



March 31, 2020

# HHS Issues Blanket Waivers of Stark Law to Address COVID-19 Pandemic

On March 30, 2020, the Secretary of the United States Department of Health and Human Services (“HHS”) exercised his authority to waive certain Medicare requirements during an emergency and issued blanket waivers of sanctions for noncompliance with 42 U.S.C. § 1395nn—better known as the physician self-referral law or the Stark Law—during the COVID-19 public health emergency. So long as conditions of a blanket waiver are satisfied, the Centers for Medicare and Medicaid Services (“CMS”) will pay claims for designated health services that may otherwise violate the Stark Law.

The Secretary issued 18 blanket waivers that cover a variety of financial relationships, and gave numerous examples of the application of the blanket waivers, including:

Blanket Waiver	Example
Remuneration from an entity to a physician may be above or below fair market value for the services provided.	A hospital pays physicians above their previously contracted rate for caring for COVID-19 patients in particularly hazardous environments.
Rental charges paid by an entity to a physician—or vice versa—to lease office space or equipment may be below fair market value.	To accommodate a patient surge, a hospital rents office space or equipment from an independent physician practice at below fair market value or at no charge.
A hospital may provide medical staff incidental benefits in excess of the current limit of \$36 per instance.	A hospital provides meals, comfort items (for example, a change of clothing), or on-site child care with a value greater than \$36 per instance to medical staff physicians who spend long hours at the hospital during the COVID-19 outbreak.
An entity may loan a physician money at an interest rate below fair market value or on terms not available from other lenders.	A hospital lends money to a physician practice that provides exclusive anesthesia services at the hospital to offset lost income resulting from the cancellation of elective surgeries to ensure capacity for COVID-19 needs.

These blanket waivers are limited to the circumstances described in the individual blanket waiver, and it is necessary to satisfy all conditions in the individual blanket waiver in order to rely upon it. Additionally, the blanket waivers apply only to remuneration and referrals related to the COVID-19 purposes, which include:

- Diagnosis or medically necessary treatment of COVID-19 for any patient, whether or not the patient is diagnosed with a confirmed case of COVID-19;
- Securing the services of physicians and other health care practitioners 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 of health care providers to address patient and community needs due to the COVID-19 outbreak in the United States;
- 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 blanket waivers have a retroactive effective date to March 1, 2020, and may be used only during the time that the Secretary has authority to issue waivers to address the COVID-19 outbreak. Additionally, those using the blanket waivers must make and keep records relating to the use of the blanket waivers and make them available to the Secretary upon request. While contemporaneous documentation is not required, the Secretary encourages those using the blanket waivers to develop and maintain records in a timely manner as a best practice.

Finally, it should be noted that as of this writing, the Anti-Kickback Statute remains in full force and effect, and the HHS Office of Inspector General (“OIG”) has not issued any corresponding waivers. However, also on March 30, 2020, OIG issued a statement that, “[f]or any conduct during this emergency [i.e., COVID-19] that may be subject to OIG administrative enforcement, OIG will carefully consider the context and intent of the parties when assessing whether to proceed with any enforcement action.”

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*This document is intended to provide you with general information regarding waivers for certain Medicare requirements from the Department of Health and Human Services in light of COVID-19. The contents of this document are not intended to provide specific legal advice. If you have any questions about the contents of this document or if you need legal advice as to an issue, please contact the attorneys listed or your regular Brownstein Hyatt Farber Schreck, LLP attorney. This communication may be considered advertising in some jurisdictions.*