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Leasing Agreements between Hospitals and Physicians Draw Considerable Attention

Simple Tips to Help Compliance Professionals Understand Complex Standards and Improve Agreements

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By now most hospitals are acutely aware that the Office of Inspector General (OIG) has been focusing enforcement to various types of arrangements involving physicians due to an enhanced opportunity for abuse in this area. Leasing arrangements between hospitals and physicians can be a very complex regulatory and enforcement area. There are many areas of risks and vulnerabilities associated in light of the regulatory and enforcement environment, particularly as it relates to the federal anti-kickback statute and Stark laws.

It has become very common now for a *qui tam* investigation to be predicated upon allegations of violations of the anti-kickback statute. In the last issue of the *Journal of Health Care Compliance*, I wrote about medical director advisory and director agreements. The other type of arrangement drawing considerable interest involves hospital leasing arrangements with physicians.

When our firm performs reviews of such agreements, we focus on about a dozen key standards from the anti-kickback statute and Stark standards that can be used to improve leasing agreements. Some of these standards can be quite complex in analyzing; however, there are some simple tests and tips offered herewith that can be done easily by compliance officers. It is important to note that this article will only touch on a few key issues and should not be considered comprehensive on the subject.

In situations in which an entity leases either space or equipment to referring physicians or other parties in a position to influence referrals, the government wants to ensure that the arrangement is not designed to create a real or implied obligation to refer business in return for any type of remuneration. In terms of leasing arrange-

ments, remuneration could take the form of rent payment that falls below *fair market value* (FMV) or the provision of free services. As Inspector General, I was responsible for the issuance of a safe harbor regulation to provide guidance on what it would deem to be leasing arrangements that comply with the anti-kickback statute. This safe harbor requires that the agreement meet the following five standards:

- There must be a written lease agreement signed by both the physician and hospital.
- The lease must specify the covered premises or equipment.
- If access to the space or equipment is for periodic intervals, a schedule for the use and exact lease payments must be set out in advance.
- The lease may not be for less than one year.
- Total amount of payments must be set out in advance and based on FMV.

Any deviations from the safe harbor standards may raise a "red flag" to a third-party reviewer of these arrangements. Strict adherence, however, to all five criteria of the safe harbor is not always necessary to ensure compliance with the anti-kickback statute. For example, the following deviations would probably be considered benign because they are clearly based on intent other than to induce referrals:

- Rent and charges for services not fixed in advance but fluctuate based on an objective, independent standard unrelated to volume of referrals or generation of business;
- Contracts that contain termination provisions permitting the term to end in less than one year, but the termination provisions are based on occurrence of circumstances unrelated to business generated or result from governmental requirements, including those for maintaining tax-exempt status of hospital or bonds issued for the hospital.

On the other hand, it is likely that the following would be considered indications of possible intent to induce referrals:

- Equipment and/or office leases are based on per-use or per-procedure payments or percentage of revenues;
- Incentive, volume, or performance-based formulas for payment of personal services contracts;
- Terms of lease or personal services contracts are not consistent with prudent business practices;
- FMV of rentals cannot be supported by objective appraisals or market standards;
- Records maintained on sources of referrals.

A hospital should *not* proceed with a transaction or arrangement that is indicative of intent to induce referrals. To ignore these warning signals could result in enforcement actions.

Of all the issues noted above, the most critical factor to be addressed by far is FMV. This is a very broad catch-all exception. It pertains to any compensation resulting from an arrangement between an entity and a physician (or an immediate family member) or any group of physicians (regardless of whether the group meets the definition of a group practice) for the provision of items or services by the physician, family member, or group as long as the arrangement is set forth in an agreement that meets all of the following criteria:

- FMV is defined as the value of the property for general commercial purposes but does not permit consideration of proximity to referral sources in its determination.
- When determining FMV, it is critical that the hospital *not* take into account the volume or value of any referrals or business generated between the parties for which any part may be payable by Medicare or Medicaid.
- It is highly advisable for any hospital considering leasing space or equipment to physicians in a position to refer business to evidence FMV.
- The Office of Inspector General does not describe specifically the methods that should be employed to establish FMV.

- In order to be credible, FMV should be determined by objective standards and the determination should be made by an independent party able to make such determinations.

Although all this appears very complicated, it can be reduced to the two key issues of charging FMV for the space and that the space must be "commercially reasonable." All leases with physicians, who refer business to the hospital, should include an evaluation addressing FMV and commercially reasonable standards.

This may not be as demanding as one would think in reading the law and attendant regulations. CMS has recognized the imprecision inherent in seeking to ascertain FMV and has stated it intended "to accept any method that is 'commercially reasonable' and provides evidence that the compensation is comparable to what is ordinarily paid for an item or service in the location at issue, by parties in arm's-length transactions who are not in a position to refer to one another." CMS has noted it also would find acceptable an appraisal that the parties have received from a qualified independent expert.

When developing leasing arrangements with potential referral sources both the guidance arising from the anti-kickback statute and Stark laws should be integrated both in the lease agreement itself as well as supporting documents.

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