STARK REALITY: A PRIMER ON MEDICAL OFFICE AND HEALTH CARE LEASING ISSUES

HOW TO AVOID MEDICAID FRAUD WHEN REPRESENTING A TENANT OR LANDLORD

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WHAT’S DIFFERENT ABOUT MEDICAL OFFICE AND HEALTH CARE LEASES?

Federal and state statutes and regulations colloquially called “Stark Laws” are a source of worry for physicians and hospitals every day in many settings, including leases.

- **Stark Act:**
  - Section 1877 of the Social Security Act, codified as the Ethics in Patient Referrals Act, 42 U.S.C. §1395nn and implementing regulations 42 C.F.R. §§ 411.351 *et seq.* (named for California Congressman Pete Stark, who sponsored the original bill)

- **Anti-Kickback Law:**
  - Section 1128B(b) of the Social Security Act, codified as the Medicare and Medicaid Patient Protection Act of 1987, 42 U.S.C 1320a-7(b) and implementing regulations 42 C.F.R. §§ 1001, 951 *et seq.*
It has always been unethical for physicians to pay referral fees.

The public policy rationale is to discourage physicians from allowing financial considerations to color their professional judgment. The Stark Act prohibits certain referrals and applies only to physicians. The Anti-Kickback Law criminalizes payments made to any parties for referrals for the sale of medical services or products that are reimbursed by the federal government.

The Stark Act and the Anti-Kickback Law cover not only direct cash payments, but any arrangement where something of value (such as below market rent) is traded for referrals.

The Stark Act and the Anti-Kickback Law directly impact leasing arrangements involving physicians, physician organizations and others who furnish items and services payable by Medicare, Medicaid and other federal and state health care programs.
The Stark Act regulates referrals for designated health services which are reimbursed by Medicare or Medicaid.

The Stark law prohibits a physician from referring a Medicare or Medicaid patient to any entity providing a designated health service if the physician (or an immediate family member) has a financial relationship with that entity, unless a specific exception applies.

Where there is a financial relationship, the designated health service provider is prohibited from submitting any Medicare or Medicaid claims for reimbursement for services rendered to the patient unless the financial relationship falls within an exception.

The Stark Act is a strict liability law. If a relationship regulated by Stark does not qualify for an exception to Stark, then the relationship violates the Stark Act and is per se illegal.
STARK ACT PENALTIES

- Denial of Reimbursement.
- Refund of Monies Paid for Improperly Submitted Claims.
- Fines up to $15,000 per Improperly Submitted Claims.
- Penalties of up to $100,000 for Each Scheme or Arrangement to Circumvent Stark.
- Exclusion from Medicare and Medicaid.

There is no such thing as a technical violation under the Stark Act. Any violation, even an inadvertent mistake, is a violation of federal law.
“Designated Health Services”
- Clinical Laboratory Services
- Physical and Occupational Therapy Services
- Radiology Services (including MRI, CT and ultrasound)
- Radiation Therapy and Supplies
- Durable Medical Equipment and Supplies
- Parenteral and Enteral Nutrients, Equipment and Supplies
- Prosthetics, Orthotics and Prosthetic Devices and Supplies
- Home Health Services
- Outpatient Prescription Drugs
- Inpatient and Outpatient Hospital Services
STARK DEFINITIONS (CONT.)

- **“Referral”**
  - Any request for designated health services for which payment may be made under Medicare or Medicaid programs.

- **“Financial Relationship”**
  - An arrangement between the entity furnishing the designated health services and a referring physician, or referring physician organization.
  - Can be an **ownership or investment interest**, either direct or indirect, through equity, debt or other means, including interest in an entity having interest in another entity (or any number of other intermediate interests in an unbroken chain) which provides designated health services.
  - Can be a **compensation arrangement**, any form of compensation received by the referring physician from the entity providing the designated health services.
  - **Leases** involving physicians, physicians’ organizations and hospitals, imaging centers, pharmacies, and other health care providers who furnish items or services payable by Medicaid or Medicare **are financial relationships, as defined by the Stark Act.**
Fortunately, there is a Stark Act Exception for the rental of office space or equipment. The lease must fit within the exception. If you deviate, you will be presumed to be in violation.
**ANTI-KICKBACK LAW**

- The **knowing and willful solicitation**, offer, payment or receipt of any remuneration, whether direct or indirect, overt or covert, in cash or in kind, in return for or to induce:
  - Referring or influencing the referral of an individual for the furnishing of any item or service; or
  - Purchasing, leasing or arranging or recommending for the purchase, lease or ordering of any item or service

- Paid in whole or in part under any federal health program.

- The Anti-Kickback Law is **broader than the Stark Act because it applies to any referrals for items or services payable by any federal healthcare program.** Any referrals by any health care providers participating in federal health care programs, not just physicians, are vulnerable under the Anti-Kickback Law.

- The Anti-Kickback Law is not strict liability like the Stark Act. A **knowing and willful violation must be shown.** The Anti-Kickback Law provides for criminal penalties.
What is considered “remuneration” under the Anti-Kickback Law?
- Remuneration includes kickbacks, bribes and rebates, whether direct or indirect, overt or covert, in cash or in kind.
- Any transaction that does not reflect fair market value for goods or services creates some kind of remuneration.

It is a violation of the anti-kickback restrictions if just one purpose is to induce referrals, even if there are other legitimate purposes for the payment.

There are over 20 “safe harbors” under the Anti-Kickback Law, each with detailed compliance requirements.
- If the safe harbor requirements are satisfied, the government will not look any further at the arrangement.
- If you don’t fall within the safe harbor, the arrangement is not necessarily illegal, but all facts and intentions are considered.

A lease could be considered remuneration under the Anti-Kickback Law.
Fortunately, there is an Anti-Kickback Statute Safe Harbor available for space and equipment leases.
Stark and Anti-Kickback violations can also result in suits under the federal False Claims Act, 31 USC 3729-3733. The federal False Claims Act permits a qui tam plaintiff with knowledge of fraud against the United States Government to file a lawsuit on behalf of the Government against the person or business that committed the fraud. The qui tam plaintiff is rewarded with a percentage of the recovery for a successful suit.

Almost every state also has its own “Stark”-type statutes and regulations.

Colorado “Stark” law is C.R.S. § 26-4-410.5
The Colorado “Stark” law is a virtual copy of the federal statute and adopts federal Stark regulations and exceptions.
To meet the Stark Act exception and the Anti-Kickback Law safe harbor, a lease needs to meet ALL of the following requirements:

- Lease must be:
  - In Writing
  - Signed by Both Parties
  - Identify the Premises to be Occupied by Tenant
  - Lease Term Must Be at Least One Year
    - If the lease is terminated (with or without cause) the parties cannot enter into a new lease during the first lease year
  - Rent Must Be Fair Market Value
    - “Fair market value” is consistent with rent in an arms-length transaction for similar space for general commercial purposes, **not** adjusted to reflect value of location near referral source
MEETING THE LEASING REQUIREMENTS (CONT.)

- Must take into account tenant improvement allowance
- Appraisal to include all buildings for general office space within relevant market area and all comparable buildings
- Must take into account free rent or other landlord concessions
- Must NOT take into account volume or value of referrals or other business between landlord and tenant

  ▪ **Rent Must be Set in Advance**
  - If there is a formula for increases (including for extended terms) it must be detailed enough to be verifiable
- Amount of Space Must be Reasonable and Necessary for Proposed Use
  - Cannot exceed what is needed for legitimate business purpose of tenant
  - Must be exclusive to tenant when being used by tenant and not shared, except
    - Common areas if: tenant pays for pro rata share based on ratio of exclusive space to total amount of exclusive space of the parties sharing
- Holdovers Cannot be Longer than 6 Months
- Holdover rent can be higher than term rent only if set out in the written lease and if it is consistent with market
Lease Must be Commercially Reasonable Even if no Referrals are Made Between Landlord and Tenant
It is important to **strictly comply with the technical terms** of the safe harbor and exception. For those matters that can’t be known with complete certainty, such as fair market value, commercially reasonable terms, no more space than is necessary for legitimate business purposes, **document all efforts** to meet the requirements are documented.
Health Care Leases When You Don’t Care About Stark Rules

- Leases between commercial landlords who don’t furnish health care services and are not owned by physicians or their families and physician and other health care provider tenants don’t need to address the issues that arise solely from Stark and Anti-Kickback laws.

- However, some large health care entities receive regular and ongoing scrutiny from federal authorities. They are concerned that a future change in ownership could put any lease within the Stark realm. So as much as possible, they try to satisfy the Stark and Anti-Kickback requirements for every lease.
HIPAA


- **Health care provider tenants are covered entities** under HIPAA. Appropriate physical, technical and administrative safeguards are required for protected health information ("PHI"). Tenant is obligated to have safeguards for PHI.

- **Landlord is not a covered entity** based on landlord tenant relationship. Tenant will want to prohibit access to exam rooms and have parties accompanied within the premises to protect PHI. Landlord will be asked to protect confidentiality of PHI. Tenant may request indemnification from landlord for disclosure of PHI. Landlord should be careful of undertaking too many obligations under HIPAA.

- If landlord has a **landlord’s lien**, tenant will seek to negotiate exclusion of medical records, including computerized medical records. Tenant should seek the right to destroy any PHI on computers before landlord takes possession. Landlord should not take possession of tenant’s PHI.
ADA

– The Americans with Disabilities Act of 1990
– The private offices of a health care provider are service establishments that have been qualified as public accommodations. Both landlord and tenant are subject to accessibility requirements.
– Adequate physical accessibility to the premises is needed. Landlord could be responsible for making readily achievable changes and providing auxiliary services in building common areas.
– Health care tenants review the building with particular care to make certain their patients can comfortably access the premises.
– Often more handicapped parking than is legally required for an office building is sought by health care tenants.
Medical Waste

- Medical office leases must address medical waste issues.
- **Medical waste is regulated** and cannot be disposed of along with normal office trash. Medical waste can include infectious wastes like blood and bodily fluids, waste pharmaceuticals and chemotherapy or nuclear materials. Medical wastes may include controlled substances.
- The Colorado Department of Public Health and Environment (“CDPHE”) governs treatment and disposal of medical wastes. A landlord, particularly a commercial landlord, will want the tenant to be solely responsible for handling tenant’s medical waste.

Utility Services

- Some medical offices store vaccines that must be maintained at specified temperatures, which make **continuous refrigeration essential**.
- Some medical offices perform procedures that make **uninterrupted electricity essential**.
- Most medical offices use electricity and water at higher rates than general office uses.
- Health care tenants may require “guarantied” electric service. This may require back-up generators being installed by either landlord or tenant.
Expensive Tenant Improvements
- Medical offices may need multiple exam rooms with sinks, built-in counters and cabinets, and light boxes for viewing x-rays.
- Offices with specialized equipment may need reinforced floors, lead-lined partitions, oversize or automatic doors and specialized lighting.

Security
- Storage of pharmaceuticals should be considered a security concern.
Thank you

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