

# Commercial Reasonableness: A Checklist For Determination Physician-Hospital Arrangements

The following checklist represents a few of the key questions to consider in evaluating the commercial reasonableness of physician-hospital arrangements. It includes questions that a professional should assess in considering the totality of any specific arrangement. This checklist, when completed, does not convey that any particular transaction either is or is not commercially reasonable. A more thorough analysis is required to make a determination about commercial reasonableness. Judgment by a professional based on specific facts and circumstances is required to make that determination.

The Stark Law commentary states that “an arrangement will be considered ‘commercially reasonable’ in the absence of referrals if the arrangement would make commercial sense if entered into by a reasonable entity of similar type and size and a reasonable physician of similar scope and specialty, even if there were no potential designated health services (“DHS”) referrals.”<sup>1</sup>

Business Purpose Analysis	YES	NO
<ol style="list-style-type: none"> <li>1. Does the proposed arrangement represent a reasonable necessity which is essential to the functioning of the hospital or the healthcare provider?</li> <li>2. Is the proposed arrangement reasonably necessary to accomplish a rational business purpose?</li> <li>3. Is the specific purpose of the arrangement clearly identifiable and appropriately defined?</li> <li>4. Do the proposed services relate to the business and/or clinical plans and strategies of the healthcare provider?</li> <li>5. Do the proposed services contribute to the provider’s profits and/or the development of a particular service line without requiring income from proscribed referrals?</li> <li>6. Do relevant national, regional, and local economic conditions exist that may affect the appropriateness of the proposed arrangement?</li> </ol>		
Provider Analysis	YES	NO
<ol style="list-style-type: none"> <li>1. Does the proposed arrangement require a physician to perform the services?</li> <li>2. Does the proposed arrangement require a physician of a certain specialty to perform the services?</li> <li>3. Does any specialized training and/or experience of the provider exist that should be taken into account when evaluating the proposed arrangement?</li> <li>4. Is the particular nature of the duties and corresponding amount of accountability associated with the proposed arrangement clearly defined and reasonable?</li> <li>5. Is the amount of time demanded of the physician under the proposed arrangement reasonable?</li> <li>6. Do any salary considerations exist that should be evaluated in relation to providers of similar specialty and experience in comparable organizations and positions?</li> </ol>		
Facility Analysis	YES	NO
<ol style="list-style-type: none"> <li>1. Are patient demand, the number of hospital patients, and/or the community need sufficient to justify the services?</li> <li>2. Are patient acuity levels such that the proposed services are necessary?</li> <li>3. Do patient needs dictate the necessity for a separate and distinct provider for the proposed services?</li> <li>4. Is the size of the hospital and its relevant departments appropriate for the proposed services?</li> </ol>		

<sup>1</sup> 69 Fed. Reg. 16093 (March 26, 2004)



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Resource Analysis	YES	NO
1. Is the proposed arrangement a necessary addition to the managerial and administrative efforts already required by the medical staff bylaws?		
2. Have the number of committees and/or meetings that otherwise require physician attendance outside of the proposed arrangement been considered?		
3. If the healthcare entity is part of a larger health system, do patient care protocols and procedures exist that can be coordinated among its facilities in lieu of the proposed arrangement?		
4. Does the proposed arrangement lend itself to the potential for duplication or misuse?		
5. Does the healthcare entity maintain any features, controls, and/or safeguards to reduce or eliminate the potential for risks of duplication or misuse?		

Independence & Oversight Analysis	YES	NO
1. Does the provider entity currently evaluate the performance of other provider arrangements?		
2. Does the healthcare entity use its performance assessments to determine whether new or existing provider arrangements should be reduced (e.g., hours condensed) or eliminated?		
3. Does the entity maintain a formal process for executive management and legal counsel to review and approve the proposed arrangement?		
4. Does the hospital engage in appropriate monitoring to determine: <ul style="list-style-type: none"> <li>- Whether services specified in similar arrangements are actually performed?</li> <li>- The total amount of funds spent for such services?</li> <li>- A verifiable outcome resulting from the arrangement?</li> </ul>		
5. Will the entity engage in regular assessments of the proposed arrangement which clearly show its effectiveness and demonstrate a legitimate need for continuation and/or renewal?		
6. Does sufficient independence exist related to the board or committee that establishes the proposed arrangement?		
7. Is there a written agreement that addresses the terms of the proposed arrangement?		

**DISCLAIMER:**

This checklist, when completed, does not convey that any particular transaction either is or is not commercially reasonable. Judgment by a professional based upon specific facts and circumstances is required to make that determination. As stated earlier, this checklist contains only a "few key questions" that a professional must assess when considering the totality of any specific arrangement. A more thorough analysis is required in order to make a determination about commercial reasonableness.

