

Special OIG Fraud Alert - Rental Of Space In Physician Offices

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The Office of Inspector General ("OIG") of the Department of Health and Human Services has released a Special Fraud Alert pertaining to physician-landlords and persons or entities that provide health care items or services to patients that are referred either directly or indirectly by their physician-landlords. The Special Fraud Alert is in response to reports received by the OIG that suppliers, whose businesses depend on physicians' referrals, offer and pay rental amounts, 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 OIG is concerned that such arrangements may be disguised kickbacks in violation of the federal anti-kickback statute.

The OIG identifies three questionable rental arrangements for space: (1) comprehensive outpatient rehabilitation facilities ("CORFs") that provide physical and occupational therapy and speech-language services in physicians' offices and other practitioners' offices; (2) mobile diagnostic equipment suppliers that perform diagnostic related tests in physicians' offices; and (3) suppliers of durable medical equipment, prosthetics, orthotics and supplies ("DMEPOS") that set up consignment closets for their supplies in physicians' offices.

SUSPECT RENTAL ARRANGEMENTS FOR SPACE

The OIG outlines three features of suspect rental arrangements for space: (1) the appropriateness of rental agreements; (2) the rental amounts; and (3) time and space considerations.

Appropriateness of Rental Agreement -

The threshold inquiry used by the OIG when examining rental payments is

whether payment for rent is appropriate at all. According to the Special Fraud Alert, payment of rent for space that traditionally has been provided for free or for a nominal charge as an accommodation for the benefit of the physicians' patients, such as consignment closets for DMEPOS, may be disguised kickbacks, therefore, in general payments for rent of consignment closets in physicians' offices are considered suspect.

Rental Amounts -

Rental amounts should be at fair market value, be fixed in advance and not take into consideration, directly or indirectly, the volume or value of referrals or other business generated. Fair market value rental payments should not exceed the amount paid for comparable property. 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. Examples of suspect arrangements:

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 modifications more often than annually;

rental amounts that vary with the number of patient 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;

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. Rental of space that is in excess of the suppliers' needs creates a presumption that the payments may be a pretext for giving money to physicians for their referrals. Examples of suspect arrangements:

rental amounts for space that is unnecessary or not used. For example, a CORF requires one examination room and rents physician office space one afternoon a week when the physician is not in the office. The rental payment is 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 the 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.

In addition, rental amount calculations should prorate rent based on the amount of space and duration of time the premises are used. The basis for any proration should be documented and updated as necessary. Depending on the circumstances, the supplier's rent can consist of three components: (1) exclusive office space; (2) interior office common space; and (3) building common space.

Apportionment of exclusive office space:

The supplier's rent should be calculated based on the ratio of the time the space is in use by the supplier to the total amount of time the physician's office is in use. In addition, the rent should be calculated based on the ratio of the amount of space that is used exclusively by the supplier to the total amount of space in the physician's office.

Apportionment of Interior Office Common Space:

If suppliers use common areas for their patients, such as a waiting room or restroom, it is appropriate for the suppliers to pay a prorated portion of the charge for such space. The charge for the common space must be apportioned among all physician subtenants that use the interior office common space based on the amount of non-common space they occupy and the duration of such occupation. Payment for the use of office common space should not exceed the supplier's pro rata share of charge for such space based upon the ratio of the space used exclusively by the supplier to the total amount of space (other than common space) occupied by all persons using the common space.

Apportionment of Building Common Space:

Where the physician pays a separate charge for areas of a building that are shared by all tenants, such as the lobby, elevator or maintenance, it is appropriate for the supplier to pay a prorated portion of that charge. As with interior office common space, the charge for the common space must be apportioned among all physician subtenants that use the interior office common space based on the amount of non-common space they occupy and the duration of such occupation.

SPACE RENTAL SAFE HARBOR

The OIG strongly recommends that parties to rental agreements between physicians and suppliers to whom the physicians refer or for which physicians otherwise generate business comply with the space rental safe harbor to the federal anti-kickback statute. An arrangement is immune from prosecution under the statute if it meets all of the criteria of the safe harbor which are as follows:

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 interval;

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 of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under the Medicare or a State health care program; and
The aggregate space rented does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental.

CONCLUSION

Physicians and health care providers and entities should examine any existing arrangements they are involved in and evaluate any arrangements that they are considering entering into and should consider speaking with legal counsel. In this day of ever-expanding scrutiny of the health care industry, physicians and health care providers and entities must be sure all their business transactions will pass governmental examination.

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