205: HOSPICE PHYSICIAN COMPENSATION: TOP TRENDS AND COMPLIANCE CONCERNS FOR PROVIDERS

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DEFINITIONS

HOSPICE CARE

Hospice care is an approach to caring for the terminally ill individual that provides palliative care rather than traditional medical care and curative treatment.

PALLIATIVE CARE

Palliative care is an approach that improves the quality of life of patients and their families facing the problems associated with life-threatening illness through the prevention and relief of suffering by means of early identification, assessment and treatment of pain and other issues.

Hospice care and palliative care are not the same thing. Hospice care includes palliative care. Not all palliative care is hospice care.

DISTINCTIONS

HOME CARE

Hospice care allows the patient to remain at home as long as possible by providing support to the patient and family, and by keeping the patient as comfortable as possible while maintaining his or her dignity and quality of life.

INTERDISCIPLINARY APPROACH

A hospice uses an interdisciplinary approach to deliver medical, social, physical, emotional, and spiritual services through the use of a broad spectrum of caregivers.

MEDICARE REQUIREMENTS

CONDITIONS OF PARTICIPATION

Centers for Medicare & Medicaid Services (CMS) develops Conditions of Participation (CoPs) that healthcare organizations, including hospices, must meet in order to begin and continue participating in the Medicare and Medicaid programs.

CORE SERVICES

A hospice must routinely provide substantially all core services. These services must be provided in a manner consistent with acceptable standards of practice.

The hospice is required by the CoPs at Section 418.100 to make nursing services, physician services, drugs, and biologicals routinely available on a 24-hour basis, 7 days a week. It also has to make all other covered services available on a 24-hour basis, 7 days a week, when reasonable and necessary to meet the needs of the patient and family.

MEDICARE REQUIREMENTS

§418.64(a) PHYSICIAN SERVICES

The hospice medical director, physician employees, and contracted physician(s) of the hospice, in conjunction with the patient's attending physician, are responsible for the palliation and management of the terminal illness, conditions related to the terminal illness, and the general medical needs of the patient.

- (1) All physician employees and those under contract, must function under the supervision of the hospice medical director.
- (2) All physician employees and those under contract shall meet this requirement by either providing the services directly or through coordinating patient care with the attending physician.
- (3) If the attending physician is unavailable, the medical director, contracted physician, and/or hospice physician employee is responsible for meeting the medical needs of the patient.

PHYSICIANS

PHYSICIAN ROLES

- Medical Director
  - A single individual doctor of medicine or osteopathy who leads and bears responsibility for the medical component of the hospice's patient care program. Employed or contracted by hospice.
- Hospice Physicians
  - Doctors of medicine or osteopathy designated by the hospice who assume the same responsibilities and obligations as the medical director when the medical director is not available. Employed or contracted by the hospice.
- Attending Physicians
  - The physician who is identified by the individual as having the most significant role in the determination and delivery of medical care to the individual at the time the individual makes an election to receive hospice care. Not employed, contracted, or compensated by the hospice.

MEDICAL DIRECTOR/HOSPICE PHYSICIAN RESPONSIBILITIES

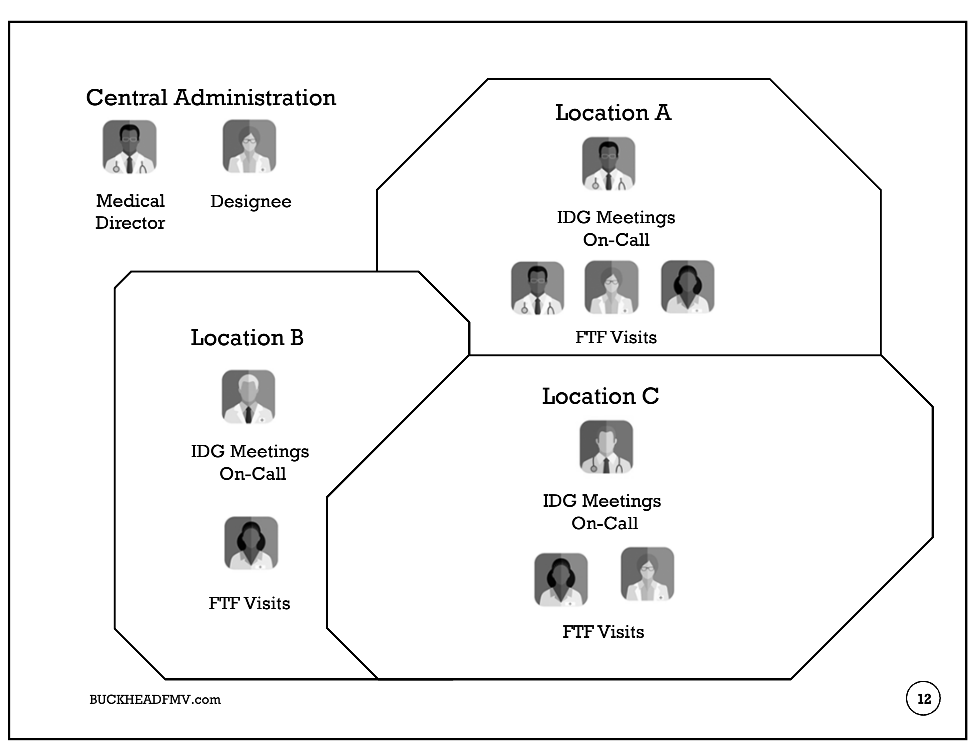
- Certify and Re-Certify Terminal Illness:
  - Hospice medical directors or physician designees must review the clinical information for each hospice patient and provide written certification that it is anticipated that the patient's life expectancy is 6 months or less if the illness runs its normal course.
- Face-to-Face Encounters
  - As of January 1, 2011, a hospice physician or hospice nurse practitioner must have a face-to-face (FTF) encounter with each hospice patient whose total stay across all hospices is anticipated to reach the 3rd benefit period. The FTF encounter must occur prior to, but no more than 30 calendar days prior to, the 3rd benefit period recertification, and every benefit period recertification thereafter, to gather clinical findings to determine continued eligibility for hospice care. All certifications and re-certifications must be signed and dated by the physician(s).

MEDICAL DIRECTOR/HOSPICE PHYSICIAN RESPONSIBILITIES

- Cover for the Attending Physician
  - If the patient's attending physician is not available to care for his or her patients, then a hospice physician would assume care responsibilities. A hospice is responsible for providing an alternate physician to meet the medical needs of the patient in the attending physician's absence
- IDG Participation
  - The hospice must designate an interdisciplinary group or groups composed of individuals who work together to meet the physical, medical, psychosocial, emotional, and spiritual needs of the hospice patients and families facing terminal illness and bereavement.
  - Interdisciplinary group members must provide the care and services offered by the hospice, and the group, in its entirety, must supervise the care and services.
  - The interdisciplinary group must include, but is not limited to, individuals who are qualified and competent to practice in the following professional roles:
    - A doctor of medicine or osteopathy (who is an employee or under contract with the hospice)
    - A registered nurse.
    - A social worker.
    - A pastoral or other counselor.
  - The hospice physician participates in the IDG task of assessing the patient's progress towards goals at least every 15 days

MEDICAL DIRECTOR/HOSPICE PHYSICIAN RESPONSIBILITIES

- On-Call Coverage
  - A hospice physician must be available to provide assistance to patients and families 24/7.
- Other
  - Maintain current knowledge of the latest research and trends in hospice and palliative care.
  - Assure physician representation and participation in the development of a patient's hospice plan of care.
  - Participate in family meetings and education sessions.
  - Consult with the patient's attending physician as needed.
  - Provide clinical leadership in the development and review of clinical protocols and processes.
  - Participate in the organization-wide Quality Assessment and Performance Improvement (QAPI) Plan.
  - Participate in operational and administrative planning process.
  - Ad hoc activities to support educational, outreach and fundraising goals.
  - Provide outreach and education to community physicians, other community agencies and health care settings.
  - Supervise hospice physician employees and contract hospice physicians.
  - Participate in resolution of interpersonal conflict and issues of clinical and ethical concerns.
  - Participate in the development and updating of patient care policies and emergency procedures



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REIMBURSEMENT

- Each hospice is reimbursed at a daily rate for each patient, depending on the patient's level of care. In its "FY 2016 Hospice Wage Index and Payment Rate Update," CMS established a two-tiered payment system for patients receiving routine home care. The Medicaid hospice benefit is required to be the same in amount and method as the Medicare hospice benefit, although there are slight variations
  - Routine Home Care: Patient Days 1-60 $186.84
  - Routine Home Care: Patient Days 61+ $146.83
- Hospices pay medical directors and designees for their services. These physicians cannot bill payers or patients for their services. When hospice coverage is elected, the beneficiary waives all rights to Medicare Part B payments for professional services that are related to the treatment and management of his/her

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REIMBURSEMENT

- (continued) terminal illness during any period his/her hospice benefit election is in force, except for professional services of an independent attending physician who is not an employee of the designated hospice nor receives compensation from the hospice for those services.
- Independent attending physician services are billed through Medicare Part B to the Medicare contractor, provided they were not furnished under arrangement with the hospice.
- The hospice FTF encounter is part of a hospice's administrative services and is not billable. However, if the physician or NP (who was identified by the patient as their attending physician) provides services that are medically reasonable and necessary while conducting the FTF, that portion of the visit can be billed by the hospice.

16 COMPLIANCE

ANTI-KICKBACK

- Because kickbacks can distort medical decision making, result in overutilization, and have an adverse effect on the quality of care patients receive, they are prohibited under the Federal health care programs, including Medicare and Medicaid. Under the anti-kickback statute, it is a criminal offense to knowingly and willfully solicit, receive, offer, or pay anything of value to induce referrals of items or services payable by a Federal health care program.
- 2 Safe Harbors
  - Bona Fide Employment
  - Personal Services and Management Contracts Safe Harbor
    - the agreement is set out in writing, specifies the services covered by the agreement and provides that the services are being provided for the term of the agreement;
    - the agreement specifies the schedule, length and exact charge for intervals of services, if not full-time services;
    - the term of the agreement is not less than one year;
    - the compensation paid under the agreement is set in advance, consistent with **fair market value** in an arm's length transaction, and does not take into account the volume or value of referrals or other business generated between the parties for which payment may be made in whole or in part by Medicare or Medicaid;
    - the services performed under the agreement do not involve the promotion of business arrangements or other activities that violate any state or federal law; and
    - the aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the **commercially reasonable** business purpose of the services.

ANTI-KICKBACK

- Problems
  - Compensating a physician above fair market value for medical director or hospice physician services
    - U.S. v. Lipkis, 770 F.2d 1447, 1449 (9th Cir. 1985): To the extent that a payment exceeds FMV, it can be inferred that the excess amount over FMV is intended as payment for the referral of health-program business.
  - Compensating a physician for services that are not needed or are inappropriate
    - Atlanta Hospice to pay $2.4 Million to resolve False Claims Act Allegations, July 6, 2017
  - Compensating a physician for services that are never provided
    - USA v. Eugene Goldman, M.D., 2013: Dr. Goldman was recently sentenced to 51 months in a federal prison, ordered to pay $300,000 in fines, and excluded from participating in Medicare and Medicaid for violating the federal Anti-Kickback Statute.
    - The government proved that Goldman, a hospice medical director, received payment for referring patients to the hospice and not for services rendered.
    - From January 2003 to July 2011, Dr. Goldman received approximately $309,000 in illegal payments for patient referrals. In January, February, and March 2009, Dr. Goldman was captured on tape receiving kickbacks for patient referrals.

COMMERCIAL REASONABLENESS

Questions

- Does the arrangement make business sense even if the parties were not in a position to refer business to one another?
- Is a physician/specialist required to perform the service?
- Can you get the same services from a less expensive source?
- Are the duties and responsibilities of the physician clearly identified in the agreement?
- Does the size and scope of the hospice warrant the number of physicians you have in the same role?
- Are you paying the physician for 2 activities at the same time?

*If even one purpose of the arrangement is to induce referrals there is a problem. Even if other, legitimate reasons exist.

*<u>Both</u> FMV and Commercial Reasonableness are required.

RISK AREAS

When:

- hospice pays a fee to a physician for each certification of terminal illness
- when the physician bills for services that are duplicative of the care that the hospice is required to provide its patients
- instances where a hospice provides nursing, administrative, and other services for free or below fair market value to physicians, with the intent to influence referrals
- contracting with a physician medical director with no palliative care experience who also is in a position to be a significant referral source
- contracting with multiple medical directors whose combined aggregate services are unnecessary
- contracting with a medical director who also is a nursing home medical director in a position to generate significant referrals.

https://www.healthlawyers.org/Members/PracticeGroups/Documents/EmailAlerts/Physicians_Sep11.pdf

FAIR MARKET VALUE PHYSICIAN COMPENSATION

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FAIR MARKET VALUE?

What is it?

- The price interested, not desperate, well-informed buyers and sellers would agree to pay/accept.
- The price paid under a reasonable timeframe.
- The value of the physician's personally performed services.
- What buyers and sellers would pay/accept when the two are not in a position to refer business to one another.
- Prospective pay and set in advance

What is it not?

- What you hear the other hospice down the road is paying.
- The revenue the physician will lose in his practice because he's at the hospice.
- A percentage of the hospice's revenues or profits.
- A commission
- Retrospective pay

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BASIC VALUATION STEPS

- Identify the services being valued
- Identify the purpose of the valuation
- Specify the standard of value
- Determine the appropriate valuation date and valuation period
- Consider the three valuation approaches
  - Cost Approach
  - Market Approach
  - Income Approach
- Choose the appropriate approach(es)
- Perform the analysis
- Describe the assumptions made
- Reconcile the values

MARKET DATA

- Physician Group Associations
  - Medical Group Management Association
  - American Medical Group Association
- Data Companies
  - Hospital & Healthcare Compensation Service
- Consulting Companies
- Industry Associations Government Sources
  - Bureau of Labor Statistics (“Careers in Hospice Care”)
  - General Services Administration (GSA.gov)
  - Form 990s (Guidestar.org)
  - Recruiting (USAJOBs.gov)
- Online Resources
  - Medscape Physician Compensation Survey
  - Online classifieds (indeed.com, practicelink.com)
  - Salary databases (payscale.com)

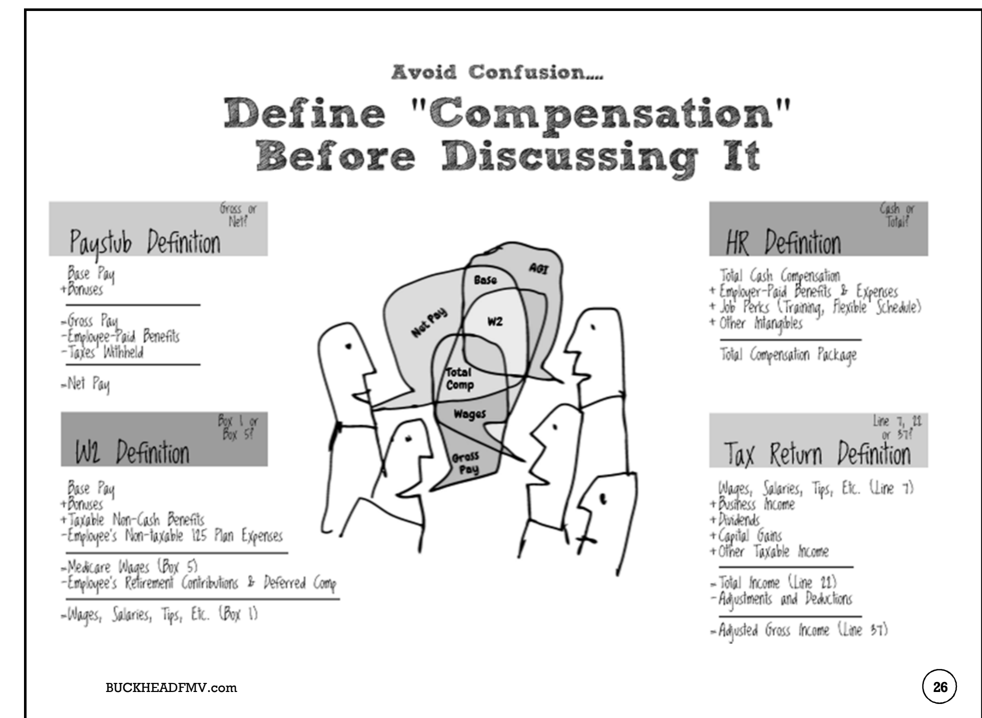
MARKET DATA

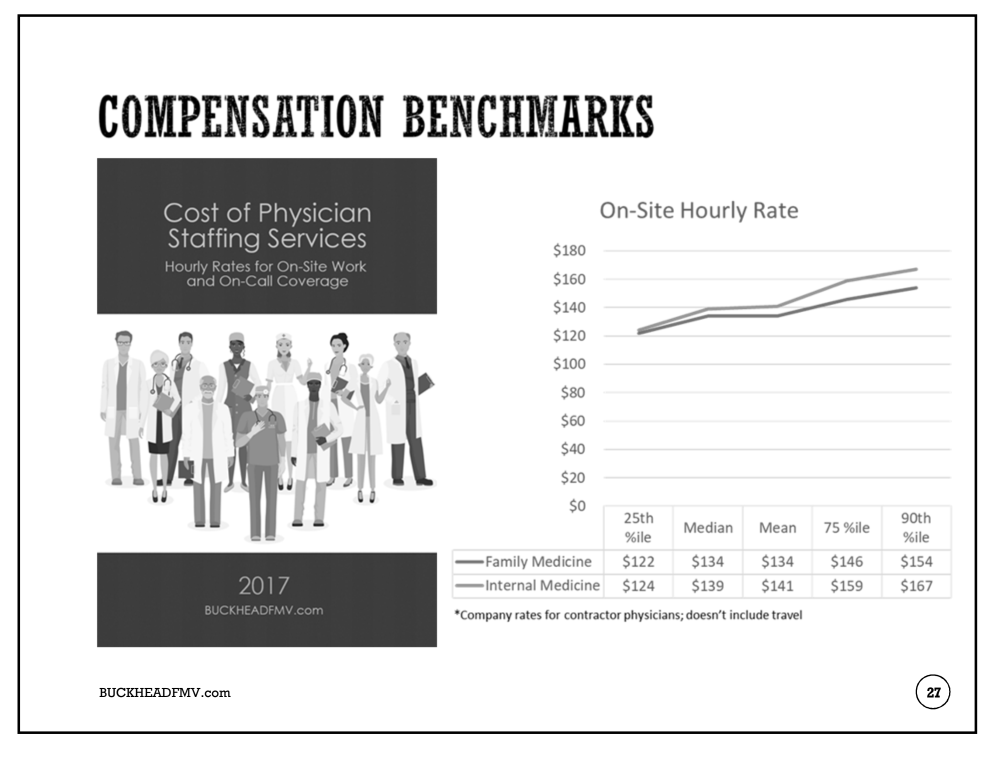
Using the Data

- Defining compensation
- Picking the comparable specialty
- Choosing the appropriate benchmark percentile range
  - Premiums for board certification
  - Impact of tenure, experience, qualifications
- Converting data into a useable format
  - Independent Contractors
  - Part-time
  - Hourly

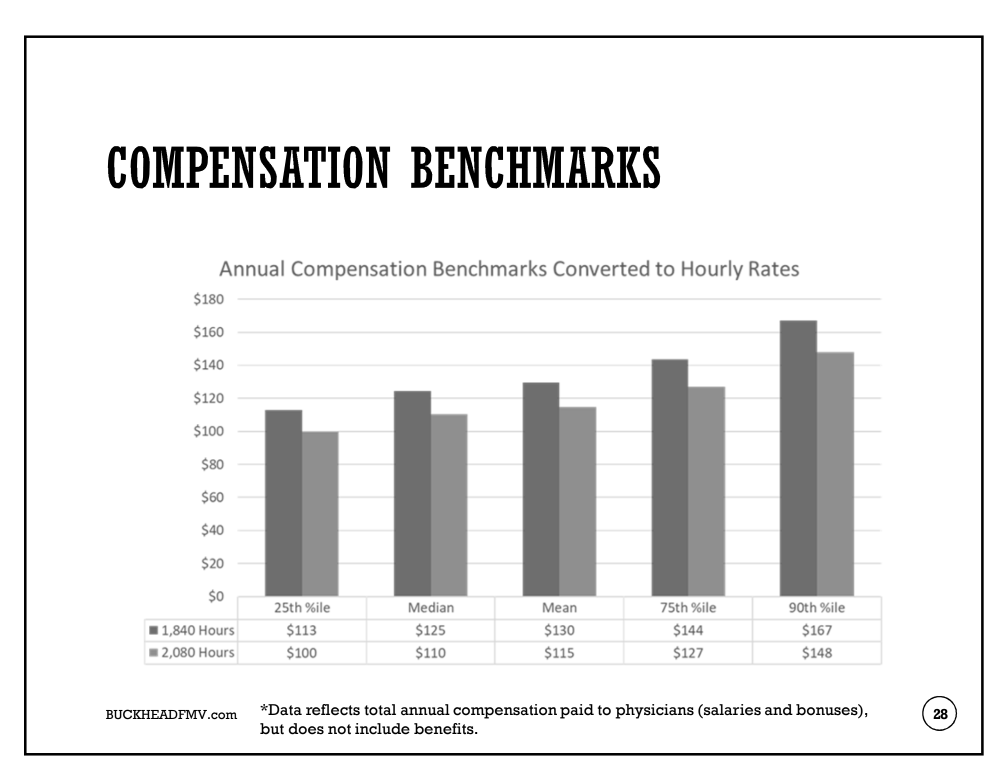
Guidance

- Stark II Phase II safe harbor for calculating hourly compensation for physicians
  - Average of median compensation
  - 2,000 hours denominator
- The DOJ/FTC Antitrust Safety Zone: Participating in salary surveys/exchanging salary information
  - The survey is managed by a third-party (e.g., a purchaser, government agency, health care consultant, academic institution, or trade association);
  - The information provided by survey participants is based on data more than 3 months old; and
  - There are at least five providers reporting data upon which each disseminated statistic is based, no individual provider's data represents more than 25% on a weighted basis of that statistic, and any information disseminated is sufficiently aggregated such that it would not allow recipients to identify the prices charged or compensation paid by any particular provider.





	25th %ile	Median	Mean	75 %ile	90th %ile
Family Medicine	$122	$134	$134	$146	$154
Internal Medicine	$124	$139	$141	$159	$167



	25th %ile	Median	Mean	75th %ile	90th %ile
1,840 Hours	$113	$125	$130	$144	$167
2,080 Hours	$100	$110	$115	$127	$148

TOP PHYSICIAN COMPENSATION QUESTIONS FROM HOSPICE PROVIDERS

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Q1 – HOW DO WE PAY OUR PHYSICIANS AN HOURLY RATE IF THEY WILL NOT DOCUMENT THEIR TIME?

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DISCUSSION

- Stipend problem: physicians don't document hours so hard to justify FMV
- Hourly rate problem: physicians don't document hours so they don't get paid enough
- Task pay: assumes it is easier to track meetings, encounters, on-call shifts
- Time documentation does not go away
- You have to do some work. What is the standard for:
  - On-call shifts?
  - Encounters?
  - Meetings?
  - Different across locations?

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Q2 – HOW DO WE COMPENSATE OUR MEDICAL DIRECTOR FOR BEING AVAILABLE 24/7?

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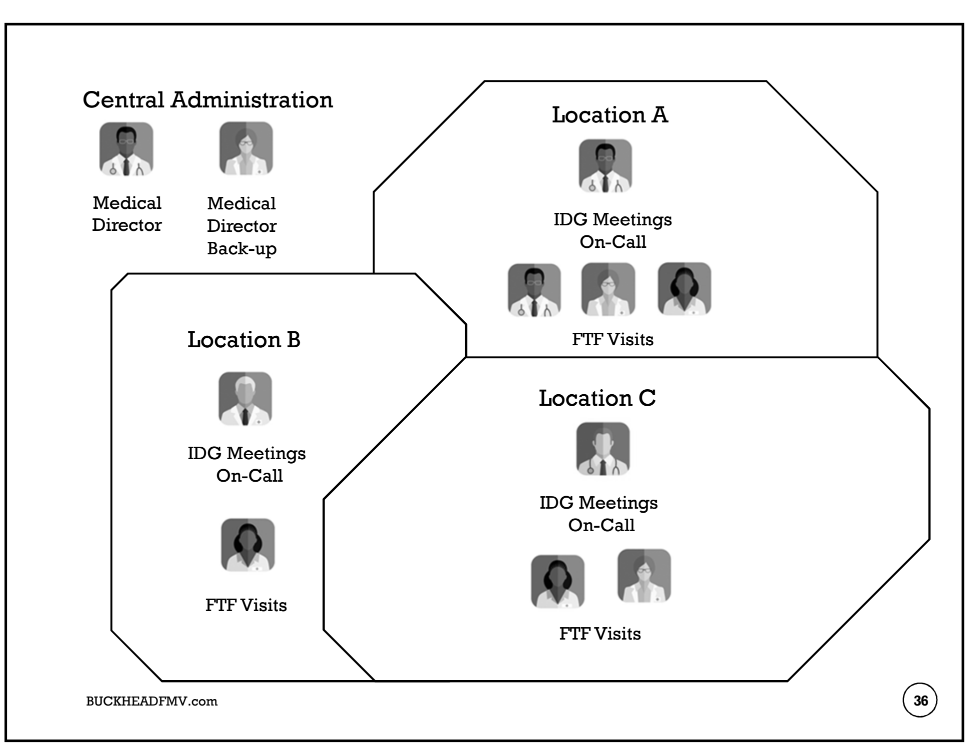
DISCUSSION

- Different types of on-call
  - Restricted: on-site requirement
  - Unrestricted: response time requirement (telephonically and/or in person)
- How is on-call compensated?
  - Per-diems
  - Hourly
  - Proxies
  - Fee-for-service
- On-Call compensation drivers
  - Phone calls
  - Return to work
  - Rotation
  - First responder
  - Back-up
- Considerations
  - Average time of services provided while on call – not otherwise compensated
  - On-call rates for nurses, other professionals, locums
    - % of hourly rate
    - $1-$6 hour
    - Hour of pay for certain number of on-call hours

Q3- HOW DO WE COMPENSATE OUR PHYSICIANS FOR ALL THE DRIVE TIME?

DISCUSSION

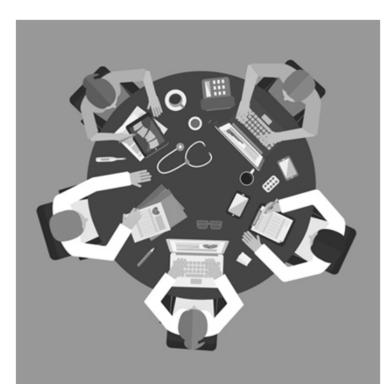
- Employee v. independent contractor issues
- How are independent contractors typically compensated for travel time?
- When is travel necessary?
- How consistent are the travel requirements?
- Considerations:
  - Task pay that factors in travel time



EXAMPLE

	Administrative Duties	F-2-F Encounters	IDG Meetings	On-Call	
	$120/HOUR	$150/VISIT Assumes 1 hour with drive time	$240/ MEETING Assumes 2-hour agenda	$75/ SHIFT Assumes a 15-hour shift	
Medical Director IDG Meetings, FTF Encounters	200 hours	50 Encounters	24 Meetings	300 shifts	**$59,760**
Back-up for Medical Director, FTF Encounters	80 hours	50 Encounters	2 Meetings	65 shifts	**$29,955**
FTF Encounters	0 hours	200 Encounters	0 Meetings	0 shifts	**$30,000**
IDG Meetings	20 hours	0 Encounters	26 Meetings	365 shifts	**$36,015**
IDG Meetings	20 hours	0 Encounters	26 Meetings	365 shifts	**$36,015**
	$38,400	**$52,500**	**$18,720**	**$82,125**	**$191,745**

Q4- CAN I PAY PHYSICIANS TO BE ON AN ADVISORY COMMITTEE?



DISCUSSION

United States ex rel. DePace v. Cooper Health System resulted in a $12.5 Million Settlement related to a "sham" advisory board

Checklist:

- ❑ There is a clearly identified purpose for the meeting
- ❑ Participants were chose based on objective selective criteria
- ❑ Participant referrals or potential referrals were not a criteria
- ❑ The specialties of the physicians are necessary based on purpose/agenda
- ❑ Meeting materials were provided ahead of time
- ❑ Active participation is required
- ❑ Hospice services will not be marketed during the meeting
- ❑ Attendance will be tracked
- ❑ Participants will not be paid for downtime
- ❑ The venue is appropriate; meals are appropriate for a business meeting
- ❑ A FMV compensation rate has been established based on the work the physicians will perform during the meeting

Q5- WHEN DO I NEED A FAIR MARKET VALUE OPINION?

RECOMMENDATIONS

My opinion:

- If you need an opinion – get an opinion – not a calculation of value.
- Opinion can be verbal (caution); emailed; in written report form.
- If you set it up right; you don't need an FMV opinion every time.
- Develop a Compensation Philosophy Statement
  - Goals of the compensation program
  - Tools to achieve goals
  - Fair Market Value ranges
  - Approach to special situations and updates
- Get a FMV opinion:
  - For any new or creative arrangement
  - Highly compensated physicians
  - For special situations
  - At regular intervals

RECOMMENDATIONS

- Tie all compensation amounts back to hourly rates.
- Think about how you will administer. Keep it simple.
- Review and monitor work effort and hours.
- Document your process.
- Model your changes before implementing.

FINAL COMMENTS

- Be able to tie all compensation arrangements back to a FMV hourly rate.
- Think about how you will administer the plan.
- Keep it simple.
- Review and monitor work effort and hours.
- Don't pay without documentation that substantiates services were provided.
- Pay only for what you legitimately need.
- Document, document, document.
- Consider the aggregate expense.
- Model your changes before implementing.
- Monitor agreements and compensation.
- Use an attorney
  - Employment law issues
  - State law issues