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# To Give or Not to Give: A Comprehensive Analysis of Stark's Nonmonetary Compensation Exception

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### Stark Act 42 U.S.C. 1395nn

- The Stark II Act prohibits a physician from making a Referral
  - to an *Entity*
  - for the furnishing of a *Designated Health Service*
  - for which payment may be made under Medicare or Medicaid
  - if the physician (or an immediate family member)
  - has a Financial Relationship with the entity







### Penalty

Denial of payment or refund; civil money penalties (up to \$100,000) and exclusions from federal and state programs for improper claims or schemes



### Examples

#### Simple Example:

**Dr. X Practice** 

Referral

Lab Owned by Dr. X



### Examples Examples

Dr. X
Practice

- Referral
- Dr. X
by Dr. X

#### How Stark II has been applied:



In both examples, the referrals violate Stark unless an exception applies



### What is a Referral?

A *referral* includes:

Request for an item or a service by a physician

Request by physician for consultation with another physician, and any tests or procedures the other physician orders, performs or supervises

Request for or of plan of care that includes provision of designated health services



#### What is a Referral?

- A referral is not a DHS personally performed by a physician
- A referral does not include a request by:
  - Pathologists for clinical diagnostic laboratory tests and pathological examination services
  - Radiologists for diagnostic radiology services
  - Radiation Oncologists for Radiation Therapy
- If the request for such additional services results from a consultation initiated by another physician



#### Designated Health Services

#### Designated Health Services include:

- Clinical laboratory services;
- Physical therapy and occupational therapy services;
- Radiology or other diagnostic services (including MRI, CAT scans);
- Radiation therapy services;
- Durable medical equipment;
- Parental and enteral nutrients, equipment and supplies;
- Prosthetics, orthotics and prosthetic devices;
- Home health services;
- Outpatient prescription drugs; and
- Inpatient and outpatient hospital services (encompassing almost every type of medical procedure).
- Note: Ambulatory Surgery Centers services are not DHS!



### What is a DHS Entity?

- Entity that bills for DHS service
- Entity that performs DHS service
  - "Perform" is given common meaning



### What Is a Financial Relationship?

#### A Financial Relationship includes:

- Ownership interests
  - Through equity, debt, compensation or other means;
     and
- Compensation arrangements
  - Includes virtually any form of direct or indirect remuneration (i.e., personal service contracts, medical directorships, lease agreements, consulting arrangements, medical service provider arrangements)



### What Is a Financial Relationship?

Remuneration is defined (42 CFR§ 411.351) as "any payment *or other benefit* made directly or indirectly, overtly or covertly, in cash or *in kind* ..."





### What Is a Financial Relationship?

#### Benefits:

- Payments for services rendered
- Use of space
- Use of personnel
- CME
- Dinners
- Trinkets
- Parking





### Nature of Exceptions

If Financial Relationship
exists with an Entity, and
patients are being Referred
for Designated Health
Service, then activity must
either comply with an
exception or the activity is
illegal





- Permitted Ownership and Compensation Arrangements:
  - Physician Services
  - In-office Ancillary Services
  - Services to Members of Prepaid Health Plans
  - Academic Medical Centers
  - Implants Furnished by ASC
  - Dialysis-related Drugs Furnished by End Stage Renal Disease Facility
  - Preventative Screening Tests, Immunizations and Vaccines
  - Eyeglasses and Contact Lenses Following Cataract Surgery
  - Intra-family Rural Referrals\*



\*New Phase II (7/26/04 effective date)



- Permitted Ownership Interests:
  - Publicly-traded securities
  - Mutual Fund Investment
  - Rural Provider (75% of DHS to Rural Residents)
  - Hospitals in Puerto Rico
  - Hospital Ownership (whole, not department or floor)



- Permitted Compensation Arrangements:
  - Rental of Office Space
  - Rental of Equipment
  - Employment Relationships
  - Personal Service Arrangement
  - Physician Recruitment
  - Isolated Transactions
  - Services Unrelated to Provision of Designated Health Services
  - Hospital-affiliated Group Practice Arrangements
  - Fair Market Value Payments Made by Physicians for Items and Services (i.e., clinical laboratory services)

- Permitted Compensation Arrangements:
  - Charitable Donations by Physician
  - Non-monetary Compensation (Benefits) up to \$300 Per Year
  - Fair Market Value Compensation
  - Medical Staff Incidental Benefits
  - Risk-sharing Arrangements (i.e., withholds, bonuses, risk pools)
  - Compliance Training
  - Indirect Compensation Arrangements
  - Referral Services

- Permitted Compensation Arrangements:
  - Obstetrical Malpractice Insurance Subsidies
  - Professional Courtesy
  - Retention Payments in Underserved Areas
  - Community-wide Health Information Systems
  - Electronic Prescribing Items and Services
  - Electronic Health Records Items and Services



Compensation (defined as *any benefit*), not including cash or cash equivalents (i.e., gift certificates that may be redeemed in whole or in part for cash), may not exceed and aggregate of \$355 per year per physician as long as:

- Benefit is not determined based upon volume or value of referrals.
- Benefit is not solicited by physician or anyone affiliated with their practice.
- Maximum cannot be aggregated to make a larger gift to a group.



The \$355 limit is updated annually.

#### See:

www.cms.hhs.gov/PhysicianSelfReferral/

#### See also:

<u>www.bakerdaniels.com/services/practices/</u> stark act.aspx



### Non-Monetary Compensation Exception

\$355 limit applies to calendar year.





- 1. If a hospital inadvertently exceeds the annual limit, the hospital will still be deemed to be in compliance if i) the value of the excess is no more than 50% of the limit, and ii) the physician returns the excess by the end of the calendar year or within 180 consecutive calendar days, whichever is *earlier*. NOTE: Can only be used once every 3 years.
- 2. Hospitals can now hold 1 formal medical staff event per year without including the cost in this exception.

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For example:

Cannot give \$1,000 oil painting to 5 physician group and allocate \$200 to each physician





Preamble, on Page 16112 of Phase II, stated that "[the Medical Staff Incidental Benefits Exception] was not intended to cover the provision of tangential, off-site benefits, such as *restaurant dinners or theater tickets, which must comply with the exception for non-monetary compensation up to \$355*." (emphasis added)



"[F]ree CME could constitute remuneration to the physician depending on the content of the program and the physician's obligation to acquire CME credits."

Phase II, page 16114



# Medical Staff Incidental Benefits Exception (Applies to *Compensation* Relationships)

Items or services used on the hospital's campus may be given to members of its medical staff if:

- Item or service is provided to all members in the same specialty without regard to volume or value of referrals.
- Item or service is provided only during periods when the medical staff members are making rounds or involved in other services that benefit the hospital and its patients.



# Medical Staff Incidental Benefits Exception (Applies to *Compensation* Relationships)

- The item or service is reasonably related to the delivery of medical services at the hospital.
- Each item or service is less than \$30 per benefit





## Medical Staff Incidental Benefits Exception (Applies to *Compensation* Relationships)

The exception specifically recognizes that "internet access, pagers, or two-way radios, used away from the campus *only* to access hospital medical records or information or to access patients or personnel who are on the hospital campus, as well as the identification of the medical staff on a hospital Web-site or in hospital advertising, will meet the single "on campus" requirement...." (emphasis added)





### Tracking Non-Monetary Compensation

The OIG assumes that DHS providers track the non-monetary compensation given to each referring physician.

#### [*Organization Name*] Non-Monetary Physician Gift/Benefit\* and Business Meal \*\* Tracking Form

Reason For Form: $\Box$ Gift/Benefit*	□□ Busine	ess Meal**
Recipients (Gift/Benefit)/Attendees (Business Meal)	):	
Gift/Benefit Description or Location of Business Me	eal:	
Reason for Gift/Benefit or Business Meal:		
Value of Gift/Benefit or Business Meal:		
If Gift/Benefit, how value determined:		
If Business Meal, primary purpose/discussion topic:		
Signed by:	Title:	Date:
Print:		
Gift/Benefit CFO/Designee Approval***:		Date:
*Defined as any non-monetary benefit, including social events like sports tickets,		
such social events, and items like mugs, hats, jackets, car washes, flowers, and oth **Modest meal at a local restaurant provided to a Physician (not including spouse)		
legitimate business issues. If any spouse is in attendance, the entire meal is a Gift.	Benefit.	
***Finance approval signifies that with this Gift/Benefit the physician(s) will not	exceed \$300 in aggregate C	iffs/Benefits during the current fiscal year.
Officer Approval Section for Gifts/Benefits:		
By affixing my signature, I attest that consistent wit above referenced Gift/Benefit will be offered, rega [Organization Name] for services (and, if applie Gift/Benefit being offered does not in any way take referrals to [Organization Name]. It is also my Physician(s) noted above have not, and will not with	ardless of whether cable, to all sime into account the understanding, a	or these individuals refer patients to ilarly situated physicians), and the evolume or value of the Physicians' s of the date noted below, that the
that exceed \$300 during the fiscal year in which the	Gift/Benefit was	given.
Signature of Chief Executive Officer or President:	n <u>- 4 12 1</u>	
Date:		
BDDB01 3318679v1	Created by:	Robert A. Wade Baker & Daniels LLP 202 S. Michigan St., Suite 1400 South Bend, IN 46601 (574) 239-1906 bob.wade@bakerd.com



### Who Tracks?

- Compliance Department
- Legal Department
- Finance Department
- Medical Staff Office



### Marketing v. Non-Monetary Compensation

- Examples:
  - Logo coffee mugs, pens, note pads

What are the marketing dollars being spent on in your organization?



### When Does Hospital Advertising Create a *Benefit* for a Physician?

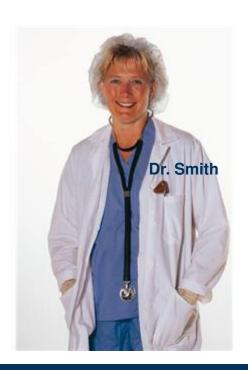
### Covenant Hospital has the best medical care





### When Does Hospital Advertising Create a *Benefit* for a Physician?

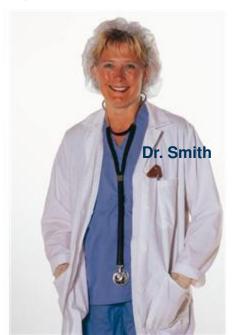
### Covenant Hospital has superior medical staff, like Dr. Smith





### When Does Hospital Advertising Create a *Benefit* for a Physician?

### Covenant Hospital has superior medical staff, like Dr. Smith



To contact Dr. Smith, call (574) 123-4567



# Real-Life Examples and How to Track

 2 dozen cookies, baked in the Hospital's cafeteria, delivered to four physician practice. Cost of ingredients only \$1.





 Listing of medical staff on Hospital's website. What if Hospital hyperlinked physician practice's website?





• Free meals to medical staff in the Hospital's cafeteria?



 Two Superbowl tickets given to Dr. Jones for use by himself and his spouse. Face value of tickets is \$100 each but presently being sold on Sportstickets.com at \$500 per ticket.







 Hospital pays \$10,000 to sponsor a foursome at a charity golf outing. Two physicians are asked to play golf as part of the foursome.





• \$150 worth of flowers delivered to a two physician practice to celebrate the opening of their new office site.

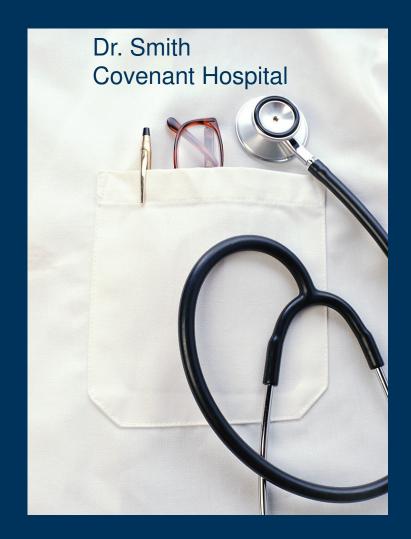


• \$100 worth of flowers delivered to funeral home to pay condolences to a physician whose spouse passed away.





 Free lab coats with the physician's name and hospital logo given to all members of the hospital's medical staff.



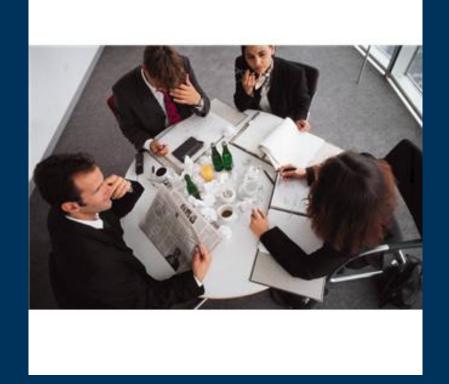


 CEO takes physician out to Ruth's Chris to discuss the operations of the hospital's orthopedic department. Physician is not employed by the hospital. Cost of the dinner, including drinks, was \$150.



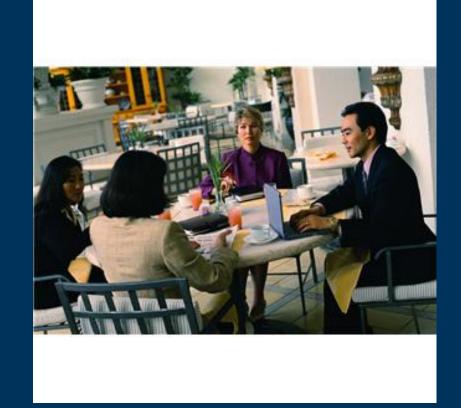


 Food given to medical executive committee during meeting in hospital's conference room.





 Medical staff funds used to pay for dinners at a local restaurant where the medical executive committee holds its monthly meetings.





Physician, who is a member of the hospital's Board of Trustees, and spouse travel to Orlando for a 3-day Board retreat. Hospital pays for all travel, hotel, and meal expenses. Total cost for physician and spouse is \$2,000. Physician is not an employee of the hospital.





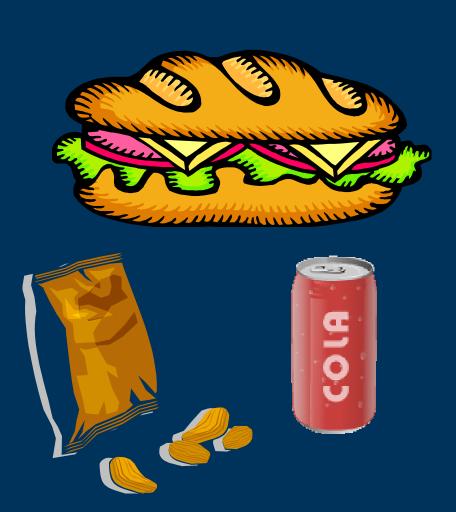
 Medical staff member receives a gold watch valued at \$500 at physician's retirement party.



 In recognition of Doctor's Day, hospital gives each medical staff member a \$50 gift certificate that can be used at any retailer at the local mall. The gift certificate does not say "Not Redeemable for Cash."



 Hospital's inpatient intake coordinator meets with physician office that has 4 physicians and 10 support staff. Coordinator brings subs, chips, and sodas for all attendees.





 Physician is given a \$200 honorarium to make a continuing medical education presentation for the hospital's medical staff. The physician/presenter is a member of the hospital's medical staff.





 Hospital makes \$1,000 donation to local charity in honor of Dr. Jones, the medical staff president.

