



A newsletter on the current legal issues facing today's health care industry

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Reduce the Risks of Renting Space in Physician Offices

By William H. Maruca



Willie Sutton reportedly claimed that he robbed banks "because that's where the money is." Businesses that want to reach consumers of health care services want to be where the patients are. That means physician offices. Doctors feeling the squeeze of declining reimbursement and increasing expenses don't mind some extra income, either, and patients like the convenience of one-stop shopping. But there are numerous regulatory considerations that if ignored can result in costly legal consequences for physician and subtenant alike. So how do you structure a lease of space in a physician office the right way?

Depending on the purpose of the leased space and the relationships between the parties, you may need to consider the Stark Law, the Anti-Kickback Law, the regulation of independent diagnostic testing facilities, the medical assistance regulations, certain durable medical equipment reimbursement rules and the policies of private insurers.

Stark Law

The Stark Law applies to financial relationships between physicians and entities that provide designated health services to their patients. Physicians can only refer Medicare patients for such services if the financial relationships meet an appropriate exception. (Stark applies to Medicaid, too, but not to Medicaid managed care plans). The designated health services (DHS) are clinical laboratory services; physical therapy services; occupational therapy services; radiology services, including MRI, CT and ultrasound services; radiation therapy services 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; and inpatient and outpatient hospital services. Keep in mind that the purpose of the lease of space does not have to involve any DHS for the Stark law to apply so long as the physician makes referrals to the entity for DHS services. Consider a hospital that rents space from an independent physician for non-DHS purposes such as hospital-employed physician visits — so long as the independent physician continues to admit Medicare patients to the hospital or refer them for outpatient services, the lease needs to satisfy Stark.

The Stark rules permit a referring physician to lease space to a DHS entity under a signed written agreement that specifies the premises it covers if the lease lasts for at least one year; the space rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the DHS entity when being used by the DHS entity (and is not shared with or used by the physician's practice except for prorated common areas such as waiting rooms); the rent is set in advance and is consistent with fair market value and does not take into account the volume or value of any referrals or other business generated between the parties; and the agreement would be commercially reasonable even if no referrals were made between the DHS entity and the physician.

Anti-Kickback Statute/OIG Bulletin

The Anti-Kickback Statute (AKS) is broader than Stark since it applies to all services covered by Medicare, Medicaid or other government programs. In 2000, the

Office of Inspector General published a comprehensive analysis of rental arrangements with physicians that included a formula for prorating part-time lease costs (<http://oig.hhs.gov/fraud/docs/alertsandbulletins/office%20space.htm>). I strongly recommend that leases spell out exactly how the rent was calculated using the OIG's formula. Note that under the optional OIG Safe Harbor, if an agreement is intended to provide access to the physician's premises for periodic intervals of time rather than on a full-time basis for the term of the rental agreement, the rental agreement must specify exactly the schedule of such intervals, their precise length and the exact rent for such intervals. This is often difficult to predict in advance, but is critical if safe harbor protection is desired. Failure to meet a safe harbor (unlike a Stark exception) does not mean the deal is prohibited, but does require the parties to defend it if it is challenged.

IDTF Rules

For independent diagnostic testing facilities (IDTFs), just meeting the Stark and AKS exceptions isn't good enough. Under CMS regulations, with the exception of hospital-based and mobile IDTFs, a fixed-base IDTF is prohibited from (1) sharing a practice location with another Medicare-enrolled individual or organization; (2) leasing or subleasing its operations or its practice location to another Medicare-enrolled individual or organization; or (3) sharing diagnostic testing equipment used in the initial diagnostic test with another Medicare-enrolled individual or organization.

Accordingly, a mobile IDTF such as a mobile x-ray, ultrasound, EMG or similar provider can share space with another provider, but a fixed IDTF such as an

Staying Well Within the Law

imaging center cannot lease space to other providers. This restriction may have been intended to curb the controversial practice of imaging centers leasing blocks of time to their busiest referring practices as a way to meet the Stark in-office ancillary rules.

The physician is not at risk under these payment rules, but the IDTF may not qualify for Medicare payments. If the IDTF is willing to forego such payments and has sufficient non-Medicare business to justify the lease, it may be possible to proceed, but keep in mind the Stark requirement of "commercial reasonableness." If a reasonable business would not rent the space under such restrictions from a landlord that was not a referral source, and the physician refers Medicare patients to the IDTF's other sites, the deal will be suspect.

DMEPOS Supplier Rules and "Consignment Closets"

A once-common arrangement under which durable medical equipment, prosthetics, orthotics and orthotic supplies (DMEPOS) companies rent small storage spaces in physician offices will no longer work as of March 1, 2010, unless CMS withdraws new payment rules that quietly appeared in an August 2009 transmittal. Such deals, referred to as "consignment closets" or "stock-and-bill arrangements," let the DMEPOS entity dispense the devices from the physicians' offices and bill Medicare directly. Instead of prohibiting the lease relationship, CMS will only reimburse the physician, not the DMEPOS company, for such items when the transmittal takes effect. This requires the physician practice to get a DMEPOS supplier number and runs directly afoul of Stark restrictions for most DME other than ambulatory aids (canes, crutches, walkers,

non-motorized wheelchairs). Stay tuned to see if this change is implemented as planned, and if you have this kind of arrangement in place, be prepared to alter or terminate it.

Medical Assistance Regulations

A relatively obscure Pennsylvania Medical Assistance regulation states:

A participating provider may not lease or rent space, shelves or equipment within a provider's office to another provider or allow the placement of paid or unpaid staff of another provider in a provider's office. This does not preclude a provider from owning or investing in a building in which space is leased for adequate and fair consideration to other providers nor does it prohibit an ophthalmologist or optometrist from providing space to an optician in his office. 55 Pa. Code 101.51(c)(3).

If the physician participates in Medicaid, most sublease arrangements with other Medicaid providers would technically violate this rule. It is not clear whether restricting the subtenant from servicing Medicaid beneficiaries while using the subleased space is sufficient to cure the violation. DPW has historically not enforced this rule aggressively, but it needs to be considered when structuring a sublease.

Private Insurer Issues

Finally, both the practice and its subtenant need to review the policies of the private insurers and managed care companies with which they participate. In Western Pennsylvania, that means Highmark first and foremost. Highmark has adopted provider privileging requirements for diagnostic imaging service, including bone densitometry, ultrasound, CT and MRI,

echocardiography, fluoroscopy, mammography, nuclear cardiology, plain films positron emission tomography (PET), urological imaging and women's health. Among other criteria, this policy states that Highmark will only reimburse providers for diagnostic imaging services if the services are provided on imaging equipment owned by the provider and used by that provider on a full-time basis or leased by the provider on a full-time basis. Full-time basis is defined as: "the provider has possession of the equipment on the provider's property and the equipment is under the provider's direct control, and the provider has exclusive use of the equipment, such that the provider, and only the provider, uses the equipment."

This policy has been interpreted to mean that a single piece of imaging equipment may only be used by one practice but a mobile unit may be moved and used at multiple sites of a single practice entity.

Do It Right

There are enough pitfalls in these rules to trip up even careful physicians and suppliers. Before entering into a lease or sublease with another provider, seek help from experienced health care counsel. Although it's hard to argue with his choice of targets, remember where Willie Sutton wound up.

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