

Health Law Bulletin

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CMS BANS PER-CLICK AND PERCENTAGE-BASED SPACE AND EQUIPMENT LEASES AS OF OCTOBER 1, 2009

The Stark statute has been around for many years and has become a way of life for most physicians. The general rule under Stark is that a physician cannot make a referral for certain designated health services (DHS) to an entity with which that physician has a financial relationship. The statute originated with physician-owned laboratories, but has been expanded to include other services such as radiology, durable medical equipment, hospital services, outpatient drugs, and other specified services. The objective of the statute was to eliminate situations where a physician had a financial incentive to over-prescribe lab work (or now other tests) because the physician, as owner of the lab or other DHS entity, received more money for each test ordered.

In recognition of the fact that there are numerous arrangements that are legitimate and do not present an opportunity for abuse, CMS has developed a number of “exceptions” to the Stark law. If a financial arrangement falls under one of these exceptions, then the referrals for DHS are not prohibited.

Two of the exceptions that are commonly used are the office lease and equipment lease exceptions. These exceptions apply where the physician, for example, owns office space and MRI equipment, and his practice leases the space and equipment from the physician. As long as the arrangement meets certain requirements (set out in writing, fair market value, term of at least one year, not based on volume or value of services, etc.), then this arrangement fits the Stark exception and is acceptable under Stark. This type of arrangement is also often used where a physician or group of physicians provide services to a hospital “under arrangements” or where a joint venture of physicians collectively owns and shares space and equipment with each physician using the equipment on a per-click or percentage-based arrangement.

However, for some time now, CMS has been concerned about what it calls “per-click” or percentage-based compensation arrangements. If the arrangement as described above uses a “per-click” payment mechanism, the lease payments by the physician practice are calculated based on a set dollar amount for each time the imaging equipment is used (“per click”). In a percentage-based arrangement, the lease payment is calculated as a set percentage of the total revenues generated by the imaging equipment. CMS is concerned that both of these situations provide incentives for the physician owner to “over-refer” for imaging services because his lease payments received go up for each use of the machine.

CMS has considered several means of curtailing what it fears is abuse and have finally settled on an outright ban of “per-click” or percentage-based compensation leases as of October 1, 2009. As of that date, any lease of space or equipment may *not* be based on a “per-click” or percentage-based compensation arrangement. As a practical matter, this means that you will be left with the option of the “block lease” where the physician practice or hospital leases the equipment for specified blocks of time

and uses the equipment only during that time. Under a block lease, you must provide the appropriate supervision during the time you lease the equipment and you may not use the equipment during a time when it is leased by someone else.

This change may require some existing agreements to be re-written in order to comply with the new requirement. If you need assistance in reviewing your current arrangements or re-writing your existing leases, you may want to consult an attorney.

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