

## Stark Post-Waiver Compliance

In response to shifting healthcare needs due to COVID-19, many hospitals may have made decisions in reliance upon the blanket waivers of enforcement of the Stark Law issued by the Secretary of Health and Human Services effective March 1, 2020. Under these waivers, absent any determination of fraud or abuse, if conditions of the blanket waiver are met, CMS will pay claims for health services that may otherwise violate Stark.

Some examples of actions that may fall within the scope of the waivers include:

**Remember – all waivers will come to an end when declared by the Secretary.**

It is important to have a plan in place regarding how to handle COVID-19 arrangements when the waivers expire.

### Alterations to Compensation Agreements

- Increase in physician pay for serving COVID-19 patients
- Modifications to policies regarding how productivity is valued in compensation
- Providing meals, comfort items or on-site childcare with a value greater than \$36 per instance to medical staff physicians serving COVID-19 patients
- Providing CME related to COVID-19 supplies, food, isolation-related needs, childcare or transportation valued at an excess of the \$423 per year limit

### Use of Facilities and Supplies

- Renting additional office space or equipment from an independent physician practice at a rate below fair market value or at no charge
- Purchasing supplies from a physician practice at below market value
- Selling PPE to a physician or allowing them to utilize space at below market value
- Providing free use of medical office space on campus to allow physicians to treat patients not requiring inpatient care
- Providing free (or below fair market value) telehealth equipment to a physician
- Converting observation beds to inpatient beds to accommodate COVID-19 surge

### Financial Assistance

- Lending money at below market rates to a physician practice that typically serves the hospital to offset lost income due to COVID-19
- Physician owner lending money to the hospital to help cover operating expenses

### Medicare Restrictions and Referrals

- Referral of Medicare beneficiary to a home health agency owned by physician's family because no other agencies have capacity to handle patient

### Timing of Agreements

- Physician providing call coverage services to a hospital before the arrangement is finalized
- Receiving masks and gloves from a physician with in-office surgical capability prior to the purchase arrangement being finalized
- Physician establishes an office in a building owned by the hospital and begins treating patients before the lease arrangement is finalized

## The Waivers Are Going to Expire – Now What?

If your hospital entered into or amended agreements or engaged in activities **on or after March 1, 2020 in a good faith effort to provide care related to the COVID-19 outbreak in reliance on a waiver**, you have a few options as to how to proceed at the waivers' expiration.

### OPTION 1: TERMINATE THE AGREEMENT

*Did you enter into a rent agreement with a local physician's office for equipment at a rental rate below market value? Did you agree to provide free office space to a physician in a building owned by the hospital to provide service to patients not needing inpatient care? Did you provide free telehealth equipment to a physician?*

If you entered into a new agreement during the emergency period, one option is to terminate this agreement once the waiver expires. If you wish to continue this arrangement, the alternatives below may be options.

### OPTION 2: AMEND THE AGREEMENT

*Did you increase physician pay for working long hours related to COVID-19? Did you modify policies regarding how productivity is valued in compensation? Did you enter into new agreements or arrangements with providers that you wish to make permanent?*

With respect to the blanket waiver, if parties amend remuneration terms of an existing compensation arrangement during the medical crisis, the arrangement may again be modified to return to the original terms or to effectuate additional necessary modifications, as long as the following requirements are met:

- The arrangement is now in compliance with Stark;
- The amendment is determined before it is implemented;
- The formula does not take into account the volume or value referrals or other business generated by the referring physician; and
- The overall arrangement remains in place for at least one year following amendment.

The same can be done for new arrangements entered into during the emergency period that you wish to maintain – they can similarly be amended to be brought within Stark compliance.

### OPTION 3: JUSTIFY CONTINUATION

If you believe that the current arrangements are reflective of fair market value because of various factors – including the medical crisis continuing in your service area despite the termination of the waivers – you can attempt to justify the continuation of the arrangements under Stark. The justification for the continuation should be sufficiently documented.

### Learn More

Visit our [Barnes & Thornburg COVID-19 Resources](#) page for more insights about COVID-19.



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