

NEWS ALERT

HEALTH CARE



In Light of COVID-19, CMS Issues Additional Waivers

By Daniel J. Kagan and Stephanie S. Sobkowiak | April 1, 2020

The Centers for Medicare and Medicaid Services (“CMS”) has issued additional waivers allowing for increased flexibility during the COVID-19 public health emergency (“COVID-19 Emergency”). Of particular importance is CMS’ blanket waiver of the Stark law (“Stark”), as related to those financial relationships and referrals that are associated with the COVID-19 Emergency. Specifically, CMS is waiving enforcement of Stark as it relates to the following relationships/referrals:

- (1) the diagnosis or medically necessary treatment of COVID-19 for any patient, regardless as to whether the patient has a confirmed case of COVID-19;
- (2) securing the services of physicians or other health care practitioners and professionals to furnish medically necessary patient care services as a response to the COVID-19 Emergency;
- (3) ensuring health care providers have the ability and can expand capacity to address patient and community needs due to the COVID-19 Emergency;
- (4) shifting the diagnosis and care of patients to appropriate alternative settings due to the COVID-19 Emergency; and
- (5) addressing medical practice or business interruption due to the COVID-19 Emergency in order to maintain the availability of medical care and related services.

The blanket waiver specifically waives Stark’s sanctions so long as the government does not determine there was fraud or abuse. CMS also provides specific examples, which are not exhaustive, to expand upon the types of financial relationships and referrals that are allowed pursuant to the Stark waiver. CMS’ examples include:

- (1) a hospital paying a physician above a previously-contracted rate in exchange for providing services for COVID-19 patients in a hazardous or challenging environment.
- (2) a hospital renting space from a physician practice at below fair market value or at no charge to accommodate a patient surge.
- (3) an entity providing free or reduced-cost telehealth software to a physician practice so it can provide telehealth services to patients practicing social distancing.
- (4) a hospital lending money to an anesthesia practice to offset lost income resulting from cancellation of elective surgeries to ensure capacity for COVID-19 patients.
- (5) referrals from a physician in a group practice for designated health services that are not provided in accordance with the Stark in-office ancillary services exception’s same building or centralized building test.

If a specific scenario is not covered by the blanket waiver, health care providers and entities can request an individual waiver of sanctions under Stark through CMS. CMS will grant individual waivers on a case-by-case basis. These requests will require the requestor to provide specific details about the actual or proposed financial relationship between the referring physicians and the referred-to entity.

In addition to the waiver of Stark, CMS has also issued other important waivers affecting health care providers. Below, we summarize some of these waivers; however, you can find a full list of the CMS waivers by clicking [here](#).

Hospitals

- Waiver of enforcement of components of the Emergency Medical Treatment & Labor Act (“EMTALA”).
- Increased flexibility with verbal orders, waiving certain Medicare conditions of participation, allowing for authentication of the verbal order to occur later than 48 hours.
- Waiver of patient rights with regard to providing copies of medical records, patient visitation, and seclusion.
- Waiving certain requirements related to discharge planning in order to assist in expediting safe discharge and the movement of patients between care settings.
- Allowing physicians whose privileges expire at a hospital to continue practicing at the hospital and allowing new physicians to practice before privileges are granted.
- Flexibility as to what can be considered hospital space to accommodate patient surges.
- Waiver of certain requirements related to nursing services and nursing care plans.
- Waiver of the provider-based department requirements to allow hospitals to establish and operate as part of the hospital at any location that otherwise meets the Medicare conditions of participation that are not waived during the COVID-19 Emergency.

Providers

- Waiver of the requirement that out-of-state practitioners be licensed in the state where they are providing services. The Connecticut Department of Public Health issued a similar waiver. Please see our bulletin regarding that waiver by clicking [here](#).
- Waiver of certain provider enrollment requirements.

If you have any questions with regard to a CMS Waiver, please contact: Stephanie Sprague Sobkowiak, 203.772.7782 or ssobkowiak@murthalaw.com or Daniel J. Kagan, 203.772.7726 or dkagan@murthalaw.com

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