

Eli's Rehab Report

Compliance: Safeguard Your Practice from Unforeseen Stark and Anti-Kickback Violations

Wellness centers: Fertile ground for profit or a ticking legal time bomb?

Creative business arrangements can be great, especially when you're looking for new ways to make income and soften the blows of decreasing insurance reimbursement.

For example, the growing trend today is the "wellness center" model, where a patient could see a physical therapist, nurse practitioner, acupuncturist, massage therapist, yoga instructor, nutritionist, and more, all under the same roof. Practitioners refer to each other, and the patient enjoys the one-stop-shop.

Not so fast: Even the most innocent situations could be grounds for trouble. "The Stark Law is a strict liability statute so it doesn't matter whether any of the parties had improper intent," notes attorney **Linda Baumann**, Partner with **Arent Fox** in Washington, DC.

Follow these basic pointers to make sure you're not in a glaringly illegal situation.

Physician + Medicare/Medicaid Triggers Stark

If you have a wellness center (or any type of rehab clinic, for that matter), a quick way to tell if you're entering risky territory with Stark is if your business has a relationship with a physician. Does your practice:

- Have a financial relationship with a physician?
- Have a financial relationship with an immediate family member of a physician?

If you can answer "yes," to either, does the physician refer any Medicare or Medicaid beneficiaries to you or your practice? If so, "the Stark Law is implicated," Baumann says.

"If you have a wellness center that has no physician ownership, that limits the role of Stark," says **David Glaser**, attorney with **Fredrikson & Byron** in Minneapolis ☐ but it doesn't eliminate the role of Stark, he says.

If a physician refers to the wellness center for services that are "designated health services" under Stark (which includes PT, OT, Speech, imaging, and labs), then any financial relationship with the physician must comply with Stark. "For example, if there is a physician who leases space from the center, or leases space to the center, the lease must meet the lease exception for Stark," Glaser says.

Tread carefully: Thinking of eliminating Medicare patients to put you in the clear? "If you don't accept any Medicare patients, that solves the Stark and anti-kickback issues, though simply refusing to bill Medicare can create problems as well," Glaser says. "Unless the physicians opt out of Medicare, they can't accept cash from a Medicare patient."

Also, opting out of Medicare is not permanent. "If you opt out you are out for two years, and you can't opt out only for a particular practice location," Glaser says.

Good to know: Although a physician relationship triggers Stark, a relationship with a nurse practitioner or physician

assistant will not. In Medicare, MDs, NPs, and PAs are usually interchangeable, but not in Stark, Glaser clarifies. "In another odd twist, NPs and PAs can't supervise diagnostic tests."

Follow Stark Exceptions to a Tee

Just because the Stark Law is implicated in your situation doesn't mean you're automatically breaking the law. Your financial arrangement with the physician simply must satisfy an appropriate Stark Law exception.

If a physician is part of the wellness center, then the center "needs to be sure its compensation formula complies with Stark and the physician does not receive any compensation for referrals of designated health services," Glaser says.

"Some of the exceptions apply to compensation arrangements, some apply to ownership interests, and a few apply to both types of arrangements," Baumann says. "Generally, compensation arrangements must be commercially reasonable and have to involve fair market value compensation that does not reflect the volume or value of referrals between the parties."

Don't miss: If your center is in an urban area, your best bet is to meet the in-office ancillary exception to Stark, as well. "That will have many requirements that include making sure 75 percent of the services provided by physicians who are part of the group are billed by the group, and 75 percent of the services billed by the group are performed by members of the group," Glaser says. "That can be an issue if there are physicians who are affiliated with the Center part-time."

Leave no stone unturned staying compliant with these exceptions. "Each exception has numerous other criteria, all of which must be satisfied to avoid violating the law," Baumann says. "It's also important to note that many terms have unique definitions under the Stark Law. These issues can get extremely complicated, depending on how the arrangements are structured."

Bottom line: Having a good healthcare attorney review your business arrangement is ideal and can save you a lot of hassle down the road.

Don't Get Kicked by Anti-Kickback

Everyone appreciates referrals, but be extremely cautious about rewarding or incentivizing them, especially if you work in close quarters with different practitioners who, naturally, refer to each other.

Under the federal anti-kickback statute (AKS), "it is a felony to offer, provide, request, or accept any payment if one purpose is to influence payments under a federal health care program," Glaser says. "Paying referral sources is a big problem."

Unlike Stark, where your intent doesn't matter, an AKS violation would require improper intent. However, AKS is implicated with Medicare and Medicaid, and, in fact, goes a bit further. AKS "applies to any financial arrangements that impacts federal health care program beneficiaries, e.g., TriCare and other programs in addition to Medicare and Medicaid," Baumann says.

Cash-pay patients do not fall under AKS.

Watch out: The prohibitions in the AKS have been broadly interpreted, Baumann says. For example, "they apply to remuneration, in cash or in kind, provided directly or indirectly, and it's not necessary for a physician to be involved. Moreover, even if an arrangement purports to apply to non-federal health care program patients, the AKS may be implicated if another arrangement that does involve federal health care programs would be affected, e.g., a 'swap.'"

The Stark Law has mandatory exceptions you must follow, while the AKS only offers voluntary "safe harbors" to stay compliant. However, "such compliance may be the safest way to prevent a violation of the law," Baumann says. "Note,

however, that the safe harbors require satisfaction of all the criteria they contain."

Don't Forget Your State Laws

Be sure to put state laws on your checklist because they can go further than Stark or AKS.

Example: Some states will not allow different professionals to jointly own a corporation and some may prohibit fee splitting, so, depending on the structure, a wellness center model may not jibe with your state law.

In the end, don't be afraid of taking referrals in-house if your wellness center structure abides by state law. "Referrals are just fine; it is when money [or offering free/below market space] gets involved that things get hairier," Glaser says. "The bottom line is that if you have money flowing to or from other medical professionals who refer to you, or get referrals from you, you want to make sure you have health care counsel who understand these laws review the relationship."

For a quick rundown of Stark and AKS visit

<http://oig.hhs.gov/compliance/provider-compliance-training/files/StarkandAKSChartHandout508.pdf>.