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The lab rental space sham

By Darrell W. Contreras, Esq., CHC-F, CHPC, CHRC

In February 2000, the U.S. Department of Health and Human Services Office of Inspector General (OIG) published a Special Fraud Alert, “Rental of Space in Physician Offices by Persons or Entities to Which Physicians Refer” (Rental Space SFA).^[1] This Special Fraud Alert built on the Space Rental exception (Rental Space Safe Harbor) to the Anti-Kickback Statute (AKS). Twenty-four years later, too many labs continue to engage in rental space arrangements that are nothing more than an inducement to pay a physician or practice to refer more specimens to the lab. Moreover, physicians and practices have been drawn to the allure of an income stream from the lab based solely on the hollow assurance that they are safe from liability because the lab has included reference to the Rental Space Safe Harbor in the rental agreement. However, a settlement announcement released by the U.S. Department of Justice (DOJ) on April 29, 2024—in which three physicians and a contracted sales representative agreed to pay more than \$1.3 million—should serve as a wakeup call for labs and physicians that engage in rental space agreements.^[2]

The legal foundation

The AKS prohibits offering, paying, soliciting, or receiving remuneration to induce referrals of items or services covered by Medicare, Medicaid, and other federally funded healthcare programs unless a specific exception—safe harbor—is met. Civil and criminal liability can attach to AKS violations for both the party offering and the party receiving the kickback.

Some laboratories may attempt to justify the payment of rent to referring providers or practices by citing the Rental Space Safe Harbor which excludes rental payments from the definition of “remuneration” provided that six requirements are met.^[3] The fifth requirement is central to this discussion because the aggregate rental charge must be set in advance and “not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties.”

The primary issue with rental space agreements is that they completely depend on the physician or practice continuing to send specimens to the lab. Typically, labs will refute this by pointing to the language in the rental space agreement, specifically the statement that the agreement is not conditioned on the value or volume of past, current, or future business or referrals (“safe harbor language”). The attorneys who draft these agreements genuinely believe the agreement is not conditioned on referrals, but, unfortunately, the language in the agreement typically does not match the practical use of the rental space agreement.

If the practice stopped sending specimens to the lab, would the lab continue to make those rental payments? Has the lab ever made an express statement to a physician or a practice that there is no obligation to send specimens

to the lab that is renting the office space? In the sham rental arrangement—notwithstanding the safe harbor language in the agreement—the physicians and practices know that if they stop sending specimens to the lab, they will terminate the lease and stop making the office space rental payment. Put another way, the person receiving the benefit of the rental space payment believes that the payments for the rental space would stop if the person stopped referring specimens to the lab. As such, there is no avoiding the conclusion that as a practical matter and in the mind of the recipient, the rental space payment is conditioned upon the continued referral of specimens from the physician or practice to the lab. Therefore, the rental space arrangement does not comply with safe harbor requirement five and is entirely dependent upon the continuation of referred specimens to the lab. Even when the lab attempts to justify its rationale for renting space from a physician or a practice, there is no avoiding the fact that the lab is making a payment to a referral source and receiving specimens from that referral source.^[4]

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