

COVID-19 Healthcare Real Estate

Pinnacle Healthcare Consulting (“PHC”) as a general practice is well versed in real estate arrangements under Fraud and Abuse. PHC is in a unique position to assist our healthcare clients in reacting to the COVID-19 pandemic. As the pandemic spikes, a real burden on the healthcare system could explode and overwhelm providers and healthcare market participants.

While market overviews and trends in real estate will manifest in the next few months, PHC will focus on our healthcare clients with immediate needs more directly related to real estate, real estate utilization, and ultimate compliance.

On March 30, 2020, The Centers for Medicare & Medicaid Services (“CMS”) issued waivers of the sanctions under Section 1877(g) of the Social Security Act, more commonly known as the Stark Law. The waivers are retroactive back to March 1, 2020. These waivers are in reaction to the COVID-19 pandemic and apply nationwide to financial relationships and referrals aimed at combatting the outbreak of the COVID-19 pandemic. These waivers include certain real estate arrangements and will remain in effect until:

- The termination of the national emergency declared on March 13, 2020; or
- The public health emergency declared on January 31, 2020; or
- Sixty days from the date of issuance.¹

CMS agreed to waive sanctions with respect to noncompliant real estate arrangements with the following Stark Law violations, provided the noncompliance relates to the COVID-19 pandemic:

- Rental charges between an entity and a physician that are below fair market value for the lease of office space or equipment;
- Remuneration from a physician to an entity that is below fair market value for the use of the entity’s premises or for items purchased by the physician from the entity;
- Remuneration between an entity and a physician resulting from a loan between the parties:
 - (1) with an interest rate below fair market value; or
 - (2) on terms that are unavailable from a lender that is not
 - (i) a recipient of the physician’s referrals or business generated by the physician; or
 - (ii) in a position to generate business for the physician; and

¹ Blanket Waivers of Section 1877(g) of the Social Security Act Due to Declaration of COVID-19 Outbreak in the United States as a National Emergency Effective March 1, 2020

- Arrangements that do not satisfy the writing or signature requirements of an applicable exception (e.g., rental of office space exception), but otherwise satisfy the requirements of the exception.²

CMS also provided examples of the following real estate arrangements that may fall within the scope of the blanket waivers but acknowledged that the examples are for illustrative purposes and do not represent an exhaustive list that would qualify for the waiver of sanctions:

- A hospital pays physicians above their previously contracted rate for furnishing professional services for COVID-19 patients in particularly hazardous or challenging environments;
- To accommodate patient surge, a hospital rents office space or equipment from an independent physician practice at below fair market value or at no charge;
- A hospital's employed physicians use the medical office space and supplies of independent physicians in order to treat patients who are not suspected of exposure to COVID-19 away from their usual medical office space on the campus of the hospital in order to isolate patients suspected of COVID-19 exposure;
- A hospital or home health agency purchases items or supplies from a physician practice at below fair market value or receives such items or supplies at no charge;
- A hospital provides free use of medical office space on its campus to allow physicians to provide timely and convenient services to patients who come to the hospital but do not need inpatient care;
- An entity provides free telehealth equipment to a physician practice to facilitate telehealth visits for patients who are observing social distancing or in isolation or quarantine.³

It is important to note that CMS did not explicitly list space leasing arrangements where the parties agree to abate rent as a result of economic hardship during the COVID-19 crisis as a situation for which the blanket waivers may apply.

FMV Documentation

Although CMS will not require the submission of documentation or notice in advance of using the blanket waivers, entities should nonetheless develop and maintain records as to the use of such waivers in a timely manner as such records must be made available to CMS upon request. Besides setting forth the specific terms of the arrangement to which the waiver applies (including any changes to existing arrangements necessitated by the COVID-19 pandemic), these records must identify the specific COVID-19 purpose for the waiver.

² Blanket Waivers of Section 1877(g) of the Social Security Act Due to Declaration of COVID-19 Outbreak in the United States as a National Emergency Effective March 1, 2020

³ Blanket Waivers of Section 1877(g) of the Social Security Act Due to Declaration of COVID-19 Outbreak in the United States as a National Emergency Effective March 1, 2020

Since the regulatory environment surrounding these blanket waivers continues to change, parties negotiating space arrangements or amendments thereto in response to COVID-19 should, in good faith, try to fit such arrangements within one of the Stark Law exceptions (e.g., rental of office space exception) to reduce any compliance risks; but if those parties are unable to draft the agreement to comply with the Stark Law, the blanket waivers may provide some compliance shelter and reduce the risk of sanctions from CMS. In these cases, entities must be sure to maintain accurate and detailed records regarding their application of a blanket waiver, including a specific explanation showing the parties entered into the agreement for an express purpose related to the COVID-19 pandemic.

Pinnacle Healthcare Consulting – A Partner for the Brave New Healthcare Industry

PHC can assist in risk management and mitigation for industry participants affected by the COVID-19 pandemic.

- PHC will provide assistance in reviewing and advising on Waivered Arrangements;
- PHC will provide FMV Opinions where necessary;
- PHC will research market data and document logical, sequential support for arrangements; and
- PHC will maintain the workpaper and documentation to defend our opinions and efforts.

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