



HAWAII HEALTH SYSTEMS
C O R P O R A T I O N

"Touching Lives Every Day"

COMPLIANCE ALERT 10-2

Stark Law: October 1, 2009 Amendments Affecting "Per-Click Leases," "Percentage of Revenue Leases," and "Under Arrangements" Services

CMS recently implemented the previously announced "Final Rule" (2009 IPPS Final Rule) that amended several provisions of the Stark Law. These changes were previously announced in 2008 but implementation was delayed until October 1, 2009.

"Per Click" Space and Equipment Leasing Arrangements Generally Prohibited

CMS now prohibits leases for space or equipment that are physician-owned based on "per click" or "per unit of service" use. Specifically, CMS now bans per-click lease payments from physician lessors to designated health service (DHS) entities for services the entities render to those physicians' patients. This is because CMS felt that there were inherent problems with referrals between the two entities.

If the lessors are non-physician owned or there are no referrals taking place, then the "per click" leases are still allowed. Finally, "Block-lease" arrangements where physicians lease time on a piece of equipment or a service for a certain number of hours per month are still allowed although these arrangements must be structured properly. The "per-click" prohibition does not apply to personal service or other employment arrangements.

"Percentage of Revenue" Lease Arrangements Prohibited

The new CMS rule bars the use of formula-based arrangements based on percentage of revenue raised, earned, billed, collected, or otherwise attributable to the service performed or business generated in the space or through the equipment use. The final rule amends the current Stark exceptions for the rental of office space, the rental of equipment, fair market value compensation arrangements, and indirect compensation arrangements. The

rule essentially prohibits most percentage-based arrangements for space or equipment between DHS entities and referring physicians.

“Under Arrangements” Transactions with Referring Physicians Prohibited

An “under arrangements” relationship is a specific type of situation where physicians supply items and services to DHS entities but do not bill for the services themselves. Such an “under arrangements” relationship exists, for instance, where a hospital bills for a service under its provider number but the service was actually provided by another entity. The two main forms of “under arrangements” are: 1) Contractual arrangements between a hospital and a physician or physician group practice, and; 2) joint venture agreements where a hospital and the physician or physician group have ownership interest in a company that, in turn, contracts with the hospital to provide these services.

Until October 1, 2009, only entities that actually billed Medicare for DHS were considered “DHS entities.” After, October 1, 2009, however, the regulatory definition of “entity” also includes the entities that perform services that are in turn billed as DHS by another entity. These types of arrangements are curtailed under the new CMS rule. Basically, this means that any entity that provides inpatient or outpatient services is now a DHS entity.

CMS has tightened the regulation of these “under arrangements” situations as CMS saw them as circumventing the limitations on the self-referral prohibitions inherent in Stark law. Under the new rule, any financial relationship between the service provider and the physicians who refer to it for services that the hospital bills “under arrangements” are prohibited unless they comply with a Stark exception. However, meeting a Stark exception to protect this type of “under arrangements” relationship is difficult.

This change basically eliminates a physicians’ ability to maintain an ownership interest in these types of service providers. As a note, this change does not include entities that lease or sell space or equipment used to perform the services, furnishes supplies used in the management of the services (if not separately billable), or provides services such as management or billing.

CMS continues to watch physician financial arrangements to implement what they interpret as Congress’ intent in Stark law. Careful review by legal counsel is necessary and required for all HHSC arrangements involving physicians, physician ownership, or physician financial relationships.