

# STARK PRIMER – PART III PHYSICIAN RECRUITMENT CASE STUDY

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**STATE BAR OF MICHIGAN  
HEALTH CARE LAW SECTION**

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# WHAT'S A RECRUITMENT AGREEMENT?

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- **Not a professional services contract**
- **Not employment**
- **Parties are the Recruit and/or “established” physician/practice**

# STARK EXCEPTIONS

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- **Indirect?**
  - **Practice owners a problem**
  - **“Stand in Shoes”**
  - **Direct payment to Recruit**
- **Fair market value?**
  - **CMS says “No” in Phase II**
- **Recruitment?**
  - **No FMV element**

# RECRUITMENT EXCEPTION: DIRECT PAYMENT TO RECRUIT

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- **Payment by hospital, RHC or FQHC**
- **Purpose = induce Recruit to relocate medical practice from outside to inside hospital's "service area" to become medical staff member**
- **In writing and signed by parties**
- **Amount of remuneration not based on volume/value of referrals**
- **Not conditioned on patient referrals by Recruit**
- **Recruit may use other hospitals/facilities (except as limited by employment or service contract).**

# "GEOGRAPHIC AREA SERVED BY HOSPITAL"

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- **General rule = lowest number contiguous zip codes from which hospital draws at least 75% of its inpatients**
- **Exceptions:**
  - **"Donut hole" zip code entirely surrounded by qualifying zip codes**
  - **Fewer than 75% of inpatients from contiguous zip codes**
  - **Rural hospitals – 90% instead of 75%; non-contiguous allowed if fewer than 90% of inpatients from contiguous zip codes**

# RELOCATION

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- **Must move from outside to inside hospital's service area, plus**
- **Must move at least 25 miles or**
- **75% of revenue from new patients**
- **Exceptions:**
  - **Resident or physician in practice one year or less**
  - **Full-time employee for two years in specific positions (without private practice on the side)**

# RECRUITMENT EXCEPTION: RECRUIT JOINS ESTABLISHED PHYSICIAN/PRACTICE

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- **All of above, plus additional requirements**
- **Party who receives remuneration also signs agreement**
- **No remuneration retained by practice except (1) actual recruitment expenses and (2) under an income guarantee, actual incremental expenses because of Recruit**
- **Stark III regs: in case of recruitment to rural or HPSA practice to fill recent vacancy, established physician/practice may recoup lower of per capita expenses or 20% aggregate practice costs.**

# RECRUIT JOINS EXISTING PHYSICIAN/PRACTICE

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- **No “unreasonable” restriction on Recruit’s ability to practice in hospital’s service area**
- **No violation of anti-kickback law or billing/claims laws.**

# CMS ADVISORY OPINIONS RE STARK RECRUITMENT EXCEPTION

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- **2007-01 – May not modify recruitment in manner favorable to Recruit after Recruit relocates**
- **2006-01 – Recruit may spend 10-20% of practice time at office located outside hospital's service area**

# CASE STUDIES

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# CASE STUDY – RECRUIT #1 FACTS

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- **Experienced physician**
- **Clearly “relocating” to join the Medical Staff**
- **Multi-part recruitment package, without repayment:**
  - **Rent**
  - **Income guaranty**
  - **Limited malpractice insurance**
  - **Moving expenses**
- **Part-time employment as Medical Director**
  - **“Non-competition” terms**

# CASE STUDY – RECRUIT #1 ISSUES

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- **Recruitment package**
  - **No repayment obligation**
  - **Limits on malpractice coverage**
- **Medical Director contract**
  - **Separate Stark exception**
  - **Ownership interest in competing facility**
  - **Prohibition on cases at freestanding facility**
  - **Prohibition on cases at another hospital**
  - **411.354(d)(4) – mandated referrals**

# CASE STUDY – RECRUIT #2 FACTS

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- **Existing internist on Medical Staff**
- **Selling practice and doing 1-year out-of-state fellowship**
- **Medical Staff LOA**
- **Ties to service area**
- **Income guarantee**
- **Recruit #2 shares office with former PC**

# CASE STUDY – RECRUIT #2 ISSUES

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- **Residents and new physicians exempt from “relocation” requirement**
  - **Is Recruit #2 a “resident”?**
  - **Is Recruit #2 a “new physician”?**
  - **Does resident/new physician exemption permit support to Recruit #2 although already a member of Medical Staff?**
  - **Different result if #2 resigns and reapplies to Medical Staff?**

# CASE STUDY – RECRUIT #2 ISSUES (continued)

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- **Are other ties to community (e.g. spouse and house) relevant?**
- **Is Recruit #2 “joining” an existing practice?**
  - **Stark group practice definitions used**
  - **Relevant to availability of in-office ancillary service exemption**
  - **No inflated payments to PC allowed**
- **Different income guaranties to #1 and #2 a problem?**
  - **What’s the rationale for the difference?**

# CASE STUDY – RECRUIT #3 FACTS

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- **Experienced Recruit #3 “relocates” to join Medical Staff, along with PA**
- **Employed by Recruit #1**
- **Income guarantee to Recruit #1**
- **Recruit #1 moves to larger, more expensive, office**
- **Restrictions in employment contract:**
  - **No solicit patients**
  - **One-year LOA from Medical Staff**
  - **Five-year/five-mile office restriction**
- **Recruit #1 performance bonus**

# CASE STUDY – RECRUIT #3 ISSUES

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- **Guarantee covers cost to Recruit #1 of employing PA**
- **“Actual incremental expenses”**
  - **Additional space**
  - **Costlier space**
- **Non-compete – what’s “reasonable”?**
  - **No solicitation – CMS says OK**
  - **Medical Staff LOA**
    - **Other hospitals in service area?**
    - **State law allows?**
  - **Five-mile/five-year office location limit**
    - **What’s size of hospital service area?**
    - **State law allows?**

# CASE STUDY – RECRUIT #3 ISSUES (continued)

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- **Medical Director performance bonus**
  - **Which Stark exception?**
  - **Fair market value standard satisfied?**