

Practice Aid: Commercial Reasonableness Assessment Tool

The following aid represents some key exercises for evaluating the commercial reasonableness of physician-hospital arrangements, including what professionals may consider in assessing the totality of any specific arrangement. Completion of this assessment alone does not convey that any transaction is or is not commercially reasonable. A more thorough professional analysis including additional questions on the specific **facts and circumstances** is required for determining commercial reasonableness.

Business Purpose Analysis

1. Describe the environment in which the proposed arrangement will operate. Include:

- a. An overview of the entity's mission, vision, values, and objectives.
- b. A description of the size of the entity's primary and secondary service areas.
- c. An overview of the applicable service line offerings.
- d. A summary of the relevant organizational history leading up to the need for the arrangement.
- e. An overview of the arrangement's importance to the service line affected; description of national/state-specific market trends; and how the arrangement may impact the cost, quality, and/or access of patient care.

2. Delineate how the proposed arrangement further effectuates a legitimate business purpose which is essential to the functioning of the entity. Include:

- a. An overview of the business alternatives.
- b. A description for how the arrangement helps the organization take advantage of its strengths/opportunities while mitigating weaknesses/threats.
- c. An explanation of why the selected arrangement is the best alternative for the entity.

3. Outline how the services contemplated in the proposed arrangement relate to the business and/or clinical plans and strategies of the organization. For example, if the arrangement is for physician employment, describe the community need in terms of current physician supply versus demand.

4. Describe how the proposed services contribute to the organization's profits and/or the development of a particular service line without requiring income from proscribed referrals.

5. If collections are anticipated in association with the provision of services under the agreement, explain whether the cost of the agreement is expected to exceed the collection levels; and, if so, list the business reasons for the cost exceeding collections.

Provider Analysis

1. If the proposed arrangement requires a clinical skillset, can the services be performed by a midlevel provider in lieu of a physician? If a physician is needed, describe why a midlevel provider is not sufficient to perform the clinical services.

2. If the proposed arrangement requires a physician of a certain specialty to perform the services, identify the specialty, and describe how the specialist's training, experience, and qualifications make him or her the best candidate to perform these services.

3. Describe in detail:

- a. The provider's duties under the proposed arrangement.
- b. The procedures and measures to be used to hold the provider accountable for performance of those duties.
- c. The method for determining the performance measures.

4. Explain how much time is required of the physician under the proposed arrangement and how such time was determined.

5. Describe what resources have been utilized (e.g., salary surveys) to date to compare the provider to other providers of similar specialty and experience and set the salary levels for the transaction.

6. Delineate the type and amount of costs budgeted for the provider's services under the proposed arrangement.

Facility Analysis

1. Explain how patient acuity levels, the size of the hospital, and/or the hospital's investment in the service line are sufficient to justify the services.
2. Determine whether any facility limitations would make the performance of the proposed services inappropriate or noncompliant with government regulations.
3. If the provision of these services requires use of facility space, explain why this service is a better use of facility space than the way the space would otherwise be utilized.

Resource Analysis

1. Explain how the proposed arrangement is a necessary addition to the managerial and administrative efforts already required by medical staff bylaws or other contractual obligation(s).
2. If the agreement includes compensation related to the provision of call coverage services, explain how the agreement takes into consideration any call obligations required by medical staff bylaws. Describe any departure from obligations imposed by medical staff bylaws.
3. If the agreement includes compensation for meeting attendance, describe any consideration for the number of committees and/or meetings requiring physician attendance outside of the proposed arrangement.
4. If the entity is part of a larger health system, explain why the proposed arrangement is necessary, *i.e.*, why existing patient care protocols and procedures (if any) are insufficient and/or cannot be coordinated among the system's facilities in lieu of the proposed arrangement.

Independence and Oversight Analysis

1. Outline the compliance procedures, features, controls, and/or safeguards in place to limit the potential duplication or misuse of the proposed arrangement.
2. Explain how the entity uses its performance assessments to determine whether new or existing provider arrangements should be reduced (*e.g.*, hours condensed) or eliminated.
3. Describe the formal process for the entity's executive management and legal counsel to review and approve the proposed arrangement and confirm that legal counsel has, or will, review the contract to ensure compliance with applicable law.
4. Describe how the entity monitors the services specified in similar arrangements to determine:
 - a. Whether the services are actually performed (including the specific documentation required to be provided) during the term of the agreements.
 - b. The total amount of funds spent for such services.
 - c. A verifiable outcome resulting from the arrangement.
5. Explain how the entity will regularly assess the effectiveness of the proposed arrangement and demonstrate a legitimate need for continuation and/or renewal.
6. Describe the board or committee responsible for establishing the proposed arrangement, and list any factors supporting its independence.

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Independence and Oversight Analysis Continued

7. Identify the following agreement terms and assess the reasonableness of agreement provisions.

- a. Describe how the agreement can be terminated without cause, including:
 - When, during the term, this is possible.
 - What the notice requirement is.
 - Whether the notice requirement is the same for both parties.
- b. Describe the agreement's for-cause termination provisions, including:
 - When termination is possible.
 - What the notice requirement is.
 - What the cure provisions are.
 - Whether the notice and the cure are the same for both parties.
- c. State the length of the agreement and how the appropriate length was determined, including how the length is appropriate for the needs the agreement will address.

8. Explain whether all terms of the agreement are consistent with other similar arrangements. If there are inconsistent terms, provide the rationale for deviation from other similar agreements.

9. Describe any questions or concerns management may have regarding the CR of the agreement and/or circumstances of which management may be aware that might affect the CR of the arrangement.