OF THE SAFE HARBOR ARE SATISFIED

FAILURE TO SATISFY ALL THE ELEMENTS OF A SAFE HARBOR WILL EXPOSE AN ARRANGEMENT TO A “FACTS AND CIRCUMSTANCES” TEST

STARK

SAFE HARBOR FOR PAYMENTS TO EMPLOYEES: 42 CFR 1001.952(I)

SAFE HARBOR FOR PERSONAL SERVICES: 42 CFR 1001.952(D)

FAIR MARKET VALUE IS KEY

UNDER BOTH STARK AND THE AKS “FAIR MARKET VALUE” IS KEY.

STARK DEFINITION: “... THE COMPENSATION THAT WOULD BE INCLUDED IN A SERVICE AGREEMENT, AS THE RESULT OF BONA FIDE BARGAINING BETWEEN WELL-INFORMED PARTIES ... WHO ARE NOT ...IN A POSITION TO GENERATE BUSINESS FOR THE OTHER PARTY.”

- Comparables are very useful
- Third-party valuations are highly recommended

MUST ALSO CONSULT SC ANTI-REFERRAL AND AKS STATUTES!

BEST PRACTICES: FMV DOCUMENTATION

WRVUS THAT ARE HIGH RELATIVE TO BENCHMARKS; CHECK THAT

- wRVUs reflect personal services only
- wRVUs reflect properly billed services
- wRVUs are properly calculated and reported For 2021, COVID Effects 2021 Medicare PFS effects

PRODUCTIVITY BONUSES BASED ON SERVICE HOURS THAT EXCEED 1.0 FTE; CHECK THAT

- All hours are properly estimated/recorded (no double counting)
- Service hours are for services actually needed and performed

STACKED SERVICES OBLIGATIONS- MEDICAL DIRECTOR, COMMITTEES, LEADERSHIP; CHECK THAT:

- All services are properly estimated/recorded (no double counting)
- All service hours are for services actually needed and performed
- Total hours and services are reasonable and make sense clinically and practically

BEST PRACTICES: FMV OPINIONS

SHOULD THE VALUATION ENGAGEMENT BE STRUCTURED UNDER THE A/C PRIVILEGE?

IS THE COMPENSATION ARRANGEMENT ACCURATELY DESCRIBED?

ARE THE FMV DATA BENCHMARKING AND THE COMPENSATION TESTING CLEAR AND PERSUASIVE?

IS THERE A CLEAR CONCLUSION REGARDING COMMERCIAL REASONABLENESS AND/OR FMV AND IS THE APPROPRIATE DEFINITION OF FMV AND/OR COMMERCIAL REASONABLENESS (STARK OR OTHER) REFERENCED?

ARE THE LIMITATIONS AND ASSUMPTIONS IN THE OPINION ACCEPTABLE?

WHAT ABOUT ANCILLARY SERVICES?

IMPORTANT CHANGE TO THE “COMPENSATION TEST” FOR BONA FIDE GROUP PRACTICES – EFFECTIVE JANUARY 1, 2022.

ALMOST ALL PHYSICIAN-OWNED PRACTICES RELY ON STARK’S IN-OFFICE ANCILLARY SERVICES (IOAS) EXCEPTION TO PROTECT REFERRALS FOR DESIGNATED HEALTH SERVICES (“DHS”) –CLINICAL LABS, MOST IMAGING, ETC.

MUST MEET THE DEFINITION OF BONA FIDE GROUP PRACTICE AS SET FORTH IN 42 CFR §411.352.

ONE GROUP PRACTICE REQUIREMENT LIMITS HOW GROUP MEMBERS ARE COMPENSATED IN RELATION TO THEIR INDIVIDUAL REFERRALS OF MEDICARE PATIENTS FOR DHS. A GROUP MEMBER MAY NOT BE COMPENSATED, DIRECTLY OR INDIRECTLY, BASED ON THE VOLUME OR VALUE OF THE PHYSICIAN’S REFERRALS FOR DHS.

WHAT ABOUT ROCK STAR PHYSICIANS?

ROCK STAR CRITERIA:

- Credentials
- Unique/unusual services
- Productivity

APPLICABILITY OF CRITERIA MAY VARY WITH CIRCUMSTANCES, BUT RELATIONSHIP LONGEVITY IS NOT AN ELEMENT, ALTHOUGH IT'S USUALLY A CONSIDERATION.

CRITERIA FROM MORE THAN ONE CATEGORY MAY DEFINE A ROCKSTAR, DEPENDING ON THE CIRCUMSTANCES.

I KNOW A ROCK STAR WHEN I SEE ONE, ESPECIALLY IF....

THIS LIST IS NOT EXHAUSTIVE AND BETTER IF WRITTEN DOWN PRIOR TO IDENTIFICATION:

- Specialized training and/or certifications
- National/international renown and name recognition
- History of peer-reviewed publications
- Frequent citation of physician's publications
- Prior academic and leadership appointments
- Invited presentations
- Extensive research experience
- Media Coverage
- Print
- Relevant internet coverage - e.g., Google, Wikipedia

SERVICES CAN WORK, TOO:

UNUSUAL OR UNIQUE SERVICE CAPABILITY

UNUSUAL OR UNIQUE PROFICIENCY, SUCCESS RATE, OUTCOMES

PERFECT MATCH EXPERIENCE OR SKILLS FOR SPECIFIC LEADERSHIP POSITION

- Example: The orthopedic surgeon in the 2019 stark law proposed rule who is “highly sought after by professional athletes... due to his professional techniques and success rate”

LEADERS WITH EXPERIENCE TO LEAD ORGANIZATIONAL CHANGES

REMARKABLY INFLUENTIAL PHYSICIANS WHO FIT A KNOWN NEED

PRODUCTIVITY ROCKSTARS

WRVUS THAT ARE HIGH RELATIVE TO BENCHMARKS

SERVICE HOURS THAT EXCEED 1.0 FTE
(2,000 OR 2,080 HOURS PER YEAR)


BURDENSOME SERVICES OBLIGATIONS

- Medical director
- Committee participation
- Leadership appointments, etc.

WHATEVER THE CRITERIA, DOCUMENT IT!

“Consulting salary schedules or other hypothetical data is an appropriate starting point in the determination of fair market value, and in many cases, it may be all that is required. However, we agree with the commenter that asserted that a hospital may find it necessary to pay a physician above what is in the salary schedule... we also agree with the commenter that emphasized the need for an analysis of the actual terms of a transaction and the actual facts and circumstances of the parties. In our view, each compensation arrangement is different and must be evaluated based on its unique factors.”

STARK LAW FINAL RULE OF DECEMBER 2, 2020 - 85 FED. REG. 77557



QUESTIONS?



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