

THREE QUESTIONS TO CONSIDER BEFORE DONATING SPACE TO PHYSICIANS FOR CHARITABLE USE

Donating space for charitable use may come at a price for health care providers under the Stark Law if they are not careful. The Stark Law^[1], which was designed to prevent physicians from referring patients to provider entities in which the physicians have a financial interest, can ensnare even those providers acting with the best of intentions, including where they are acting consistent with their charitable purpose. The statute lacks an intent element and its regulations include a formulaic list of exceptions that do not anticipate every case where rigid application of the statute would not be necessary to serve the Stark Law's underlying purpose. Notably, to date, there is no general exception to the Stark Law permitting health care providers to donate space to a physician for free or at a reduced cost.

At first glance, the application of the Stark Law appears counterintuitive in these circumstances. The regulations and the policy reasons behind the Stark Law are not seemingly implicated where providers are simply attempting to use existing resources to improve their communities and expand care to those who cannot afford it. However, these arrangements create the *threat* of improper referral incentives, given that a health care provider may receive referrals, some of which may be for substantial care, from the physician using the free space. Although the policy concerns underlying the Stark Law might not be implicated in every charitable use lease, they are clearly implicated in some of these leases.

But even without a general exception for charitable use leasing arrangements, health care entities are not forced to abandon these leases altogether. In the face of this regulatory uncertainty, providers can still reduce the risk of the Stark Law's application by drafting or reforming these leasing agreements either (1) to fit within an existing exception to law (e.g., the Space Lease Exception), or (2) to avoid the Stark Law altogether. With 25 exceptions to date,^[2] rather than address here the applicability of each Stark Law exception to these leases, the focus is instead on identifying potential issues for providers to consider prior to entering into charitable space arrangements to improve the chances that such arrangements will not collide with the Stark Law.

The following list is not exhaustive and cannot categorically guarantee that the Stark Law will not apply. However, by carefully considering each of the following, health care entities can reduce the risk that their good-faith attempts at improving care in their communities do not have unintended consequences.

1. IS FEDERAL MONEY INVOLVED IN REFERRALS BETWEEN THE PROVIDER AND PHYSICIAN?

The Stark Law applies when a physician makes a referral to a provider for the provision of certain services for which payment may be made under a federal health care program (e.g., Medicare and Medicaid). The Stark Law conditions receipt of federal reimbursement on providers not entering into "sweetheart" deals whereby financial incentives, rather than the quality of care, dictate physician referrals. Where there are no referrals of federal health care program services involved, the Stark Law likely will not apply.

Importantly, depending on the relationship between the provider and physician, it may not be enough to draft a charitable use lease to prohibit referrals involving federal funds that arise out of the free use of the space at issue. Assuming any "financial relationship" exists between the parties (discussed in detail below), the Stark Law takes aim at that *entire* relationship. So while no federal funding may be involved in a referral stemming from the free use of the space, the physician may still make a referral at a later date, or as part of a separate arrangement between the physician and provider, where Medicare or Medicaid reimbursement is sought, thus triggering the Stark Law's application. The existence of the "financial relationship" between the two connects what would otherwise appear to be a wholly separate benefit and referral. Therefore, the question these parties must ask themselves is not whether federal health care program services are involved in the free use of the space but whether any federal health care program services are referred in connection with the parties' relationship. If the physician using the space to provide free or reduced care does not accept Medicare and Medicaid altogether and does not refer federal health care program business, then the risk of noncompliance with the Stark Law is greatly reduced as no federal health care funds are implicated. But, for many providers, it may be difficult to find physicians who do not accept Medicare and Medicaid or who can ensure that no such referrals will be made to the entity going forward. Fortunately, as discussed below, receipt of federal funds does not categorically foreclose providers from this type of in-kind donation.

2. WILL ANY PATIENTS BE REFERRED TO THE PROVIDER ENTITY?

As noted above, unless an exception applies, the Stark Law generally prohibits physicians who have any "financial relationship" with a provider from making referrals for certain services to that provider for which reimbursement may be received from Medicare and Medicaid. The definition of "financial relationship" in the Stark regulations is broad, encompassing *any* ownership or compensation arrangement involving remuneration.[3] "Remuneration" is similarly given an expansive meaning, including "any payment or other benefit . . . in cash or kind." [4] Giving a physician free or reduced cost access to facility space likely falls under the umbrella of in-kind compensation, thus triggering the Stark Law.

To avoid this result, when drafting an agreement for charitable use, providers and physicians can include a provision that precludes any referrals between the two. Once again, because the Stark Law looks at the entire relationship between the parties, it would be insufficient for the lease to prohibit any referrals that arise solely out of the charitable use of the space. The Stark Law would look past those referrals to *all* referrals between the two. Likewise, it would similarly be insufficient to state merely that neither party is entering into the lease with the intent of receiving referrals. As noted previously, there is no intent element in the Stark Law, which applies even where neither party's motives are nefarious. Only by wholly excluding referrals between the provider and physician will this particular risk of the Stark Law be eliminated.

These "no referral" arrangements may be particularly useful in areas where several referral options exist, such as urban areas with multiple hospitals and hospital systems. These leases also may be appropriate where the physician is not from the locality. The physician may be a specialist who is traveling to the area to provide evaluation and management services for patients suffering a particular or rare ailment. But, unfortunately, including this provision may be impractical in other cases, especially those in rural areas where patients have limited care options. As important, in some cases prohibiting referrals between the parties would frustrate the underlying policy objectives of the Stark Law. For example, if the provider offers the best treatment for a certain condition, the physician would be doing a disservice to that patient by not referring the patient to that provider.

However, as described below, even where there are referrals, providers can still reduce the likelihood that the Stark Law will apply.

3. IS THE PROVIDER DIRECTLY DONATING THE SPACE TO THE PHYSICIAN, OR IS THERE AN INTERVENING SEPARATE ENTITY?

Where an intervening entity exists between the provider and the physician, the Stark Law may not apply, depending on the circumstances. For example, a hospital could donate the space to a separate nonprofit corporation, who in turn leases the facility space to the physician at no cost. However, faithful adherence to the Stark Law depends on the ownership of the nonprofit corporation. To make sure providers do not use corporate separateness to avoid the Stark Law and prevent narrow or formulaic readings of that statute, the accompanying regulations clarify that "financial relationships" include indirect compensation arrangements.[5] That means where an "unbroken chain" of entities or persons who each have a financial relationship in each other exists between the physician and provider, the Stark Law may prohibit any referrals between the two no matter the number of entities in between, unless a statutory or regulatory exception applies.[6]

Importantly, where the ownership interests between the physician and provider do not overlap, the relationship may not be "financial" under the Stark Law. In that case, there is an intervening entity that can prevent the parties from creating the type of referral incentives the Stark Law was enacted to prevent. If properly and independently structured, the entity becomes a kind of referee, making sure everyone is playing by the rules. It may therefore be permissible for a hospital to donate space to a nonprofit corporation that hires physicians or procures physician volunteers to provide the free or reduced care.

Even where an intervening entity separates the provider entity and the physician, both parties should be mindful of the Anti-Kickback Statute, which similarly aims at preventing a provider or physician's financial interests from dictating care. Unlike the Stark Law, the Anti-Kickback Statute is not a strict liability offense and applies *only* where an individual or entity "knowingly" or "willfully" solicits or receives remuneration for referrals reimbursed by Medicare or Medicaid. Although the application of the Anti-Kickback Statute does not solely depend on the existence of a financial relationship between the parties, a charitable space agreement may implicate the statute even if there is a chain of multiple intervening entities between the space provider and the referral source. However, as long as neither party has the requisite intent, these charitable leases will not run afoul of the Anti-Kickback Statute.

Even without a specific Stark Law exception that permits providers to donate space to physicians to provide charity care, providers can reduce the risk of the Stark's Law application by carefully considering the questions above, as well as the policy foundations and objectives of the Stark Law.

If you have questions or would like additional information about this topic, please contact [Addison Bradford](#) at 317.977.1403 or abradford@hallrender.com or your regular Hall Render attorney.

[1] 42 U.S.C. § 1395nn.

[2] 42 C.F.R. § 411.357.

[3] Id. § 411.354(a)(1)(ii), (c).

[4] Id. § 411.351.

[5] Id. § 411.354(a)(1)(ii), (c).

[6] Id. § 411.354(c)(2).

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