

## CMS ISSUES STARK LAW BLANKET WAIVERS IN RESPONSE TO COVID-19 PANDEMIC

In an effort to ensure the availability and accessibility of health care items and services, the Centers for Medicare and Medicaid Services (CMS) has issued blanket waivers of sanctions under the federal physician self-referral law (also known as the Stark Law) in response to the COVID-19 pandemic (the “Stark Blanket Waivers”). The Stark Blanket Waivers are retroactive to March 1, 2020, and will protect only remuneration and referrals that are related to a broad set of “COVID-19 Purposes,” as more fully discussed below. While documentation regarding use of the Stark Blanket Waivers is not required to be submitted to CMS, providers should maintain contemporaneous records to ensure compliance. Such records are required to be made available to the Secretary of the Department of Health and Human Services upon request.

In general, the Stark Law (1) prohibits a physician from making referrals for certain “designated health services” (DHS) payable by Medicare to an entity with which he or she (or an immediate family member) has a financial relationship, unless all of the requirements of an applicable Stark Law exception are satisfied; and (2) prohibits the entity from filing claims with Medicare for DHS furnished pursuant to a prohibited referral, unless all of the requirements of an applicable Stark Law exception are satisfied. The Stark Law is a strict liability statute, such that the intent of the parties is irrelevant, and can pose barriers to DHS referrals that might otherwise be necessary or appropriate in an emergency situation.

Importantly, the Stark Blanket Waivers will only protect remuneration and referrals that are directly between a physician (or his or her immediate family member) or physician organization and a DHS entity, and are for “COVID-19 Purposes,” which includes the following:

- 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;
- Securing the services of physicians and other health care practitioners and professionals to furnish medically necessary patient care services, **including services not related to the diagnosis and treatment of COVID-19**, in response to the COVID-19 outbreak in the United States;
- Ensuring the ability and expanding the capacity of health care providers to address patient and community needs due to the COVID-19 outbreak in the United States;
- Shifting the diagnosis and care of patients to appropriate alternative settings due to the COVID-19 outbreak in the United States; or
- 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.

The Stark Blanket Waivers ensure that otherwise prohibited conduct will not be subject to sanctions, again to the extent that the remuneration and referrals are related to “COVID-19 Purposes.” Some examples of conduct that would be permissible under the Stark Blanket Waivers include, but are not limited to, the following:

- Compensation That is Not Fair Market Value. Hospitals will be permitted to pay physicians (or their immediate family members) compensation that is not fair market value to rent equipment or office space, or receive services, from physicians (or their immediate family members), and vice versa.
- Medical Staff Benefits. Hospitals may provide medical staff incidental benefits (e.g., meals, clothing, on-site child care, parking and other items or incidental services that are used on the hospital’s campus) to staff physicians in amounts that exceed current limits (\$36 per occurrence).
- Non-Monetary Compensation. Hospitals may provide non-monetary compensation to physicians and their immediate family members in amounts that exceed current limits of \$423 per calendar year, including, but not limited to, continuing medical education related to the COVID-19 outbreak, supplies, food or other grocery items, isolation-related needs (for example, hotel rooms and meals), child care, or transportation.



- **Modification of In-Office Ancillary Services Exception.** Physician referrals in a group practice for medically necessary DHS may be furnished by the group practice in a location that does not qualify as a “same building” or “centralized building.” This will allow group practices to furnish medically necessary DHS (such as MRIs and laboratory tests) from mobile locations.

Please note that any arrangement that implicates the Stark Law or the Stark Blanket Waivers should be carefully reviewed by legal counsel prior to implementation to ensure compliance and appropriate documentation.

For more information, the full text of the Stark Blanket Waivers may be accessed at: <https://www.cms.gov/files/document/covid-19-blanket-waivers-section-1877g.pdf>

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**As this pandemic unfolds, recommendations and requirements are being updated and changing at a rapid pace. If you need any assistance in understanding or addressing these issues, please contact the [Garfunkel Wild attorney](#) with whom you regularly work, or contact us at [info@garfunkelwild.com](mailto:info@garfunkelwild.com).**

**Make sure to check [Garfunkel Wild's event page](#) for all upcoming webinars that may address your present concerns.**

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