

# Stark Law and Anti-Kickback Statute Issues in Healthcare Facility Leasing (2)

Written by: [Peter F. Imse](#), Esq. and [Gregory L. Silverman](#), Esq.

In our companion article entitled “Healthcare Facility Transactions Pose Unique Issues for Real Estate Practitioners”, we discussed some of the unique issues that face real estate practitioners when addressing the sale and leasing of healthcare facilities. That article mentioned various regulatory concerns that may apply to such transactions. In this article, we would like to discuss some of the key provisions of the Stark Law (42 USC §1395m) and Anti-Kickback Statute (42 USC §1320a-7(b)) (together, the “Laws”) that should be considered in the context of a healthcare facility lease.

## Stark Law and Anti-Kickback Statute

The restrictions contained in the Laws reflect the federal government's long-standing concern with economic referral relationships among individuals and entities who participate in federal healthcare programs – principally Medicare and Medicaid. The Stark Law prohibits a physician from referring patients needing designated health services to an entity in which the physician or an immediate family member has a direct or indirect financial interest, unless the relationship fits within an approved exception. The Anti-Kickback Statute makes it a crime to knowingly and willfully solicit or receive any direct or indirect remuneration for (a) referring a patient to a person who furnishes services, or (b) leasing any goods or facility. While the Stark Law applies only to physicians and their immediate family members, the Anti-Kickback Statute, applies to all persons and entities. The Stark Law is a strict liability statute, meaning that you are guilty if you violate it, even if you did not intend to violate it. The Anti-Kickback Statute, however, is a criminal statute and requires intent. Violations of the Laws can also give rise to violations of the Federal False Claims Act (31 USC § 3729, et. seq.).

Before entering into any healthcare facility lease, the parties and their respective ownership structures must be analyzed to identify actual or potential referral relationships that may violate the Laws. All restrictions, covenants and agreements that will apply to the property should also be scrutinized for the same reasons. If the property will be under outside management, the parties should also review the manager, its owners, and its powers. The primary goal of these reviews is to avoid any provisions in a lease or related document that confer an economic benefit upon a party that could be deemed to be a “referral” that is prohibited by the Laws.

## Exceptions and Safe Harbors

A statutory exception to the Stark Law and a similar Safe Harbor under the Anti-Kickback Statute (together, the “Exceptions”) permit parties to enter into certain rental arrangements that would otherwise violate the Laws, provided that the parties satisfy a number of criteria, including, without limitation:

1. The terms of the lease must be commercially reasonable.
2. The lease must be in writing, it must be signed by the parties, and it must identify all of the leased space.
3. The lease must have a term of at least one year, and, if the lease is terminated during the first term, the parties may not enter into a new lease until end of the first year of the original term.
4. The rent must be fixed in advance, and the amount of the rent must be consistent with commercial fair market values. The rent cannot be contingent on the value of referrals or the volume of business that is generated between the parties, nor can the rent reflect any additional value for the fact that the leased premises are located near a referral provider (i.e. a hospital or doctor's office). Whenever feasible, the parties should obtain an appraisal to support the rent and other fees that are to be charged to the tenant.
5. The base rent may not be amended during the term of the lease unless strict limits are complied with. If the lease includes provisions for the rent to increase, the lease must include a specific, verifiable and commercially reasonable formula to determine the amount of the increase.
6. Payments for common area charges cannot exceed a pro rata share of costs based on square footage.

7. The leased space cannot exceed what is reasonable and necessary for tenant's legitimate business purposes, and it must be used exclusively by tenant. However, certain subleases are permitted, if each sublease and subtenant independently qualify under the Exceptions.

8. The lease may provide for renewal terms, but the adjusted base rent during any renewal at term should be based upon new appraisal at the time of each renewal.

9. A holdover rental cannot exceed six months and must be on the same terms as the original lease (though a reasonable "penalty" rent is permitted).

### **Conclusion**

As this overview makes clear, healthcare facility leasing involves complicated considerations at the intersection of real estate and healthcare regulatory law. If applicable to a proposed transaction, the Stark Law and its Exceptions, and the Anti-Kickback Statute and its Safe Harbor impose significant limitations on the permissible terms of such leases. Due to the breadth and complexity of the issues involved, this article should not be relied upon to make legal decisions, and all parties involved in a healthcare facility lease should seek advice of experienced counsel.