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Commercial Reasonableness for Physician Contracts: A Checklist

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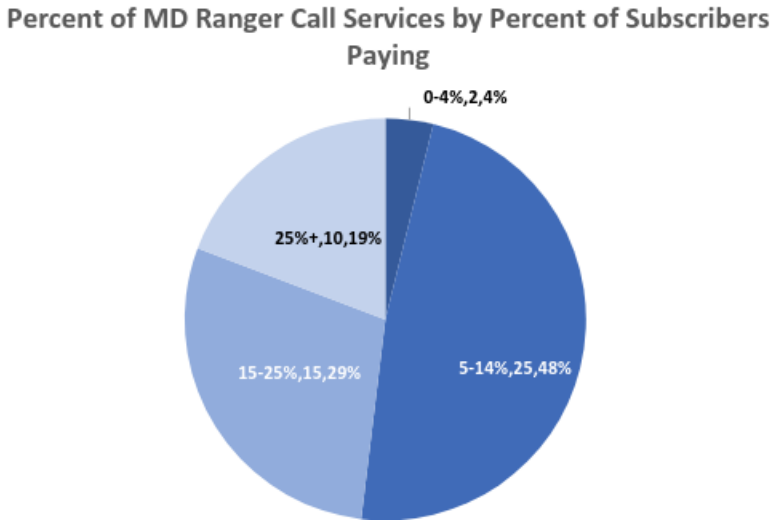
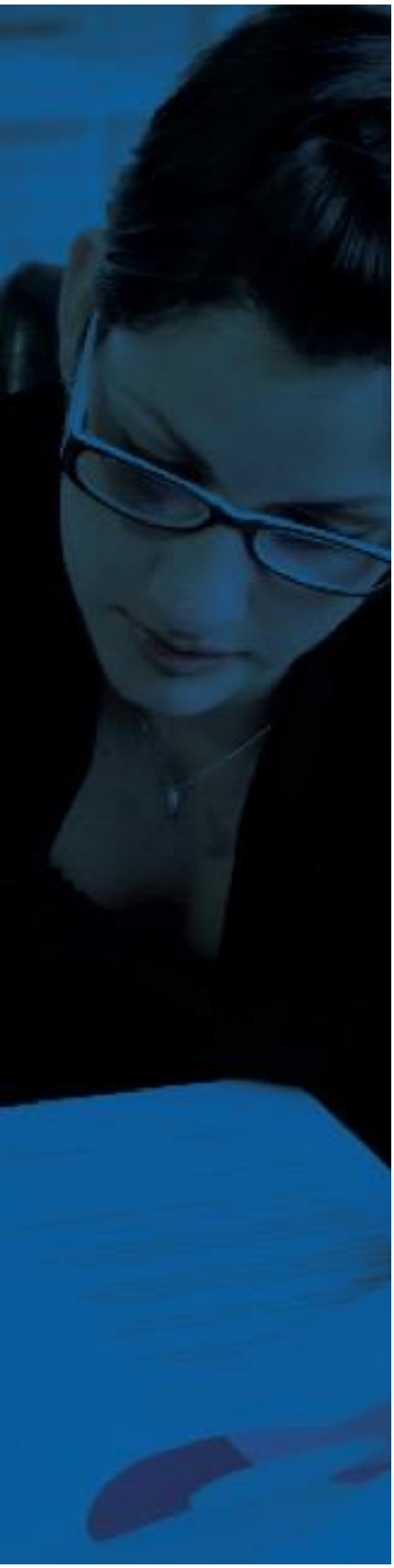
A number of recent settlements for alleged violations of the Stark, Anti-Kickback, and False Claims Act regulations have stemmed from issues with commercial reasonableness. This aspect of compliance documentation doesn't get as much attention as Fair Market Value but it is equally important.

In general, commercial reasonableness refers to whether it makes business sense and is common practice to pay for the specific position or services provided. Most of the time, FMV and commercial reasonableness go hand-in-hand, but sometimes an agreement can appear to meet FMV on a term by term comparison, but it fails to meet the test of commercial reasonableness because few providers pay for the service, there are too many hours being paid, or too few hours required for a fixed stipend. MD Ranger provides several tools to evaluate commercial reasonableness including percent of subscribers paying for a service and number of hours for administrative contracts.



What does "Commercially Reasonable" Mean?

Federal regulations define commercial reasonableness as "a sensible, prudent business agreement, from the perspective of the particular parties involved, even in the absence of any potential referrals" *(Medicare and Medicaid Programs; Physicians' Referrals to Health Care Entities with Which They Have Financial Relationships 63 FR 1700 (January 9, 1998))*.In the preamble to the Stark interim final rule, Phase II, CMS noted that an arrangement:



"will be considered 'commercially reasonable' in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician (or family member or group practice) of similar scope and specialty, even if there were no potential DHS referrals." 69 FR 16093 (Mar. 26, 2004)

Simply put, commercially reasonable means that it is common business practice for an organization to pay for that particular physician service, and that the quantity of service provided fits the job duties of the position.

How is Commercial Reasonableness Different from "Fair Market Value"?

While fair market value is an "arm's length" negotiated fee for a physician service in the absence of referrals, commercial reasonableness addresses whether or not it is actually reasonable to pay for the service in the first place. A commercially reasonable service could have payment terms that exceed fair market value, and a fee that falls well within fair market value might not be commercially reasonable given certain market conditions. One example is paying for a physician's specialty, instead of for the position the physician is filling. If an orthopedic surgeon is working as the medical director of a pediatric clinic, she should be paid the same as if a primary care physician was serving in the role.

The Checklist:

Does the Position Satisfy a Business Need?

- Is the arrangement necessary for the hospital or healthcare organization to function?
- Does the arrangement and the services provided relate to the clinical or business strategies of the healthcare organization?
- Does the arrangement have a rational business purpose in the absence of referrals?

Is There a Clinical Need, and Do Current Volumes Justify the Service?

- Does the arrangement require a physician to perform the services listed, or may they be performed by a non-physician, mid-level provider or another type of provider?
- Does the arrangement require a specific specialty of physician to perform the service?
- Are time requirements defined and reasonable in the arrangement?

- Does the physician in consideration currently have other compensation that should be evaluated in broader context, particularly if it is derived from a related business?
- Is there patient demand, acuity levels, community need, and/or quality concerns to justify providing the service in the arrangement?

Is There a Market Need?

- Do relevant market conditions exist that may affect the reasonableness of the arrangement?
- How frequently are other organizations paying for this service?
- Do the organization's characteristics such as size, trauma status, location etc. justify the arrangement?

Are the Duties Already Covered?

- Does the proposed arrangement duplicate efforts already in place?
- Does the proposed service make a service line have too much administrative support or too many medical directors compared to other similar providers?
- Is the arrangement necessary and is payment consistent within the context of the medical staff bylaws?
- Do protocols and procedures already exist that could be used instead of the proposed arrangement?

By going through this checklist, your organization can critically evaluate each paid position and determine when additional justification may be needed to manage risk.

Need help? MD Ranger experts are here to answer questions and guide you to resources.

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