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Leasing to Health Care Tenants: What You Need to Know

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Leasing space to health care service providers requires the parties to consider regulatory and statutory requirements that may not be familiar to landlords traditionally leasing office space.

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Commercial office building landlords frequently find themselves leasing to health care provider tenants. A landlord may not consider doctor's offices or diagnostic labs as specialty uses, but there are several lease provisions that may warrant special attention when a tenant is a medical service provider. Additionally, while a commercial landlord who is not a physician or other health care service provider is not subject to the Stark Law[1] or the Anti-Kickback Statute,[2] larger health care tenants may nevertheless require that their landlords agree to comply with these regulatory laws. Accordingly, landlords will need to consider these regulatory requirements in their leases.

Stark and Anti-Kickback Laws

The Stark Law and the Centers for Medicare & Medicaid Services' (CMS's) companion regulations prohibit a physician from referring Medicare and Medicaid patients for "designated health services"[3] to an entity if the physician or a member of the physician's immediate family has a financial (including ownership/investment or compensation) relationship with the entity, unless a specified exception or safe harbor applies. The Stark Law also prohibits entities from presenting or causing to be presented a claim to any individual, payor or other entity for designated health services furnished under a prohibited referral.

The federal Anti-Kickback Statute prohibits any knowing and willful offer, payment, solicitation or receipt of any form of remuneration, either directly or indirectly, in return for, or to induce, (i) the referral of an individual for a service for which payment may be made by Medicare, Medicaid or another government-sponsored health care program or (ii) the purchasing, leasing, ordering or arranging for, or recommending the purchase, lease, order or arrangement of, any service or item for which payment may be made by Medicare, Medicaid or another government-sponsored health care program.

While commercial landlords who are not physicians (or the immediate family member of a physician) and who do not make or receive referrals to or from their medical service provider tenants are not subject to Stark and Anti-Kickback laws, some larger health care provider tenants may insist on strict compliance with these regulatory laws due to the heightened scrutiny health care entities receive from authorities. The good news for commercial

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landlords is that the safe harbor requirements under the Stark and Anti-Kickback laws are typically satisfied in the normal course of most arm's length commercial leases:

- *The lease must be in writing and signed by the parties.*

- *The lease must specify the premises to be leased by the tenant and cover all of the space leased between the parties.* Any storage space or other space that the tenant leases in addition to the premises should also be covered by the terms of the lease.

- *The lease term and any renewal terms must be for at least a one-year period*. Neither the initial lease term, nor any extension periods may be for less than one year.

- *Rental charges for the premises (including tenant concessions, such as allowances and free rent periods) must be at fair market value, consistent with arm's length lease transactions*. *The rent must be set in advance and cannot take into account the value or volume of any referrals*. This requirement is unlikely to be a concern when a landlord is not a medical service provider. For regulatory purposes, fair market value means the value of the rental property for general commercial purposes, not taking into account the intended use of the premises. To satisfy these safe harbor requirements, the parties should confirm that the health care provider tenant's lease terms are no more favorable than those of other tenants of the building. The "set in advance" requirement does not forbid future rental increases so long as there is either a definitive formula (such as adjustments tied to the consumer price index) for calculating how rent will be increased during the term or specified increases.

- *The space leased must not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental.* The leased premises must be used exclusively by the tenant and may not be shared with or used by the landlord or any entity related to the landlord.

Utilities and Medical Waste

Medical office and lab users often have more intensive water and electricity usage than typical office users. Additionally, health care service provider tenants may need an uninterrupted power supply, requiring the installation of back-up generators. The parties should determine how the cost of these utilities and services, which may exceed the usage by other tenants, will be paid for by the tenant under the lease.

Additionally, health care tenants typically generate medical waste. The parties should allocate the responsibility for the separation, storage, removal and disposal of this waste in the lease, all of which must be done in compliance with applicable laws. Additionally, the party responsible for the medical waste (typically the tenant) should indemnify the other party for any failures to comply with law or other claims related to the medical waste.

Security and Landlord Access

The Health Insurance Portability and Accountability Act (HIPAA) requires health care provider tenants to take steps to prevent the disclosure of protected health information (PHI). In the typical landlord-tenant context, any PHI exposure would likely be incidental only, but tenants should still ensure that their leases prevent landlords

from accessing or disclosing PHI. A tenant may require that their landlord follow the tenant's adopted security protocol before entering the premises, and the tenant should require that PHI and any equipment containing PHI be excluded from any landlord liens, so that the landlord has no legal right to acquire this property to satisfy any claims that the landlord may have. If a tenant stores pharmaceuticals or other regulated substances within the premises, the parties should determine who is responsible for providing security to the space. Often due to regulatory concerns, the tenant is most likely responsible for, and may be best equipped to contract for, any required security.

Tenant Improvements

Medical user tenants may require more expensive tenant improvements than typical office tenants. Floors may need to be reinforced to handle heavy equipment or lead-lined partitions may be needed for x-ray rooms. Exam rooms may each require sinks and special cabinetry. The parties should consider the scope of any potential build-out or tenant improvement allowance early on in the negotiation of lease terms.

ADA

The offices of health care service providers are typically considered places of public accommodation under the Americans with Disabilities Act of 1990 (ADA). Both the landlord and tenant are subject to accessibility requirements under the ADA. If upgrades to the building or property will be required under the ADA (such as increases in handicapped parking or ramps), the parties should negotiate who is responsible for the cost and performance of these improvements in the lease.

While every lease is unique, leasing space to health care service providers requires the parties to consider regulatory and statutory requirements that may not be familiar to landlords traditionally leasing office space. The parties should also negotiate the allocation of the responsibility for and costs of any specialty services or utilities provided to the tenant.

Endnotes

[1] §1877 of the Social Security Act, 42 U.S.C. 1395nn.

[2] 42 U.S.C. §1320a-7(b).

[3] Designated health services include clinical laboratory services; physical therapy services; occupational therapy services; outpatient speech-language pathology services; radiology and certain other imaging services; radiation therapy services and supplies; durable medical equipment and supplies; parenteral and enteral nutrients, equipment and supplies; prosthetics, orthotics and prosthetic devices and supplies; home health services; outpatient prescription drugs; and inpatient and outpatient hospital services.

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