

Minimizing Risks for Healthcare Providers

Minimizing Risks For Healthcare Providers

By David S. Barmak, Esq.

SPECIAL FRAUD ALERT FROM THE OFFICE OF THE INSPECTOR GENERAL

RENTAL OF SPACE IN PHYSICIAN OFFICES BY PERSONS OR ENTITIES TO WHICH PHYSICIANS REFER

On February 23, 2000, the Office of Inspector General (OIG) issued the following fraud alert that has been edited by Risk Management, Inc.:

THE CONCERN

A number of suppliers that provide health care items or services rent space in the offices of physicians or other practitioners. Typically, most of the items or services provided in the rented space are for patients, referred or sent, either directly or indirectly, to the supplier by the physician-landlord. In particular, such rental arrangements between physician-landlords often take the form of:

- comprehensive outpatient rehabilitation facilities (CORFs) that provide physical and occupational therapy and speech-language pathology services in physicians' and other practitioners' offices;
- mobile diagnostic equipment suppliers that perform diagnostic related tests in physicians' offices; and
- suppliers of durable medical equipment, prosthetics, orthotics and supplies (DMEPOS) that set up "consignment closets" for their supplies in physicians' offices.

The OIG is concerned that in such arrangements, the rental payments may be disguised kickbacks to the physician-landlords to induce referrals. The OIG has received numerous reports that in many cases, suppliers, whose businesses depend on physicians' referrals, offer and pay "rents" -- either voluntarily or in response to physicians' requests -- that are either unnecessary or in excess of the fair market value for the space to access the physicians' potential referrals.

THE LAW

The Anti-Kickback law prohibits any payments to induce referrals. The law recognizes that kickbacks can distort medical decision-making, cause overutilization, increase costs and result in unfair competition by freezing out competitors who are unwilling to pay kickbacks. Kickbacks are also thought to adversely affect the quality of patient care by encouraging physicians to order services or recommend supplies based on profit rather than the patients' best medical interests.

Section 1128B(b) of the Social Security Act (the Act) prohibits knowingly and willfully soliciting, receiving, offering or paying anything of value to induce referrals of items or services payable by a Federal health care program. Both parties to an impermissible kickback transaction are liable. Violation of the statute constitutes a felony punishable by a maximum fine of \$25,000, imprisonment up to five years, or both. The OIG may also initiate administrative proceedings to exclude persons from Federal health care programs or to impose civil money penalties for fraud, kickbacks and other prohibited activities under

sections 1128(b)(7) and 1128A(a)(7) of the Act. (2)

THE ARRANGEMENTS

The questionable features of suspect rental arrangements for space in physicians' offices may be reflected in three areas:

Appropriateness of Rental Agreements. The threshold inquiry when examining rental payments is whether payment for rent is appropriate at all. Payments of "rent" for space that traditionally has been provided for free or for a nominal charge as an accommodation between the parties for the benefit of the physicians' patients, such as consignment closets for DMEPOS, may be disguised kickbacks. In general, payments for rents of consignment closets in physicians' offices are suspect.

Rental Amounts. Rental amounts should 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. Fair market value rental payments should not exceed the amount paid for comparable property. Moreover, where a physician rents space, the rate paid by the supplier should not exceed the rate paid by the physicians in the primary lease for their office space, except in rare circumstances. Examples of suspect arrangements include:

- rental amounts in excess of amounts paid for comparable

property rented in arms-length transactions between persons not in a position to refer business;

- rental amounts for subleases that exceed the rental amounts per square foot in the primary lease;
- rental amounts that are subject to modification more often than annually;
- rental amounts that vary with the number of patients or referrals;
- rental arrangements that set a fixed rental fee per hour, but do not fix the number of hours or the schedule of usage in advance (i.e., "as needed" arrangements);
- rental amounts that are only paid if there are a certain number of Federal health care program beneficiaries referred each month; and
- rental amounts that are conditioned upon the supplier's receipt of payments from a Federal health care program.

Time and Space Considerations. Suppliers should only rent premises of a size and for a time that is reasonable and necessary for a commercially reasonable business purpose of the supplier. Rental of space that is in excess of suppliers' needs creates a presumption that the payments may be a pretext for giving money to physicians for their referrals. Examples of suspect arrangements include:

- rental amounts for space that is unnecessary or not used. For instance, a CORF requires one examination room and rents physician office space one afternoon a week when the physician is not in the office. The CORF calculates its rental payment on the square footage for the entire office, since it is the only occupant during that time, even though the CORF only needs one examination room;
- rental amounts for time when the rented space is not in use by the supplier. For example, an ultrasound supplier has enough business to support the use of one examination room for four hours each week, but rents the space for an amount equivalent to eight hours per week;
- non-exclusive occupancy of the rented portion of space. For example, a physical therapist does not rent space in a physician's office, but rather moves from examination room to examination room treating patients after the physician has seen them. Since no particular space is rented, the OIG will closely scrutinize the proration of time and space used to calculate the therapist's "rent".

PROTECTION

The Space Rental Safe Harbor can be used to protect legitimate

arrangements. The OIG recommends that parties to rental agreements between physicians and suppliers to whom the physicians refer or for which physicians otherwise generate business make every effort to comply with the space rental safe harbor to the anti-kickback statute. (See 42 CFR 1001.952(b), as amended by 64 FR 63518 (November 19, 1999)). When an arrangement meets all of the criteria of a safe harbor, the arrangement is immune from prosecution under the anti-kickback statute. The following are the safe harbor criteria, all of which must be met:

- The agreement is set out in writing and signed by the parties.
- The agreement covers all of the premises 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 with access to the premises for periodic intervals of time rather than on a full-time basis for the term of the rental agreement, the rental agreement specifies exactly the schedule of such intervals, their precise length, and the exact rent for such intervals.
- The term of the rental agreement is for not less than one year.
- The aggregate rental charge is set in advance, is consistent with fair market value in arms-length transactions, and is not determined in a manner 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 aggregate space rented does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental.

In addition, arrangements for office equipment or personal services of physicians' office staff can also be structured to comply with the equipment rental safe harbor and personal services and management contracts safe harbor. (See 42 CFR 1001.952(c) and (d), as amended by 64 FR 63518 (November 19, 1999)). Specific equipment used should be identified and documented and payment limited to the prorated portion of its use. Similarly, any services provided should be documented and payment should be limited to the time actually spent performing such services.

Visit other areas of our website for overview of our services, our experience and our attorney profiles.