

Understanding Physician Lease Agreements & The Anti-Kickback Statute

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The rental of space in a physician's office to a renter who, herself, provides health-related services creates a landlord-tenant arrangement between the physician and the renter. The potential and actual abuses that have arisen from these arrangements have become so significant that the Office of the Inspector General ("the OIG") of the Department of Health published a Special Fraud Alert in February 2000 regarding how numerous arrangements may be in violation of the Federal anti-kickback statute.

As noted in the Special Fraud Alert, "the OIG is concerned that in such [rental] arrangements [between physician-landlords and other health-related providers]," the rental payments may be disguised kickbacks to the physician-landlords to induce referrals." Rental arrangements are usually deemed suspicious based on 1) the appropriateness of the rental agreement (i.e. whether any rent should be charged at all for the space provided); 2) the rental amount; 3) time and space considerations (i.e. how much space is rented and how the rent is calculated based on how often the space is used by the renter); or a combination of all three.

Rental Amount: The most prominent of these considerations is the rental amount. The rent must be "at fair market value, be fixed in advance and not take into account, directly or indirectly, the volume or value of referrals or other business generated between the parties." In the event that the tenant is paying above fair market value for the leased space then the OIG shall assume that the tenant is paying the landlord for the referral of patients. In the event that the tenant is paying below fair market value for the leased space then the OIG shall assume that the tenant is referring patients to the landlord for a reduced rental fee.

Rental Space: Second in prominence is time and space consideration. Renters should only rent space from the physician-landlord of a size and for a time that is reasonably necessary to carry out the renter's business purpose for the rented space. The OIG specifically warns that the "rental of space that is in excess of the [renter's business needs] creates a presumption that the payments may be a pretext for giving money to [the physician-landlord] for their referrals." The rent must be prorated based on the amount of space and duration of time the space is used. The prorated rent is based on three components: 1) space used exclusively by the renter; 2) common space within the physician-landlord's office; 3) common space within the physician-landlord's building. As to exclusive space, the OIG has specified the formula for proration of the annual rate as follows:

$$\frac{\text{Annual rent of primary lease}}{\text{No. of work days/year}} \times \frac{\text{Sq. ft. exclusively occupied by supplier}}{\text{Total office sq. ft.}} \times \frac{\text{Tenant hours}}{\text{Landlord hours}} \times \frac{\text{Tenant days per year}}{\text{Landlord days per year}} = \frac{\text{Supplier's annual rent for exclusive space}}{\text{Landlord days per year}}$$

As to so-called common space, the charge for common space must be apportioned among all physicians and subtenants that use the common space.

Safe harbor: It must be emphasized that rental agreements are not, by themselves, in violation of the law. However, for an arrangement to be immune from prosecution under the anti-kickback statute, the following criteria (known as “safe harbor criteria”) must be met:

- the agreement is set out in writing and signed by the parties
- the agreement covers all of the premises (i.e. the spaces or areas) rented by the parties for the term of the agreement and specifies the premises covered by the agreement
- if the agreement is intended to provide the lessee (i.e. the renter) with access to the premises for periodic intervals of time (i.e. on a part time) rather than on a full-time basis for the term of the rental agreement, the rental agreement specifies exactly the schedule of intervals, their precise length, and the exact rent for such intervals
- the term of the rental agreement is for not less than one year (i.e. the agreement must be for at least one year)
- the aggregate (or total) rental charge is set in advance, is consistent with fair market value in arms-length transactions, and is not determined in such a way that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare or a state health care program
- the total space rented does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental

The Federal anti-kickback statute forbids the knowing and willful “soliciting, receiving, offering or paying anything of value to induce referrals or items or services payable by a Federal health care program.” Such an arrangement constitutes a serious crime punishable by a fine of up to \$25,000, imprisonment or both. The participants of such an arrangement may also be excluded from Federal health care programs and be subject to civil money penalties. Though beyond the scope of this brief discussion, the aftermath of prosecution under the anti-kickback statute, both criminal and civil, may include the commencement of an investigation by the Office of Professional Medical Conduct (whose powers include the revocation of a medical license), investigations by other insurance companies (who may exclude the physician from their panels) and referrals to other regulatory agencies and parties.

Even in this brief discussion, the complexity of compliance with the anti-kickback statute and the potential, far-reaching complications of being found in violation of the statute are significant issues. Physicians who are currently renting space from health-care related providers, or leasing space to other physicians, are strongly encouraged to review their arrangements for potential violations of the anti-kickback statutes with their legal counsel.

If you should have questions regarding leases, contracts, or transactional matters of any kind, please contact Mathew J. Levy, Esq. at 1-800-445-0954.