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CMS Issues Broad Stark Waiver Related to COVID-19

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In yet another example of coronavirus-related regulatory dispensation, on March 30, 2020, CMS announced that it will waive penalties for violations of the Stark Law in regard to compensation relationships between physicians and entities, such as hospitals, to which they refer if "solely related to" the Covid-19 pandemic. In particular, the waiver applies, among other things, to:

- violations of FMV requirements in the services, space and equipment lease exceptions,
- medical staff incidental benefits in excess of the regulatory cap,
- non-monetary compensation to physicians that exceeds the regulatory cap,
- interest free or low interest loans,
- use of space by group practices that does not meet the same building requirements, and
- violations of the signature requirements.

The following are examples of actions that would be deemed "related to the Covid-19 pandemic":

- diagnosis and treatment of Covid patients,
- securing the services of physicians to provide services even if unrelated to Covid-19,
- ensuring the ability and expanding the capacity of providers to meet patient needs,
- shifting patient care locations to alternative sites, and
- addressing medical practice or business interruptions.

CMS cites a number of specific examples of permissible activity including:

- paying a premium or below market compensation,
- free office space,

- non-monetary services and incidental benefit increases (e.g., food, child care, housing, clothing) beyond regulatory limits,
- providing hospital staff to assist private physicians' offices in staff training related to Covid-19, patient intake and treatment and care coordination tied to the crisis, and
- paying the physician's 15% EHR subsidy obligation.

The waiver only applies, "absent the government's determination of fraud and abuse." In this regard, the premise of the waiver is that the party is acting in good faith, and unable to meet the otherwise generally applicable exceptions, which may limit the benefit if interpreted literally; how does "unable" apply when technical compliance is feasible but at unnecessary delay and expense? Another concern is the use of the word "solely" before "related," because very few things are "solely" the product of another. Nevertheless, the examples of the types of arrangements that CMS would appear to bless provide some comfort as to how "unable" and "solely related" will be defined. The Stark waiver is welcome news to providers on the front lines, but must be utilized conservatively and only when reasonably necessary to facilitate prompt, quality and coordinated services during the emergency.

The waiver is effective March 1, 2020, and will last for the duration of the emergency.

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