

Do Stark waivers cover your rent break? Only if the break meets 'COVID-19 purposes.'

by: Roy Edroso

Effective Jul 2, 2020
Published Jul 6, 2020
Last Reviewed Jul 2, 2020

Ask Part B News

Question: *I understand there have been Stark Law waivers issued for the COVID-19 pandemic, and that one of the waivers covers rental arrangements that are under fair market value (FMV), which are usually forbidden under Stark. The shutdown has been hard on the finances of one of our clinics, and the health system that rents space to us, knowing it will be hard to find new tenants, has offered to forgive the rent on that clinic for a month or two to help it stay open. Would the Stark waivers allow such an arrangement?*

Answer: First, it's helpful to set the stage with some additional background. The federal anti-kickback statute (AKS) "prohibits any form of payment that rewards referrals or other business involving items or services payable by federal health care programs such as Medicare or Medicaid," explains Heather Macre, an attorney and director of the business litigation department at the Fennemore Craig law firm in Phoenix, Ariz.

AKS works in tandem with Stark Law, which "prohibits a physician from making referrals of items or services payable under federal health care programs to an entity with which the physician or an immediate family member has a financial relationship," Macre adds.

These "items or services" include rent, because rent has value and could be manipulated to deliver a kickback for referrals. Generally, you're OK if you have a written lease with a term of at least one year, your rent is consistent with FMV and "no part of the deal [is] contingent on the volume or value of referrals," Macre says. Normally, the idea of a rent moratorium — which presumably would be below market value — between medical organizations that might make referrals to one another would raise questions.

CMS issued the blanket Stark waivers effective March 1 (*see resource, below*). The waivers say that certain financial arrangements usually proscribed by Stark would, so long as they serve "COVID-19 purposes," be allowed for the duration of the public health emergency (PHE) "absent the government's determination of fraud or abuse."

One such allowance is "rental charges É that are below fair market value," according to the waivers.

The COVID-19 purposes are also specific, though, and here's where it gets sticky. There are six of them, and they are focused on a specific disease and its treatment. The first one, for example, is that the arrangement is necessary for "diagnosis or medically necessary treatment of COVID-19 for any patient or individual, whether or not the patient or individual is diagnosed with a confirmed case of COVID-19." It would be hard to show a rent break is needed for that.

Macre thinks the purpose that comes closest to matching your scenario would be "Addressing medical practice or business interruption due to the COVID-19 outbreak in the United States in order to maintain the availability of medical care and related services for patients and the community."

"Rent relief could certainly fall under business interruption," Macre says.

But can you demonstrate the practice needs the break to "maintain the availability of medical care and related services for patients and the community"?

Geoffrey R. Kaiser, senior counsel with the Rivkin Radler law firm in Uniondale, N.Y., has his doubts. "The fact pattern you describe has nothing to do with COVID-19 other than the fact that the economy took a downturn because of COVID-19 — that would be outside of those purposes," Kaiser says.

"If it's arguably related — if you needed [the rent break] for one of those purposes — then you'd have to document it," Kaiser adds. "But 'times are hard' is a little too attenuated for these purposes. The purposes were made part of the waiver in order to prevent an unlimited waiver of the Stark Law. It's designed as a response to the emergency."

It's not impossible to establish relevance. In fact, Kaiser points to a relevant example in the waiver announcement of an arrangement that would pass muster and suggests it could also apply to a rent holiday: "A hospital lends money to a physician practice that provides exclusive anesthesia services at the hospital to offset lost income resulting from the cancellation of elective surgeries to ensure capacity for COVID-19 needs or covers a physician's 15% contribution for electronic health records (EHR) items and services in order to continue the physician's access to patient records and ongoing EHR technology support services." Conceivably, the hospital could cover the practice's rent for the same reasons.

HI ROY

 My bookmarks

Current Issue

Click here to read latest issue.

QUICK LINKS



click icon to expand

Bottom line: If you want to be sure the feds won't find your rent break a Stark violation, you must be able to show real relevance to the pandemic and community need.

And even if you can, once the PHE ends, the rent should go back up to FMV.

"The 1135 waivers are temporary, so the protection will end when they do," Macre says.

Resource

CMS, "Blanket Waivers of Section 1877(g) of the Social Security Act Due to Declaration of COVID-19 Outbreak in the United States as a National Emergency," March 1: www.cms.gov/files/document/covid-19-blanket-waivers-section-1877g.pdf



[BACK TO TOP](#)



Part B News

- PBN Current Issue
- PBN User Tools
- PBN Benchmarks
- Ask a PBN Expert
- NPP Report Archive
- Part B News Archive

Coding References

- E&M Guidelines
- HCPCS
- CCI Policy Manual
- Fee Schedules
- Medicare Transmittals

Policy References

- Medicare Manual
 - 100-01
 - 100-02
 - 100-03
 - 100-04

[Subscribe](#) | [Log In](#) | [FAQ](#) | [CEUs](#)

[Part B Answers](#) [Select Coder](#)

Join our community!

- [Like us on Facebook](#)
- [Follow us on Twitter](#)
- [Join us on LinkedIn](#)

[Read and comment on the PBN Editors' Blog](#)

[Participate in PBN Discussion Forum](#)

[Contact the Part B News Editors](#)



[Our Story](#) | [Terms of Use & Privacy Policy](#) | © 2020 H3.Group