

Can We Share? Sharing Ancillary Service Facilities Under The Self-Referral Laws

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Many small or solo practices wishing to offer ancillary services – such as lab or x-ray – cannot afford to do so because the costs of providing the services, including equipment, space and personnel, exceed potential revenues. Can two or more practices share these costs, thereby allowing each to provide the service? The answer is “it depends.” It depends on the particular service the practices wish to offer, how the practices are organized and where they are physically located.

A sharing arrangement among physicians is different than a joint venture. In a joint venture, the service is typically provided through the venture and the participants share in the profits and losses. If the service is a “designated health service “ under the Stark Law or a covered service under Stark’s New York counterpart, the New York Health Care Practitioner Referrals Law, physicians participating in the venture would be prohibited from referring Medicare, Medicaid or commercial payer business to the venture. A sharing arrangement, on the other hand, involves practices sharing the costs, but not the profits or losses of the particular service and can be structured so that it complies with the requirements of the Stark Law and the New York Health Care Practitioner Referrals Law.

If the proposed service is covered under either of these self-referral laws, the sharing practices may offer the service to their Medicare, Medicaid and commercial patients so long as each practice satisfies the “in-office ancillary services” exception provided under both laws. Note that, particularly in the imaging area, the New York Health Care Practitioner Referrals Law covers more modalities than the Stark Law. For example, while dexascans and nuclear cardiology services are not designated health services under the Stark Law, they are covered under the Health Care Practitioner Referrals Law. To qualify for the in-office ancillary services exception, each practice must separately meet the laws’ supervision, location and billing requirements.

1. Supervision. The services must be furnished personally by the referring physician or a member of his or her group practice or by individuals who are “directly supervised” by the referring physician or group practice member. For Stark Law purposes, the supervision requirement is the same level of supervision that would apply under Medicare payment and coverage rules for the specific service. Supervision by independent contractor physicians hired by the practice is permitted under the Stark Law, but not under the New York Practitioner Referrals Law, which requires supervision by an employee of the practice.

2. Location. The sharing practices must occupy the same building in which the ancillary services are being provided. The services could be furnished in the office of any of the sharing practices or in a separate office provided it is in the same building as the sharing practices.

3. Billing. Each practice must bill for the services provided to its own patients. If the service includes a technical component, each practice must independently satisfy the Medicare billing requirements. Generally, the billing entity must own or lease the equipment involved, perform the test in premises it owns or leases for that purpose and have its bona fide employees perform the test. A sharing arrangement, covering equipment, space and/or personnel, can be structured to satisfy this requirement.

Although a sharing arrangement may also implicate other legal issues – such as pension, tax and anti-kickback – these issues are manageable provided that there is no impediment under either the Federal or State self-referral laws to referrals by the sharing practices.

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Designated health services include 10 categories of services including lab, certain imaging services, radiation therapy, PT, OT, DME, inpatient and outpatient hospital services, among others. Services covered under this law include lab, imaging, radiation therapy, pharmacy, and PT.