

2017 Physician Fee Schedule Includes Clarification of Space and Equipment Rental Exception Under Stark Law

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The Department of Health and Human Services Center for Medicaid and Medicaid Services (“CMS”) recently finalized the Calendar Year 2017 Physician Fee Schedule (“2017 Fee Schedule”), which includes a restatement of a provision under the law known as the “Physician Self-Referral Law” or “Stark” (42 U.S.C. § 1395nn). Under Stark, which was initially enacted on December 19, 1989, physicians are generally:

1. Prohibited from making referrals for certain designated health services (“DHS”) payable by Medicare to an entity with which the physician (or an immediate family member) has a financial relationship (ownership or compensation), unless an exception applies; and
2. Prohibited from filing claims with Medicare (or billing another individual, entity, or third party payor) for those referred services.

Stark has a number of specific exceptions, one of which is for arrangements that involve the rental of office space or equipment. The Stark regulations have addressed the arrangement of rental of office space or equipment in several rulemakings. Sections 1877(e)(1)(A)(iv) and (B)(iv) of the Act specifically provide that for an arrangement involving rental of office space or equipment to satisfy the relevant exceptions to Stark, the rental charges over the term of the lease must be set in advance, be consistent with fair market value, and not be determined in a manner that takes into account the volume or value of any referrals or any business generated between the parties.

CMS had, in regulatory provisions that became effective in 2009, added a requirement that rental charges for office space or equipment not be determined using a formula based on per-unit of service rental charges, to the extent that such charges reflect services provided to patients referred by the lessor to the lessee (“Per Unit Rules”). Most providers already comply with this provision. Since 2009 there has been some question as to CMS’ authority in issuing the Per Unit Rules, which prompted CMS to re-issue the same Per Unit Rules and to clarify its rulemaking authority under Section 1877(e)(1)(B)(vi) of Stark.

In the final 2017 Fee Schedule, CMS has now “re-finalized” a limitation on the types of “per-unit of service” compensation formulas that may be used for determining office space and equipment rental charges. Specifically, CMS has included a requirement that rental charges for the lease of office space or equipment may not use a formula based on per-unit of service rental charges, to the extent that such charges reflect services provided to patients referred by the lessor to the lessee. CMS has emphasized that the rule is not an absolute prohibition on rental charges based on units of service furnished. Rather, per-unit of service rental charges for the rental of office space or equipment are permissible, but per-unit of service rental charges, where the lessor generates the payment from the lessee for referral to the lessee for a service to be provided in the rented office space or using rented equipment, are prohibited.

In its commentary related to the Stark changes, CMS argued that the reason for finalizing the rule is its continued concern that when physicians have a financial incentive to refer a patient to a particular entity, the incentive can affect utilization, patient choice, and competition. CMS also argues that where referrals are controlled by those sharing profits or receiving remuneration, the medical marketplace suffers since new competitors cannot win business with superior quality, service, or price.

CMS also pointed to two notable advisory opinions in which the Office of Inspector General of Health and Human Services (“OIG”) expressed its concern with per-unit of service compensation arrangements under the federal Anti-Kickback Statute. Specifically, in Advisory Opinion 03-08, the OIG stated that “‘Per patient’, ‘per click’, ‘per order’, and similar payment arrangements with parties in a position, directly or indirectly, to refer or recommend an item or service payable by a federal healthcare program are disfavored under the Anti-Kickback Statute. The principal concern is that such arrangements promote overutilization...” Additionally, in Advisory Opinion 10-23, the OIG noted that the arrangement that was the subject of the opinion “involves the ‘per-click’ fee structure, which is inherently reflective of the volume or value of services ordered and provided...”

Finally, the 2017 Fee Schedule also includes an updated list of CPT codes that will be covered by Stark, effective January 1, 2017. This list is available on the **CMS website** (https://www.cms.gov/medicare/fraud-and-abuse/physiciansselfreferral/list_of_codes.html) and generally has expanded the codes which are covered in areas of physical therapy, occupational therapy, radiology (particularly mammography and PET), as well as certain preventative screening tests. Physicians should check this list and adjust referrals and financial arrangements accordingly if items or services for which they refer federal patients have been included as a Stark covered service.

Physicians with concerns about these changes to Stark and how they may be impacted should contact the listed Roetzel attorneys to discuss further.

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