

## **HOSPITAL – PHYSICIAN ALIGNMENT: EMPLOYMENT VS. PROFESSIONAL SERVICE AGREEMENT**

Consistent with a national trend, many Idaho hospitals are acquiring physician practices and then entering into a direct financial relationship with post-acquisition physicians formally associated with the practice. The two prevalent legal models to define the relationship between the physician and the hospital are the employment model and the professional services agreement (“PSA”) model. This article is intended to address the principal advantages of each model. This article does not address, however, the business and legal issues related to the acquisition of a practice’s assets.

An employment relationship between a physician and a hospital is usually defined by a written employment agreement between a single physician and a hospital. Under the Stark law, a written agreement is not required, but a written agreement is preferred. Under the employment model, the physician becomes a “W-2” employee of the hospital and receives benefits, such as health insurance, medical liability insurance and pension benefits, through the hospital. This can be an advantage where the hospital can provide these benefits more economically. The flexibility of such benefits and scope of coverage (under the medical liability coverage) may, however, be more limited.

The PSA model is an independent contractor relationship that is most often between the physician practice entity and the hospital. The physician practice entity will typically include multiple physicians and may include staff and mid-levels. Frequently, however, the PSA applies only to the physicians, and all other practice employees become employees of the hospital.

Under the PSA model, a hospital pays the physician practice entity a single periodic payment, most often tied to the total amount of professional services rendered by the practice. The physician practice entity will continue to provide benefits for the physicians, such as health insurance, medical liability and pension. The physician practice entity provides all of the professional services required at a designated location, which most often is the historic practice site.

Hospitals often view the PSA model as a transitional model toward the more fully integrated employment model. Physicians who are reluctant to become direct employees of the hospital often prefer the PSA model because the PSA model likely allows greater physician autonomy and avoids the perception of being a direct employee of the hospital. Another advantage of the PSA model is that it allows the group greater flexibility in the manner in which it distributes the compensation it receives in a single check from the hospital. In addition, by retaining control over benefits (such as pension), physicians might (subject to ERISA rules) be able to maintain an existing pension plan that is favorable to them.

The PSA model may also be more convenient for the physician practice entity if the members of the physician practice entity have significant outside revenue from providing medical expert testimony or other activities not directly related to delivery of direct patient care.

The PSA model is typically easier to unwind in the event the relationship does not prove to be satisfactory. Maintaining the integrity of the PSA model may allow the members of the physician practice entity to act as a group. In reality, however, most of these benefits can be addressed through carefully drafted employment agreements with the individual physicians that incorporate certain rights such as control of the historic practice site and permission to engage in outside activities consistent with the historical practice.

A major drawback of the PSA model is its lack of full integration with the hospital. This of course can be both a benefit and a detriment. One of the detriments, however, is determining how and when to recruit and where the recruitment of additional physicians takes place (at the hospital level or at the PSA level).

One of the biggest drawbacks of the PSA model is its more uncertain status under the Stark law and the antikickback statute. The antikickback statute does not apply to bona fide employment agreements, but does apply to PSAs. A safe harbor exists for independent contractor relationships, but requires that the full amount of compensation be fixed in advance; which is not a practical way for a hospital to compensate a physician group. Therefore, a typical compensation method between a hospital and a PSA puts the relationship outside any available safe harbor. Safe harbor status is not required, but is certainly preferred as the arrangement could be second guessed by the OIG.

In summary, the employment model and PSA model are viable models for integrating a physician practice entity with a hospital. The employment model offers a more certain legal status, and the PSA provides greater flexibility. A carefully drafted employment agreement can, however, ensure much of the flexibility of the PSA model.