IMPLEMENTING A TIMESHARE LICENSE: SIX THINGS TO CONSIDER

Earlier this year, we reported on several benefits associated with the new Stark exception for timeshare arrangements. While we believe that, under many circumstances, the new timeshare exception is an improvement over the space lease exception, it does have several limitations. Before a health care provider enters into a timeshare license that is designed to fit within the new timeshare exception, we recommend that the following be considered.

1. Parties. The arrangement must be between one of the following: (a) a physician and a hospital; (b) a physician organization and a hospital; (c) a physician and a physician organization; or (d) a physician organization and a physician organization. If the arrangement is not between the parties described in the previous sentence, the new timeshare exception is not available.
2. E/M Services. The space, equipment, personnel and supplies must be predominantly used for the provision of evaluation and management services to patients. This requirement has been viewed by some as a substantial limitation associated with the new timeshare exception. While this does force the parties to the arrangement to identify and monitor the scope of services that will be provided in the space, we do not believe that it is a substantial limitation. In many cases, timeshare lease agreements (structured under the Stark rental of office space exception) are used by physicians to provide evaluation and management services to their patients. This requirement does, however, require that the licensor monitor how the space is being used by the licensee. The licensor will want to build certain protections into its license agreement to ensure that the licensee does not provide services beyond evaluation and management services.
3. Term. Unlike other Stark exceptions, the new timeshare exception does not require that a timeshare arrangement include a one-year term. This additional flexibility can be a double-edged sword. On one hand, it allows parties to structure short-term timeshare arrangements that are limited in duration or long-term open-ended arrangements with no expiration date. On the other hand, open-ended arrangements could easily fall out of compliance if not periodically reviewed. For example, compensation under the arrangement, if not reviewed from time to time, may fall outside of the range of fair market value.
4. No Schedule. One of the benefits available to health care providers under the new timeshare exception is that a fixed occupancy schedule is not required. While this is a welcomed benefit, we believe that a fixed schedule or scheduling guidelines may be warranted. The licensor, for example, will likely want to know in advance when a specialist will be using the licensed space and equipment. Without a schedule or scheduling guidelines, it could be difficult for the licensor to track how often the licensee uses the space and equipment or to schedule other specialists for the clinic.
5. Non-Exclusive Use. Unlike the Stark rental of office space exception, the new timeshare exception does not require that the space be exclusively used by the timeshare licensee. In fact, a timeshare arrangement designed to satisfy the new timeshare exception cannot grant a possessory leasehold interest. This means that the arrangement must be structured as a license, and, in most cases, a license does not grant exclusive use of the space described in the arrangement. This can present several challenges for the licensor. For example, if the licensed space is designed for a single occupant, it may not be appropriate to structure the arrangement as a timeshare license. Instead, the licensor may want to consider leasing the space using a Stark-compliant timeshare lease agreement. Other challenges may exist as well. If the space is made available to the licensee on a non-exclusive basis (as opposed to exclusive use), using a market rent rate for traditional timeshare leasing arrangements may not be appropriate. Valuation professionals may apply a different compensation methodology to address the fact that a licensee is given non-exclusive use of the space and equipment.
6. Existing Timeshare Leases. Until the new timeshare exception was published, health care providers structured timeshare arrangements as lease agreements in order to comply with the Stark rental of office space exception. If a health care provider operates existing timeshare clinics that are subject to timeshare lease agreements, introducing a timeshare license arrangement may present several challenges. For example, space and equipment may be shared under the new timeshare exception. However, space being leased exclusively to a timeshare tenant cannot be shared. Doing so could cause the existing timeshare lease agreement to no longer satisfy the exclusive use requirement under the Stark rental of office space exception. Other issues may exist as well, including a scenario

where a timeshare tenant pays more or less than a timeshare licensee for the same space and equipment.

If you would like additional information about this topic, please contact:

- Andrew Dick at (317) 977-1491 or adick@hallrender.com;
- Robert A. Hicks at (317) 977-1433 or rhicks@hallrender.com;
- Douglas J. Kochell at (317) 977-1412 or dkochell@hallrender.com;
- Joel D. Swider at (317) 429-3638 or jswider@hallrender.com; or
- Your regular Hall Render attorney.