

Healthcare Trustees Responsibility Related to Physician and Executive Compensation

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LEGAL FRAMEWORK FOR HEALTHCARE BOARDS' RESPONSIBILITIES

- There must be an effective governing body that is legally responsible for the conduct of the hospital. Medicare CoP
- The governing body is “responsible for a hospital's organization, management, control, and operation, including appointment of the medical staff.” – TDSHS Licensing Rules



LEGAL FRAMEWORK FOR HEALTHCARE BOARDS' RESPONSIBILITIES

- “The responsibility of directors is to provide oversight, not manage day to day affairs.” –
US DHHS OIG



LEGAL FRAMEWORK FOR HEALTHCARE BOARDS' RESPONSIBILITIES

- “Decisions made by governmental bodies must be made by the body as a whole.”
Fielding v. Anderson, 911 S.W.2d 858, 864 (Tex. App.—Eastland 1995, writ denied).



LEGAL FRAMEWORK FOR HEALTHCARE BOARDS' RESPONSIBILITIES

- Board Fiduciary Duties
- Hospital Board Members or “Trustees” have a fiduciary or “trust” relationship with the hospital
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- 3 fiduciary duties: Duty of Care, Duty of Loyalty, Duty of Obedience



LEGAL FRAMEWORK FOR HEALTHCARE BOARDS' RESPONSIBILITIES

- Duty of Care – should exercise the same care that a prudent person would exercise under similar circumstances regarding their own personal affairs; includes duty to make informed decisions and duty of inquiry; expert consults
- Duty of Loyalty – put interests of hospital ahead of personal interests; avoid conflicts of interest
- Duty of Obedience – obey the law and follow hospital's mission or purpose



LEGAL FRAMEWORK FOR HEALTHCARE BOARDS' RESPONSIBILITIES

- Board Fiduciary Duties/Liability Regarding Compliance (billing, coding; Stark, anti-kickback; etc.)
 - US Dept. of HHS OIG: “Boards have a duty to oversee [] management’s operation of the [] compliance program... directors, under extreme circumstances, may be at risk if they fail to reasonably oversee the organization’s compliance program...”



LEGAL FRAMEWORK FOR HEALTHCARE BOARDS' RESPONSIBILITIES

- Board Fiduciary Duties Regarding Financial Management
- Lucy Webb Hayes case (1974) Federal district court ruled that the hospital directors had breached their fiduciary duties in allowing hospital assets to be grossly mismanaged. Board allowed only a few individual directors to manage the charitable assets under clear conflicts of interest, and allowed large sums of money to be held in checking accounts, rather than being invested, amounting to a breach of their duty of care.
- Lemington Home case (2015) – fiduciary breach by nursing home board



Top Compensation Comparison

- Physician overall average salary:
 - \$313,000 (Medscape; 2019)
- Hospital CEO average comp:
 - \$533,000 – stand-alone
 - \$373,000 – system-owned
 - Modern Healthcare/Sullivan Cotter 2018 survey; 384 systems, 988 hospitals
 - <https://sullivancotter.com/wp-content/uploads/2018/08/Modern-Healthcare-Annual-Exec-Comp-Article.pdf>



PHYSICIAN COMPENSATION ISSUES

- Implicates board member/trustee fiduciary obligations related to compliance and financial management



PHYSICIAN COMPENSATION ISSUES

- Stark/Anti-Kickback basics
 - Financial relationship; referrals
- DHS
- Exceptions



PHYSICIAN COMPENSATION ISSUES

- Stark/Anti-Kickback basics
 - Can't pay based on volume or value of referrals
 - Fair Market Value
 - Commercially Reasonable



PHYSICIAN COMPENSATION ISSUES

- Stark/Anti-Kickback basics
 - Fair Market Value
 - Survey data
 - Independent appraisal
 - Total compensation



PHYSICIAN COMPENSATION ISSUES

- Stark/Anti-Kickback basics
- Commercially Reasonable
 - Directorships, on-call, etc.
- Proposed rules
- Role of profit – Tuomey and other cases



PHYSICIAN COMPENSATION ISSUES

- Board should approve most/all physician contracts
- Board should understand all physician functions, all sources of compensation: clinic, medical directorships, on-call pay, mid-level supervision, in-patient fees
- Quality based compensation



EXECUTIVE COMPENSATION – LEGAL ISSUES/PROCESS

- IRC Section 4958 rebuttable presumption - 3 requirements:
 - disinterested board/committee
 - rely in independent source(s)
 - contemporaneously document decision/rationale

Sanctions



EXECUTIVE COMPENSATION – LEGAL ISSUES/PROCESS

- IRS interim guidance on excise tax on executive compensation to covered employees
 - 21% tax on: remuneration over \$1 million; or, excess parachute payment
 - Exemption for compensation attributable to medical services



EXECUTIVE COMPENSATION – LEGAL ISSUES/PROCESS

- Confidentiality/public disclosure of compensation
 - Form 990 comp disclosures
 - NLRA - concerted activity; Antitrust - wage discussions
 - Govt hospitals - OMA/PIA



COMPENSATION PRACTICES

- Compensation surveys; look at total compensation
- Compensation committee
- Executive session without CEO
- Performance based compensation and evaluations
- Paying too little, esp in rural communities

