

ADJUSTING COMPENSATION AND BUYOUTS FOR LARGE REFUNDS

In recent years, we have seen Medicare, Medicaid, and other third party payors request large refunds from practitioners for past overpayments for medical services. In the case of Medicare and Medicaid, the refund claims may be accompanied by assessments of fines, penalties or interest. Group medical practices need to be particularly concerned with this trend, as it may have a dramatic impact on not only current compensation but also current and recently completed buy-outs. Group practices need to consider whether employment contracts and stock redemption agreements should be revised to address the potential problems that may arise when a claim for a large refund is made. This article looks at some of the issues.

Request for refunds may arise for a number of reasons. In some cases, third party payors audit their payment records and determine that they have historically overpaid for a particular service. In the case of Medicare or Medicaid, oftentimes requests for a refund arise from the determination that the provider has been incorrectly billing for a particular service, has been billing for a service that is not covered under Medicare or Medicaid, or has been billing for a service that is not medically necessary. Individuals within the group practice may or may not have culpability for the mistakes that were made.

Whether or not there is individual culpability, the fact remains that refunds of this nature will reduce current compensation and may affect the value of the practice for buyout purposes. If there have been changes in the makeup of the group or in the level of productivity of individual members, it is likely that the adverse economic impact of any large refunds will not fall fairly among the current members of the group.

Consider this example. A group of six physicians is comprised of two shareholders, each of whom has been employed by the practice for only two years, and four senior shareholders who have been employed for ten or more years. During the past five years, two other shareholder physicians have retired. One is currently receiving deferred compensation, and the other has been completely bought out. The practice receives from Medicare a claim for reimbursement of overpayments. The total amount of the claim is \$420,000. Since there are six current physicians, each physician will have to forego \$70,000 of current compensation in order for the practice to have funds to make the repayment. The younger shareholders are irate, as 90% of the refund claims relate to a period prior to the time they were employed by the practice. This potential liability was not disclosed to them when they purchased their shares, and they do not feel that is fair that they suffer as result of the refund. The four senior shareholders are miffed as well, because at least one third of the refund claim relates to work performed by the two retired partners. However, at least the four senior shareholders and the two retired shareholders had received extra compensation in those years in which the overpayments were collected.

In the absence of written agreements among the parties for dealing with this type of situation, litigation is likely. It may have been possible to avoid litigation, if these

contingencies had been addressed in the employment contract and stock redemption agreement. How these contingencies should be addressed is a complicated matter. Consider the following questions:

Even if we assume that any compensation adjustment should only impact those shareholders who were employed at the time the overpayment was collected, how should the cost of the refund be allocated to those individuals? Should it be allocated based on current compensation or should it be allocated based upon compensation at the time the overpayment was collected?

Should group practices delay commencing payment of deferred compensation to retiring shareholders in order to keep funds available to pay refunds? If so, for how long should payments be delayed?

Should the amount charged to a retiring shareholder reduce deferred compensation, the payment for stock, or some combination of both?

How long should a retired shareholder be liable contractually for his or her share of past overpayments?

If the overpayments are attributable to the behavior of one shareholder, should he or she bear the full brunt of the refund claim? What if other members benefited indirectly, as a result of the culpable shareholder paying a higher percentage of the overhead costs in those years in which the overpayments were collected?

These types of issues require discussion with your partners.

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