

## Eli's Rehab Report

### Compliance: Sharpen Your Stark Law Knowledge: Part 2

#### Learn the new twists on gifts, amending agreements, and more

As you may be well aware, the Stark law resurfaced in the headlines last fall with the publication of Stark III -- and both therapists and their referring physicians have been scrambling to get a handle on the latest changes.

**Background:** For Medicare and Medicaid cases, if a physician (or the physician's immediate family member) has any type of financial relationship with an entity, the physician may not make a referral to that entity for a designated health service (DHS) -- unless the arrangement falls under one of the Stark law's exceptions. (Physical therapy, occupational therapy and speech-language pathology are all considered DHS, and physicians may self-refer to them under certain Stark exceptions.)

In the last issue of Physical Medicine & Rehab Coding Alert, you read about several Stark III changes. Here are a few more you'll want to be aware of.

#### DME Services Still a Tricky Route

The "in-office ancillary exception" allows certain ancillary services to be performed in-house for a physician. For example, rehab services can be provided in a physician's office under certain circumstances. -- Most durable medical equipment (DME), however, was not protected by that exception. Nevertheless, some physicians provided DME in their offices thinking that the Stark Law was not implicated because the physician was "personally providing" the DME to the patient. -- And under the Stark Law, a personally performed service does not constitute a referral that triggers the Stark prohibitions. But now, under Phase III, it is much more difficult to use this analysis.

**How it works:** "If the doctor is personally providing the DME, that's OK," said **Wayne J. Miller, Esq.**, with Compliance Law Group in Los Angeles, in the Eli-sponsored audioconference "The Latest Stark Law Essentials From the Expert: Nail 'Phase 3' of the Final Rules." But that means the physician must do everything involved in supplying that DME, including the fitting, the training, ongoing support and maintenance, plus be a certified supplier, he added. "And CMS thinks it's unlikely that MDs will actually do this."

#### Want to Amend an Agreement? Not So Fast

If you're forming a space or equipment-lease contract with the physician, or with the rehab provider if you're a physician, you can't afford to be wishy-washy on your financial terms. That's because most Stark Law exceptions require a one-year term and that compensation must be "set in advance."

Further, the Stark III preamble contains language insisting these requirements mean that parties who want to change the rental charges can't amend the contract to do so. First they have to terminate the existing agreement, and then they can enter a new contract with the revised charges. -- However, they can't enter a new agreement until after the first year of the original lease term.

**Example:** A PT is leasing space in a physician office. According to Stark III, the physician can't change the rent by amending the contract during the term of the lease. -- "If she wants to modify the rent, she has to wait until after the first year, then terminate the lease and enter a new contract for the new amount." says **Linda Baumann, Esq., JD**, with Arent Fox in Washington, D.C. -- Of course, the Stark rental exceptions still require fair market value payment, she adds.

**Bottom line:** If you want to make amendments, the safest bet is not to make any until after year one, Miller said in his presentation. You should limit the amendments to non-compensation issues during the first year. "Financial modifications during the first year have to be carefully done because they could arguably be seen as changing because of the volume

or value of referrals -- and that's a very dangerous thing to do," he said.

Luckily, Stark III introduced a six-month holdover period-under the personal services exception-to offer a grace period to those trying to renegotiate agreements within the correct timeframe. "For example, if your agreement was due to terminate Jan. 1, and you were having trouble negotiating a new agreement, you'd still be protected for six months, assuming you were proceeding on the same terms," Baumann tells Eli. This rule, which previously-applied to space and equipment rentals, has been expanded to personal services as well-under Phase III.

### **Non-Cash-Compensation Rules Defined**

If you're a therapist who's used to giving gifts to a referral source, watch out. The "non-cash-compensation arrangement" exception caps your monetary gifts at \$300 per year, assuming they meet the-exception's other requirements. But the cap increases with inflation, Baumann says,-and has gone up to \$338/physician/year for 2008. So on the other side of the fence, for physicians, the total value of your gifts from DHS companies is limited to \$338.

If you find that you've accidentally received somewhat more than \$338,-and you return-the excess within six months, you'll-usually-be OK, Miller said.-However, "this really requires you to consider the gifts you're getting from physical therapy companies or others you're referring for DHS."

**Best bet:** Keep careful track of your gifts, or even better, "just don't accept gifts," Miller said.

**Resource:** To view the official text of Stark III law released in September, see <http://a257.g.akamaitech.net/7/257/2422/01jan20071800/edocket.access.gpo.gov/2007/pdf/07-4252.pdf>. To purchase a CD of Miller's presentation, go to [http://www.audioeducator.com/industry\\_conference.php?id=619](http://www.audioeducator.com/industry_conference.php?id=619).