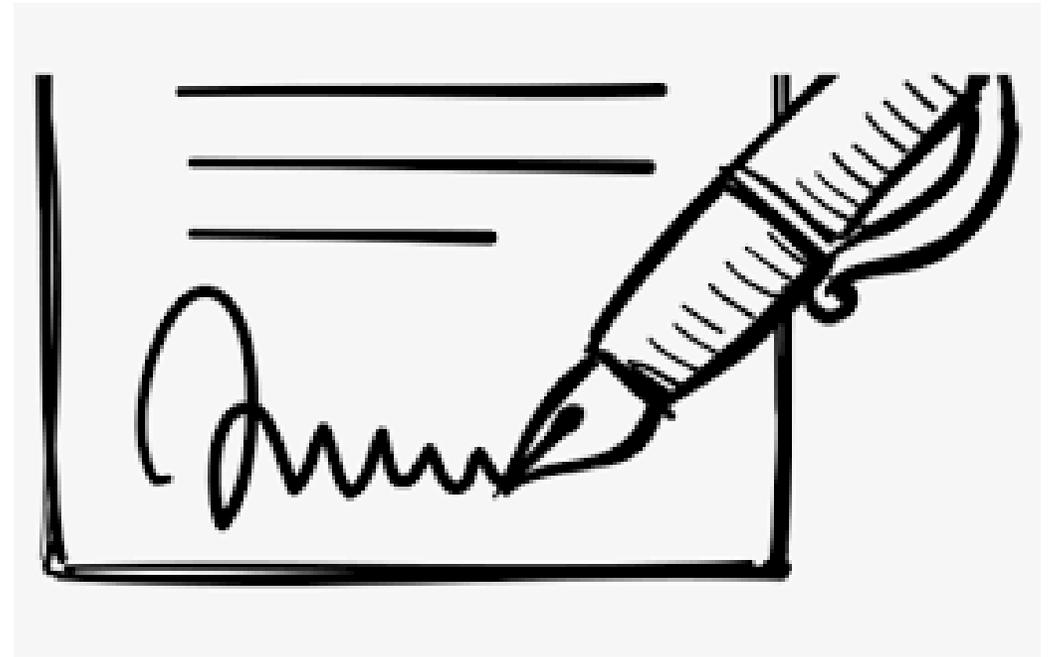

Employment Contracts: Read Between the Lines

Kelly M. Jolley



JLJG
JOLLEY LAW GROUP



Agenda

- Essential Elements of the Agreement
- Boiler Plate
- Incentive Pitfalls
- Fair Market Value and 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); FTE, 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”?
- Who controls decision making
- Clinical?
- Administrative?
- Where, how and how strong is the physician(s) voice?
- Governance?
- Deadlock?

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
 - If the Employer is unable to obtain malpractice insurance covering Employee;
 - If the Employee's license to practice medicine is revoked, terminated, limited, conditioned, suspended, restricted in any way;
 - If the Employee's license to prescribe or dispense controlled substances is revoked, terminated, limited, conditioned, suspended, restricted in any way;
 - If the Employee is found guilty of professional misconduct by any professional organization having jurisdiction;
 - If the Employee is excluded, terminated, suspended or declared ineligible to participate in Medicare, Medicaid, or any other governmental program providing compensation for services rendered to patients;
 - If the Employee is charged with the commission [conviction] of a felony crime, or a crime involving moral turpitude.
 - If the Employee's medical staff membership or clinical privileges at the Hospital are revoked, terminated, limited, conditioned, suspended, restricted in any way;
 - The Employee's failure or refusal to faithfully and diligently perform the duties of, or adhere to the provisions of this Agreement.
 - If the Employee's board certification is restricted, limited, suspended or revoked;
 - If the Employee commits or engages in any act or practice, including without limitation the abuse of alcohol or drugs, which is detrimental to the care and treatment of the Employer's patients or otherwise detrimental to the Employer.
 - If the Employee fails to commence services hereunder on the Commencement Date.

Termination

- Change in Control – By the Employer or Employee
- Cause – By Employee
 - Employer's licensure, certification or accreditation expires or is revoked, terminated, limited, conditioned, suspended, restricted in any way or not renewed;
 - Employer is excluded, terminated, suspended, or declared ineligible to participate in Medicare, Medicaid, or any other governmental program providing compensation for services rendered to patients;
 - Employer fails or refuses to perform or fulfill any of Employer's duties, obligations or covenants under the Agreement;
 - Employer files for bankruptcy, is adjudicated bankrupt, takes advantage of applicable insolvency laws, make an assignment for the benefit of a creditor, or a receiver or its equivalent has been appointed for Hospital's property

Termination

- Termination – Without Cause
 - Mutual?
 - Might this change at a renewal period?
 - What notice?
 - Accelerated Removal Options 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 of Property
- Due Process

Compensation

- Typical Arrangements
 - Base for the entire term
 - Base + Productivity
 - Productivity, less expenses (periodic reconciliation)
- Compensation for administrative duties, research?
- Typical Adjustments
 - Base adjustments if fail 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 reasonableness of 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
- Ability to address competition indirectly through these provisions

Boiler Plate

- Often overlooked, but still important.
- Entire Agreement
- Severability
- Assignments (not same as Successors and Assigns)
- Indemnifications
- Remedies
- Choice of Law

Representations & Warranties

- Everything each parties 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
- Qualifiers for reps and warranties between parties → materiality; knowledge; time periods; and reasonableness
 - Time periods → define the applicable time periods for specific warranties – is the time period limited or unlimited?
 - Fundamental representations should be applicable indefinitely
 - Representations specific to the transaction could survive indefinitely or parties can specify the post-termination time period
 - Consider how this will impact the overall statute of limitations
- 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

- 4 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 noticed, 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 even
 - “The affected Party must use reasonable efforts to mitigate the effect of the Force Majeure Event upon its performance of the Agreement and to fulfill its obligations under the Agreement. Upon completion of the Force Majeure Event, the affected party must as soon as reasonably practicable recommence the performance of its obligations under this Agreement. A Force Majeure Event does not relieve a Party from liability for an obligation that arose before the occurrence of that Force Majeure Event.”

Confidentiality

- Define what is considered “confidential information”
 - Usually excludes information available to the public or received from third parties
- 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 accountant/attorneys)
- Require protection of other Party’s confidential information– specific time period to report any misappropriation of that information (i.e., 6 business days)
- Specify:
 - Duration of confidentiality obligations
 - Return/destruction of confidential information
 - Damages or injunctive relief for breaches
 - Define scope for public statements:
- Require compliance with HIPAA since patient information is being exchanged

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)
- Tip: Discuss the implications of the dispute resolution process with litigation counsel to reduce appeals based on fraud/corruption
- 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 for the Unwary

- Commercially reasonable?
- “Overnight successes” (moving from 65th percentile 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
- Overextending the employee = overpayment of 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

Federal Anti-Kickback Statute

- 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 highly recommended
- Must also consult SC anti-referral and AKS statutes!

Prior to January 19, 2021

Fair Market Value: The value in arm's-length transactions, consistent with the general market value.

The General Market Value: The... compensation that would be included in a service agreement as the result of bona fide bargaining between well-informed parties to the agreement who are not otherwise in a position to generate business for the other party... at the time of the service agreement. Usually... the compensation that has been included in bona fide service agreements with comparable terms at the time of the agreement, where the price or compensation has not been determined in any manner that takes into account the v+v of anticipated or actual referrals.

Proposed October 2019

Fair Market Value General - The value in an arm's length transaction with like parties under like circumstances of like assets or services, consistent with the general market value of the subject transaction.

General Market Value: Services - The compensation that would be paid at the time the parties enter into the service arrangement as the result of bona fide bargaining between well informed parties that are not otherwise in a position to generate business for each other.

Final Rule Effective January 19, 2021

Fair Market Value: General - The value in an arm's-length transaction, consistent with the general market value of the subject transaction.

General Market Value: Services -The compensation that would be paid at the time the parties enter into the service arrangement as the result of bona fide bargaining between well informed parties that are not otherwise in a position to generate business for each other.

CMS on Methods for Determining Fair Market Value

- “...need for an analysis of the actual terms of a transaction and the actual facts and circumstances of the parties... each compensation arrangement is different and must be evaluated based on its unique factors.” (85 Fed. Reg. 77557)
- “We are uncertain why the commenters believe that it is CMS policy that compensation set at or below the 75th percentile in a salary schedule is always appropriate, and that compensation set above the 75th percentile is suspect, if not presumed inappropriate. The commenters are incorrect that this is CMS policy.” (85 Fed. Reg. 77558)

Determining Fair Market Value

- May use "any commercially reasonable method" that fits with the Stark definition of fair market value, but:
 - "Reference to multiple, objective, independently published salary surveys remains a prudent practice for evaluation fair market value."
 - "...the appropriate method for determining fair market value for the purposes of [Stark] will depend on the nature of the transaction, its location, and other factors..."
 - although a good faith reliance on an independent valuation (such as an appraisal) may be relevant to a party's intent, it does not establish the ultimate issue of the accuracy of the value itself (69 FR 16107)" (72 Fed. Reg. 51015)

New Stark Law Final Rule: “Commercially Reasonable”

- “The particular arrangement furthers a legitimate business purpose of the parties to the arrangement and is sensible, considering the characteristics of the parties, including size, type, scope and specialty.” (85 Fed. Reg.77531)
- “[T]he determination of whether a compensation arrangement is commercially reasonable is dependent on the facts and circumstances of the parties... it is not possible to know definitively that, in every instance, a particular type of arrangement would be commercially reasonable. An arrangement that is commercially reasonable for one set of parties may not be commercially reasonable for another [and vice versa].” (85 Fed. Reg. 77532)

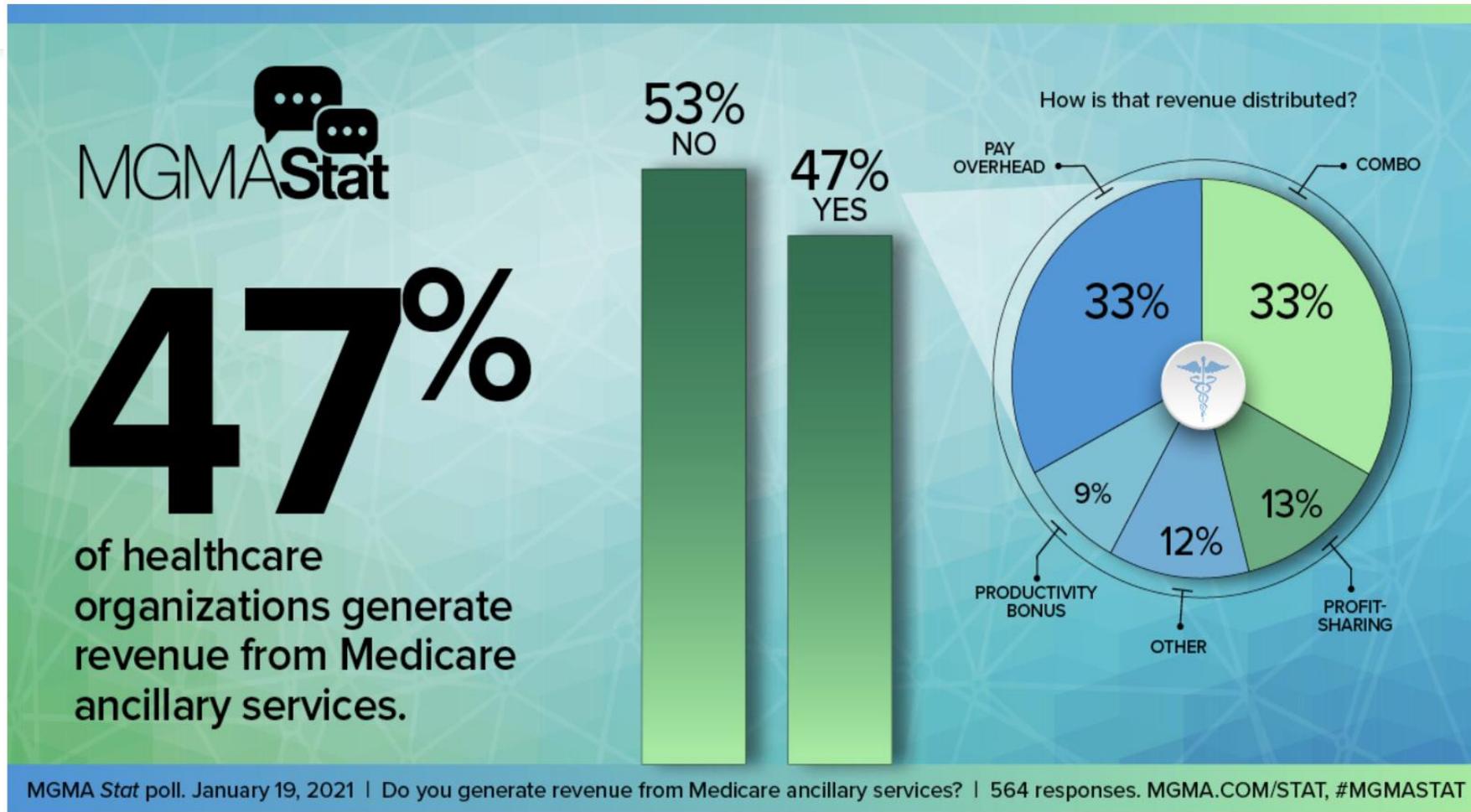
Best Practices: FMV Documentation

- 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?



What about Ancillary Services?

- Important change to the “Compensation Test” for Bona Fide Group Practices – Effective January 1, 2022.d
- 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 definition of bona fide group practice as laid out in 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.

The Revised Compensation Test

To illustrate, CMS provides an example:

A group practice comprised of 15 physicians furnishes three types of DHS: clinical laboratory services, diagnostic imaging services, and radiation oncology services. The group divides its physicians into three components of five physicians (A, B, and C). To comply with the “revised” special rule on profit shares, the group practice must aggregate the profits from all of the DHS furnished by the group and referred by any of the five physicians in the component before distribution.

The group may then distribute the overall profits from all DHS to:

- Component A using one method (e.g., per-capita)
- Component B using a different method (e.g., personal productivity)
- and Component C using a third method (or the methodology used for A or B).

To reiterate, the final rule would not permit the group to distribute clinical laboratory services to Component A and imaging services to Component B. It would also not permit the group to use a per capita methodology for some physicians in Component A and personal productivity for other members of Component A.

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 I see one. Especially if ...

- (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?





Kelly M. Jolley

kjolley@jolleylawgroup.com

803.830.6500 Columbia

843.681.6500 Hilton Head

