

		YEAR
BASIC PAY	1,973.84	GROSS PAY
SHIFT PAY	2,238.54	OTHER DEDUCTIONS
OVERTIME	0.00	SHARE SHOP
BONUS / COMMISSION	0.00	TAXABLE PAY
	115.00	
	1,937	

## CMS proposes to change the way group practices can pay profit shares to physicians under Stark Law

October 23, 2019

Part of the Centers for Medicare and Medicaid Services' (CMS) [proposed changes](#) to the regulations interpreting the Physician Self-Referral Law (the "Stark Law"), released on October 9, 2019, include changes to the special rules for profit shares and productivity bonuses paid by "group practices" to physicians. The proposed changes to the special rules for group practices are an example of CMS' efforts to remove barriers to physicians' ability to participate in, and transition to, a value-driven health care system.

To qualify as a "group practice" under the Stark Law, the practice must satisfy various requirements relative to its organizational and operational structure, physician members, services and how revenues are distributed.

If a practice meets all "group practice" requirements, it may pay physicians in the group practice a productivity bonus or a profit share, subject to certain conditions. In particular, the current regulation prohibits calculating profit shares and productivity bonuses in a manner that directly relates to the volume or value of the recipient physician's referrals to the group practice.

Citing concerns that the current regulation may discourage physician participation in alternative payment or other value-based care models, because physicians cannot be suitably rewarded for their accomplishments in advancing the goals of value-based models, CMS is proposing to add an additional deeming provision that would permit the distribution of designated health services (DHS) profits that are directly attributable to a physician's participation in a value-based enterprise. Under this new provision, these DHS profits would be deemed *not* to directly take into account the volume or value of the physician's referrals. If finalized, this would permit group practices to distribute directly to a group practice physician DHS profits derived from the physician's

participation in a value-based enterprise, including profits from DHS referred by the physician.

CMS gives the following example to illustrate how this new deeming provision would allow physicians to be rewarded for their role in value-based models:

Assume “a 100-physician group practice where only two of the physicians participate with a hospital in a commercial payor-sponsored alternative payment model. Under the current regulation, the profits from the” DHS “ordered by the physicians and furnished by the group practice to beneficiaries assigned to the model participants may not be allocated directly to the two physicians.”

As proposed, however, the regulation “would permit the 100-physician group practice[...]to distribute the profits from” DHS “derived from the two physicians’ participation in the alternative payment model directly to those physicians[...]including profits from DHS referred by the physicians.”

According to CMS, “[n]either distribution would jeopardize the group’s ability to qualify as a ‘group practice’”.

CMS is also proposing several changes to “restructure and clarify” the special rules for profit shares, including:

- Revising the definition of “overall profits” that can be distributed to physicians in the group. The new definition clarifies that if there are fewer than five physicians in the group, “overall profits” means the profits derived from *all* of the DHS of the group.
- Clarifying that group practices cannot distribute profits on a service-by-service basis. Profits from *all* DHS of the practice (or a component of at least five physicians) must be aggregated and distributed.
- Removing the reference to Medicaid in the definition of “overall profits,” because the definition of DHS includes only those services payable in whole or in part by Medicare.

In this part of the proposed rule, CMS is proposing a number of clarifications and changes to the Stark Law that will help the industry interpret the regulations and properly use the Stark exceptions. The proposed changes will likely generate many public comments regarding how these proposals will impact real-life arrangements. [Public comments](#) are due by December 31, 2019. As a result, CMS will not finalize the proposed Stark Law changes until 2020.

*This publication is part of a series of updates regarding CMS and OIG's proposed fraud and abuse law changes. Bricker & Eckler's health care attorneys will continue to publish analyses of the proposed rule.*

# Authors

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