

Beware: Negotiating MOB Leases

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In negotiating a lease of medical office space, have you ever been told, "We can't do that, it might violate Stark," and wondered whether it was some kind of negotiating ploy? "Stark" is the commonly employed shorthand for two federal statutes, the Medicare and Medicaid Patient Protection Act of 1987, 42 U.S.c. 1320a-7(b) (the "Anti-Kickback Law"); and the Stark Self-Referral Prohibition Act, 42 U.S.c. 1395nn et. seq. (the "Stark Self-Referral Act"). These statutes impose restrictions and penalties on parties who receive Medicare and Medicaid reimbursements, and on certain parties having a financial relationship with, or who make referrals to, providers of such reimbursed services. Colorado and most other states also have enacted similar statutes.

The Anti-Kickback Law provides for criminal penalties for persons who knowingly and willfully solicit, offer, pay or receive any remuneration intended to induce the referral, purchase, lease, order or other arrangement for any good, facility, service, or item reimbursed by the Medicare program or other federal or state health care programs, such as Medicaid. Remuneration includes kickbacks, bribes and rebates, whether direct or indirect, overt or covert, in cash or in kind.

The Stark Self-Referral Act prohibits a physician from referring a Medicare or Medicaid patient to any entity providing "designated health services" if the physician or a member of the physician's immediate family has a financial relationship with that entity. If a Medicare or Medicaid claim is

submitted in violation of the Stark Self-Referral Act, the penalty can be exclusion from the Medicare or Medicaid program, a civil penalty of up to \$15,000 per service and assessments equal to double the dollar value of each service. The list of "designated health services" includes all inpatient and outpatient hospital services, physical and occupational therapy, radiology, MRI, ultrasound, radiation therapy, home health services, prosthetics, outpatient prescription drugs and others.

Both the Anti-Kickback Law and the Stark Self-Referral Act cover similar activities and often are lumped together as the "Stark rules," but they are distinct and carry different penalties. The Stark Self-Referral Act is a strict liability law. Its terms and safe harbors are exacting. Whether you intended to violate it or not does not matter. If you deviate from the specific safe harbor exemptions contained in the Stark Self-Referral Act, your actions are presumed to be a violation. By contrast, under the Anti-Kickback Law, a knowing and willful violation must be shown. The Anti-Kickback Law also has safe harbor provisions, but an activity is not automatically illegal if it fails to fit neatly within a safe harbor. Under these statutes, both the party who offers a rebate or a better-than-market deal and the party who accepts it are violators and both are subject to the penalties.

So why do we care? But for the exceptions and safe harbors contained in the statutes, office leases are the type of financial relationship that falls within the purview of the Stark rules. The

Stark rules clearly are implicated in leases of space between a hospital and a physician, or between physicians of related specialties, or with physician/provider joint ventures that construct or own ambulatory surgery centers, or with other shared enterprises or multiple-owner entities. The Office of the Inspector General is sensitive to leasing transactions, particularly any that involve low-interest loans, free rent, below-market rent, and any leases with rents based on volume of business.

Even when the owner of a medical office building is a third-party entity that neither provides designated health services nor makes referrals, careful hospital and physician-related entities still play by the "Stark rules" because ownership of the landlord could change hands during the term of a lease and because the scrutiny of the Office of the Inspector General can be intense. Since the consequences of violations can be severe, smart health care entities fit their leasing transactions into the safe harbors and exemptions available.

Although the safe harbors are not identical, in general the following provisions must be met to fit within the Stark rules:

1. The lease agreement must be in writing, signed by both parties.
2. The lease must specify the specific premises covered and must cover all the space to be leased.
3. The space or equipment leased must not exceed what is reasonable and necessary for the lessee's business.
4. If the lease is intended to provide the lessee with access to the premises for periodic intervals of

time (like an office timeshare) it must specify exactly the schedule of such intervals, their precise length and the exact rent.

5. The lease term must be at least one year.

6. The rent must be set in advance, consistent with fair market value in arms-length transactions and not determined in a manner that takes into account the volume or value of referrals or other business

generated. The "set in advance" rent cannot be changed during the lease term.

7. The lease must be commercially reasonable in the absence of any referrals.

The Anti-Kickback Law regulations define "fair market value" in a manner that is counterintuitive to real estate professionals, as the value of the rental property for general

commercial purposes, not adjusted to add value due to proximity or convenience to sources of referrals or other business generated.

Most health care entities are tuned in to the Stark rules and take them seriously. Lessors of medical office space would be well-served to understand the Stark rules related to leasing, as well.