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## NOTE

Vol. 28, No 1 April, 2026

**Stark Profit-Sharing: More Flexible Than You Thought** *This newsletter is for informational purposes only and is NOT legal advice. For legal advice consult a lawyer.*

In her article “ The Stark Statute: Parsed, Probed and Panned” [[https://www.gosfield.com/images/PDF/Stark\\_P3.fn1.022124\\_1.pdf](https://www.gosfield.com/images/PDF/Stark_P3.fn1.022124_1.pdf)] , among the 17 problems that she cited, Alice did not address something in the regulations that actually provides an opportunity for group practices to customize their profit-sharing in ways that likely are unappreciated.

Effective January 1, 2022, the regulations made clear that it was prohibited for a group practice to share its profits by designated health service (DHS) modality. Until then, we had advised clients in groups that they could have a pool of imaging money, a different pool for lab, and a third pool for PT profits to be shared, among different pods of physicians, as an example. Moreover, we counseled and still do, that the formula to pay the participants in profit sharing could vary by any pool of at least five and could take into account past performance in terms of use of DHS, but not current referral patterns. So, for example, if a physician last year was responsible for 25% of the referrals for PT, he could be paid the following year 25% of the PT profits, if the group chose to do that. But he would have to be paid that, regardless of whether he maintained the same practice referral patterns, and even if he was not working for a period of illness, (unless he met the group’s definition of disabled, and under pre-established employment rules or his contract he no longer qualified for profit sharing) he’d still get 25% of the PT profits. Otherwise, the 25% share could only be changed prospectively. And we do not recommend changing these profit-sharing models during the year.

So, the change published in December 2020, that took effect in 2022, required many groups to recalculate their profit sharing to establish one pool of all DHS profits to be divided among those who participate. There is no requirement that any profits be

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distributed, nor that all must participate. But the applicable provision allows for a different approach as well.

“Overall profits means the profits derived from all the designated health services of *any component of the group that consists of at least five physicians*, which may include all physicians in the group.” (42 CFR §411.352(i)(1)(ii))

Therefore, a group of ten physicians could have two pods, or only one pod of five or seven, and the others don't share in profits. But more surprisingly, in the preface they said. "A group practice need not treat all components of at least five physicians the same with respect to the distribution of shares of overall profits from DHS." (85 Fed Reg 77563 (Dec 2, 2020) So, it is permissible to have a pod of 12 and aggregate all of their DHS profits, separate from the group as a whole. We would not recommend creating a pod of five or more who only refer for one DHS modality, because that would get too close to the prohibition on per modality profit sharing.

If the group has only one type of DHS, say imaging or lab, they can still have subgroups of at least five who share their DHS profits on their formula, while another pod could share on a different formula. Where there are pods of physicians that refer for at least two types of DHS, they can have their own pod of five, and share all of their DHS within their pod. The formulas may not reward volume or value of referrals, but they can reflect number of encounters, wRVUs performed, number of patients in their panels, or E&M volumes only. Those are just examples of surrogates for measuring productivity or contribution to the practice. The possibilities are relatively broad. The other potential risk lies in establishing several pods which leads to pods of varying sizes, with only four physicians left over. They can't share in profits, then, because they are not a pod of at least five. In a group of less than five, everyone must share on the same formula all the DHS profits of the group.

Taken together, there are math problems that abound here, but to establish a profit sharing model that takes advantage of the flexibilities the regulations allow requires some thought about what the group wants to incentivize. We look forward to working with groups to avail themselves of this opportunity.

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