Physician Contracting –
An Overview of Legal Policy No. 9
Learning Objectives

To Understand:

- CHI policy requirements for physician contracting
- Recent updates to Legal Policy No. 9
- How to obtain review and approval for physician contracts
- Who is covered by the policy and who is responsible for the process
- How to complete and present checklist methodology/plan that meets both the individual’s and the organization’s needs
- Where to locate additional information
Anti-Kickback Statute (AKS) – 42 U.S.C. § 1320a-7b(b)

- Establishes criminal and civil prohibitions against knowingly and willingly offering, paying, soliciting, or receiving any remuneration directly or indirectly, in case or in kind, to induce or reward:
  - The referring of an individual for furnishing or arranging for the furnishing of items or services reimbursable by a Federal healthcare program, or
  - The purchasing, leasing, or ordering, or the arranging for or recommending the purchasing, leasing, or ordering of items or services reimbursable by a Federal healthcare program.
- Individual need not actually make a prohibited offer for the AKS to be implicated. Simply providing a physician or other healthcare provider the opportunity to earn money by referring patients for a particular service or to use a particular product that may be reimbursed by Federal healthcare program may be sufficient to violate the statute.
Physician Contracting – Why?
Stark and Anti-Kickback Compliance

Stark Law – 42 U.S.C. § 1395nn

• Provides that if a physician (or a member of the physician’s immediate family) has a financial relationship with an entity:
  • The physician may not make a referral to the entity for the furnishing of designated health services for which payment may be made by Medicare, and
  • The entity may not present, or cause to be presented, a claim for a designated health service rendered pursuant to a prohibited referral, unless a specific exception is met.
• Strict liability statute that does not take intent into account.
• Defines “designated health services” to include a range of items or services, including, among others, clinical laboratory services, rehabilitation services, radiology, outpatient prescription drugs, inpatient and outpatient hospital services, and durable medical equipment and supplies.
1. **Compliant Arrangements** - Common Elements:

   - **Commercially reasonable** and **reasonable and necessary** for a legitimate business purpose, without regard for referrals.
   
   - Compensation/remuneration is **fair market value** (FMV) and does not vary with volume or value of referrals.
   
   - Compensation must be **set in advance**.
   
   - Signed, written agreement that identifies the services/space/equipment in advance

2. **Waivers** for Special Arrangements: EHRs, MSSP ACOs, BPCI/CJR
3. **And** Independent Review. An arrangement is presumed to comply with IRS rules if:

- The organization’s board or a delegated committee, with no conflict of interest, approves the arrangement *in advance* as FMV and serving legitimate need

- The board/committee relies on appropriate comparability data as to FMV

- The decision is documented
Legal Policy No. 9 Physician Contract Initiation, Review and Approval

Policy Overview
Purpose of Reviews

- To ensure that all Physician Transactions have received all necessary reviews, recommendations, and approvals, and are documented in a Contract that sets forth the material terms of the arrangement.
- All Physician Transactions must be initiated, reviewed, approved, and documented in accordance with all applicable CHI policies, standards and guidelines.
- The Physician Transactions should be consistent and appropriate from a business and mission perspective.
- All Physician Transactions must be reviewed and approved in accordance with Policy within the following time frames:
  - Leases with Physicians: every five (5) years
  - All other Physician Transactions: every three (3) years
Which Transactions are Subject to Review and Approval?

Specific examples when the checklist for Physician-Related Arrangements should be utilized:

- Employment
- Joint Ventures
- Asset purchase/sale
- Immediate family members
- Clinical management
- Personal/professional service agreements
Which Transactions are Subject to Review and Approval?

• Policy applies to “Physicians” who may make or receive referrals
  • MD, DO, chiropractors, dentists, optometrists, podiatrists
  • Physician-owned or –controlled entities (e.g., groups, ASCs)
  • Immediate family members of Physicians
• Locum tenens – if owned or controlled by Physician who is an actual or potential referral source to Contracting Entities
• Payments made to Physicians by virtue in their participation in Accountable Care Organizations (ACOs) or Clinically Integrated Networks (CIN).
  • Physician may be entitled to receive payment (e.g., shared savings or other comparable payments) resulting from their participation in an ACO/CIN.
Physician Contracting – What?

Which Transactions Are Subject to Review and Approval

- Policy applies to “Physicians” who may make or receive referrals
  - MD, DO, chiropractors, dentists, optometrists, podiatrists
  - Physician-owned or -controlled entities (e.g., groups, ASCs)
  - Immediate family members of Physicians
- APC reviews are optional
- Arrangements with other organizations that provide physician services are optional
Physician Contracting – Approval Process

De Minimus Transactions

- Definition of a *De Minimus* Compensation Arrangement
  - New compensation arrangement or change to existing compensation arrangement does not require MGLC or PTRC approval
  - Total of such de minimus arrangements for prior 12 months does not exceed $5,000 for provider under review
- Exemption does not apply where:
  - De minimus change in compensation would require review under current MGLC standards
  - Existing arrangement was subject to review as required by Physician Compensation Standards
  - LSG member, CRO or any MBO executive requests review
- Complete a checklist and submit to Contract Administrator
Physician Contracting – Application of and Responsibility for Policy

Key Terms and Roles and Responsibilities
Key Terms

- **Fair Market Value (FMV):**
  - Comparable to amounts ordinarily paid for the same services or goods in an *arms-length* transaction
  - Consistent with general market value
  - Value determined via bona fide bargaining
  - Between well-informed buyers and sellers
  - Not otherwise in a position to generate business for each other
**Key Terms**

- **Commercial Reasonableness**: The arrangement would make commercial sense if entered into:
  - By a reasonable entity of similar type and size
  - By a reasonable physician of similar scope and specialty
  - Even if there were no potential referrals for healthcare services

- **Legitimate Need**: The arrangement furthers the legitimate business purposes of the enterprise, including promoting its charitable purpose and community benefit
Physician Contracting – Who?
Key Roles and Responsibilities

Business Executive

- Ensure proposed Physician Transactions meet all legal and regulatory requirements and the requirements defined by Legal Policy No. 9 and other associated CHI or KentuckyOne policies and practices.
- Ensure the Checklist and any supporting materials are complete and accurate.
- Ensure that the Transaction review process is carried out appropriately.
- Verify that the terms of each Transaction approved by the PTRC are consistent with those that were reviewed by CHI Physician Services and are reflected in the signed Contract.
- Ensure a current Contract, approved through this process, is in place before services are performed or any payment is made to or received from a Physician and is implemented appropriately.
- Ensure that the arrangement is reviewed and approved, the contract is implemented properly, and annual reports and routine re-reviews are completed.
Contract Administrator

- Facilitate Transaction communications and management.
- Ensure all Supporting Documentation required for the review and approval of each Transaction is complete and accompanies the Checklist.
- Ensure that the signed Physician Contract Checklist, the PTRC approval date, and any other relevant Supporting Documentation is uploaded in electronic form into CHI’s contract management system upon Contract execution and the associated Contract profile and provision sections are completed with all necessary information.
- After Contract execution, provide education and guidance, as necessary, for the Contracting Entity personnel related to their role in fulfilling the following responsibilities:
  - adhering to the terms and conditions of the Contract;
  - ensuring proper completion and submission of any Supporting Documentation required by the Contract prior to payment (e.g., timesheet);
  - performing the periodic evaluation of the business/clinical need for the Physician services; and
  - submitting reports to CHI Physician Services and the PTRC.
- After Contract execution, provide support for the Contracting Entity related to managing other administrative and contractual matters.
**Physician Contracting – Who?**  
*Key Roles and Responsibilities*

**Legal Counsel**

- Provide an initial draft Contract based on terms set forth in the Checklist and approved by management.
  - Note: provision of a draft Contract by the LSG Counsel does not represent approval or endorsement of the business terms of the Transaction, support for a deviation from this Policy, or authorization to sign a Contract prior to approval.
- Review proposed changes to a draft Contract before they are included in a final Contract.
- Advise the Contracting Entity Business Executive regarding legal and policy implications of proposed Contract changes or terms and discrepancies between the Contract and the PTRC approved Checklist.
- Initiate or facilitate attorney-client privileged external reviews when appropriate.
- Advise the PTRC, participate in its meetings when feasible and make recommendations to the Board regarding the composition and responsibilities of the PTRC.
- Assist the Contracting Entity in providing training opportunities to PTRC members to assist them in their role.
Physician Contracting – Who?
Key Roles and Responsibilities

Corporate Responsibility Officer

• Review each Checklist to ensure it is completed and reviewed in accordance with this Policy and includes Supporting Documentation.
• Upon completion of the Checklist and verification of the completeness of all Supporting Documentation, authorize the proposed Transaction for review by the Contracting Entity’s PTRC for final approval. Authorization to move forward for presentation to the PTRC does not represent approval or endorsement of the business terms of the Transaction or fair market value analysis.
• Ensure that changes to Transaction remuneration terms are reviewed in accordance with this Policy.
• Ensure that the Physician Contract Attestation statement included in the Checklist has been completed by the Contracting Entity CEO or a designee.
Physician Contracting – Who?

Key Roles and Responsibilities

Vice President of Finance/CFO

- Review each Checklist to ensure it is completed and reviewed in accordance with the Policy and includes Supporting Documentation.
- Ensure that changes to Transaction remuneration terms are reviewed in accordance with the Policy.
- Ensure that payment processes for Physician Transactions conform to the Policy.

Chief Executive Officer

The CEO (or a designated executive, as applicable) is responsible for final administrative approval of the Transaction prior to submission to PTRC, as evidenced by completion of the CEO Attestation section in the Contract Checklist and is ultimately responsible for the Contracting Entity’s compliance with the Policy.
Physician Contracting – Who?
Key Roles and Responsibilities

CHI Physician Services

• Evaluate Transactions requiring CHI Physician Services review for consistency with the standards set forth in the Physician Compensation Standards and request external reviews, if required by the Physician Compensation Standards or otherwise recommended
• Provide the Contracting Entity and its PTRC, via the Checklist, the results of CHI Physician Services’ review of Transactions
• Suggest other policies and establish practices to supplement this Policy and support its purpose and applicable regulatory and legal requirements
• Recommend development of additional Physician Contract templates as appropriate

CHI Physician Services does not determine whether a particular Transaction reflects fair market value, this being solely a function of PTRC (or the Board), as described in Legal Policy No. 9.
Physician Transaction Review Committee (PTRC)

- Review and approve all Transactions, based upon review of Checklists or information, Supporting Documentation, and any other relevant information
- Oversee Contracting Entity-wide Physician contracting practices (including compensation) consistent with CHI policies
- Establish other policies and practices reasonably necessary to perform its functions

PTRC approval evidences that the Transaction is commercially reasonable and consistent with fair market value based on the information provided for each Transaction. PTRC (or the Board) is the final determiner of each Physician Transaction that requires review under this Policy, including for purposes of obtaining the Rebuttable Presumption of Reasonableness.
Physician Contracting
General Requirements

Process of Checklist Approval
• MBO Business Executive describes the transaction on a checklist:
  ▪ Role and responsibilities
  ▪ All compensation terms and all other arrangements with, and compensation payable to, the physician (new and existing)
  ▪ Support for FMV and for commercial reasonableness/justification/legitimate need for each component of the compensation

• Checklist includes additional information needed for contract preparation, for compliance, and for recordkeeping

• All departments impacted by the transaction have reviewed the checklist and arrangement (e.g. Finance, HR)
Physician Contracting – General Requirements
Employment Arrangements

- Demonstrate the need for a new employment arrangement through a strategic plan, business development plan, human resources plan, workforce development plan, and community need analysis.
- Legitimate need may be established using various resources, including:
  - Regulations,
  - Community needs assessments,
  - Strategic plans,
  - Medical staff development, or
  - Recruitment plans.
- FMV should be established in accordance with the Physician Compensation Standards.
  - Survey data of FMV ranges for compensation: e.g., CHI blended survey.
Renewal Employment Arrangements must conform to the Physician Compensation Standards and document justification if there is a material change in any of the following:

- The production for the arrangement is lower than anticipated;
- The business of payment model has changed;
- The organization has changed in size;
- Regulatory requirements have changed;
- Circumstances suggest that the position may no longer be needed; or
- Other factors suggest that the arrangement has changed.

FMV should again be established in accordance with the Physician Compensation Standards.
Physician Contracting – General Requirements

Lease Arrangements

• Should be justified by new or ongoing operations needs of the parties.
• The rent, including any supplemental rent, should be consistent with rates charged for similar space in the area where the premises are located.
• Contracting Entity should obtain a formal report of FMV for lease rates by the real estate professionals.
• Critical Access Hospitals must use the greater of the rate of the FMV for similar space, or the cost of the space as reflected on the most recent Medicare cost report.
• A summary business report will be required to use a rental rate that is less than the cost reflected in the cost report.
Physician Contracting – General Requirements

Other Arrangements

• The Contracting Entity may seek review and approval of either:
  • Standard compensation/financial parameters for Physician Transactions;
  or,
  • Individual Physician Transactions.

• You are encouraged to utilize standard compensation parameters for Physicians performing a specific class or category of services.

• Exclusive Arrangements: explain need for exclusivity outside the traditional hospital arrangements for pathology, emergency medicine, anesthesia, and radiology.
Checklists are submitted to Contract Administrator with MBO Business Executive approval.

Contract Administrator reviews and forwards to Legal (LSG) and Corporate Responsibility (CRO) for further review.

Contract Administrator may request clarification or changes to the checklist based upon reviews.

MBO should allow at least 60 days to complete this process.
• The Contracting Entity must retain throughout the life of the contract, in a readily accessible format and location, including electronic, records reflecting compliance with Legal Policy No. 9, including but not limited to:
  • The checklist;
  • The supporting documentation; and
  • The PTRC approval.
• When the executed contract is in place, the Contract Administrator will enter the following into the electronic contract management system:
  • The fully executed contract;
  • The completed checklist; and
  • The date of PTRC approval.
• All attorney-client privileged (ACP) documentation should be maintained pursuant to the direction of the LSG representative and should not be uploaded into the electronic contract management system.
Physician Contracting – General Requirements

Physician Timesheets

All services provided by physicians with contracts that require timesheets must be recorded by current, correct timesheets that are reviewed and approved **before** payment. The timesheet must state the physician’s exact duties as shown on the physician’s written job description or contract.

Generally, the timesheets must be approved by the President (or his/her designee) and the responsible Vice President.
Physician timesheets **must include all of the following**:

- Written descriptions of the physician’s tasks during that time period
- Meaningful, detailed entries (e.g., attended weekly meeting of XYZ committee, discussed ABC and other topics”, instead of “attended meeting”)
- Confirmation that the hours listed were provided
- Timesheet covers the correct timeframe and any minimum and maximum number of hours during that interval (e.g., if the contract says that a physician must bill a minimum and maximum number of hours in a weekly period)
- 15-minute time slots
- Physician’s handwritten signature

Failure to comply with these requirements can lead to termination of the physician contract and/or the SJL reviewing executive. Exceptions to the policy can only be made by the President of SJL, and must always be documented and kept with the related contract.
Physician Contracting – General Requirements
Role of MGLC

• The MGLC standard is a three (3) business day turnaround for simple reviews once all supporting data has been submitted.
• Non-simple reviews require more time depending on the nature of the arrangement.
• The checklist should not be submitted for review until all relevant data has been gathered, including:
  • Business plan
  • Proforma
  • Historical data
  • Community assessment
  • Third party evaluation, as applicable
  • Clinical necessity review
  • Billing and coding review
Requirements are outlined in Physician Compensation Standards:

- Compensation exceeds the 75\textsuperscript{th} percentile for new hires or 90\textsuperscript{th} percentile for current hires, using CHI benchmark data
- Per wRVU rate more than 10\% above CHI benchmark
- Gap between productivity and compensation exceeds 25\textsuperscript{th} percentile
- Compensation component rate in excess of 75\textsuperscript{th} percentile
- Payment for administrative work is not based on time cards
- Co-management arrangements
New physician compensation arrangements require MGLC panel review when:

- 25% gap or greater between compensation and productivity
- If compensation is over the 75\textsuperscript{th} percentile
- If compensation and/or productivity is over the 90\textsuperscript{th} percentile \textbf{and} quartile gap is over 25\% -> FMV required
- If new physician and new job position -> practice business plan and/or proforma required
- If new physician and existing job description -> practice final report or budget required
- Physician practice acquisitions -> clinical appropriateness review and E/M coding reviews required within 180 days unless risk identified by Physician Enterprise CRO; then review must occur before employment.
Existing physician compensation arrangements require MGLC panel review when:

- 25% gap or greater between compensation and productivity
  - Billing and coding
  - Production/compensation over the 90th percentile -> clinical appropriateness review and billing and coding audit
- External third party reviews or market compensation and terms, lease rates, billing and coding and/or clinical necessity.
  - Required for certain arrangements.
  - Done under attorney-client privilege for certain (especially existing) arrangements.
  - Included with checklist.
- The reviews/audits are required to be performed externally. It takes approximately 12-16 weeks upon ACP executed agreement from LSG with external vendor. Please plan accordingly.
Is External Review Required

External Review Decision Tree *

START HERE

Comp greater than 150% of 90%ile?

NO

Ask Questions 1 one:

Comp greater than 90%ile?

NO

Co Management?

NO

FMV required. Contact LSG

YES

FMV required. Contact LSG

Other notable factors (e.g. Board member, production to comp gap)?

NO

No Review

YES

FMV required. Contact LSG

Current BC review required. ASK:

Current CA appropriateness review required.

ASK:

Gap of 25% or more between comp and production percentiles?

NO

YES

Current / annual BC & CA reviews required. ASK:

ASK:

MGLC review may be required or FMV advisable. Contact LSG for assistance

KEY:

BC= Billing and Coding
CA= Clinical Appropriateness
FMV= Fair Market Value and Commercial Reasonableness

* For convenience only. Refer to Physician Compensation Standards for definitive guidance.
Physician Contracting – General Requirements

Role of PTRC

• All physician arrangements that fall within the scope of Legal Policy No. 9 require PTRC review and approval.
• The role of PTRC is limited to the review of the commercial reasonableness and FMV of all physician arrangements falling within the scope of Legal Policy No. 9.
• This function must be performed by an independent body in order to take advantage of the rebuttable presumption of reasonableness.
• The Contracting Entity CEO is ultimately accountable for all physician arrangements at their entity.
In addition to satisfying any other requirements contained in the applicable Conflict of Interest policy, no one who is eligible to participate in the review and approval of a transaction may be:

- The physician whose agreement is under review (including, without limitation, a member of a medical group whose physician arrangement is under review);
- An immediate family member of such physician;
- Subject to the control or substantial influence of such physician or immediate family member;
- In a direct or indirect financial relationship (including referrals for business) with a physician whose arrangement is under review; or
- A direct competitor of the physician whose arrangement is under review.

Any director may recuse himself/herself from the deliberation and vote on a transaction in order to avoid the appearance of a conflict.
• All **new** arrangements or strategy should be placed on the Non-Consent agenda.
• Indicate on the checklist whether this is a replacement or an amendment. It is critical to know **why and what changed**.
• Does it follow the recruitment plan?
• Indicate the business and charitable purpose, including detail for all consent agenda items.
• The location **must** be included on the checklist.
Physician Contracting – Approval Process
How to Obtain Approval

PTRC may approve transactions one of two ways:

(1) **Standard parameters** may be approved by PTRC. This serves a pre-approval for individual transactions entirely within standard parameters *(standard compensation model)* and those generally do not require further CHI Physician Services or PTRC review

• Situations that require further approval for standard transactions
• One location for approved standard transactions

(2) **Individual transactions** are approved one by one and signed after approval
• Proposed Content of Annual PTRC Report:
  ▪ Recent standard transactions
  ▪ Ongoing appropriateness of standard parameters and factors affecting it
    ✓ Market changes affecting compensation/lease rates
    ✓ Status of recruitment efforts, business plans – status and required updates
• Other information relevant to PTRC’s ability to evaluate transactions or revise standard parameters
Physician Contracting

Mitigating Risks and Key Takeaways
Physician Contracting
Mitigating Risks

- Consult all applicable CHI policies and standards (Legal Policy No. 9, CHI Physician Compensation Standards, CHI Physician Services Review).
- All compensation checklists should include the most recent benchmark data provided by CHI Physician Services.
- All real estate checklists should include a FMV not greater than three (3) years old unless the external valuation includes a specific period of time it remains valid.
- All fully executed contracts and supporting documentation must be loaded into the electronic contract management system (MediTract).
- **Business owners should execute and provide documentation to contracting personnel within fourteen (14) days.**
Physician Contracting

Key Takeaways

• Following the process outlined in Legal Policy No. 9, we should be able to document the strategic and business justification for business investments.

• We need to continually evaluate physician arrangements.
  • Does this still make sense?
  • Is the compensation and/or are the lease terms still within FMV and still considered to be commercially reasonable?
• The Contracting Entity shall ensure that a current Contract, approved through this process, is entered into and signed before any services are performed, any payment is made to or received from a Physician, or a Physician Transaction is otherwise implemented.
• Ensure financial arrangements with physicians and other referral sources are well documented.
  • Written agreement for services exists.
  • It is not based on the volume or value of referrals.
  • Beware of free or discounted services (i.e., less than FMV).
Physician Contracting
Where to Find More Information

- Legal Policy No. 9 - Physician Contract Initiation, Review and Approval
  [Link]

- CHI Physician Services Physician Compensation Standards and Procedures
  [Link]

- The Anti-Kickback Statute (42 U.S.C. § 1320a-7b(b))

- The Stark Law (42 U.S.C. § 1395nn)
Congratulations!

You have completed the review of
Physician Contracting – An Overview of Legal Policy No. 9

Thank you for participating in this important training session. If you have any questions, please contact your Corporate Responsibility Officer at (606) 330-6771.

Please complete the test in order to receive completion credit.