Many physicians serve their patients better and boost their revenues by offering ancillary services in their offices or from locations they control. Across Kentucky, southern Indiana, and southern Ohio, we see physicians providing an ever widening array of CAT scanning, MRI, and other noninvasive imaging services, physical and occupational therapy services, medication based pain management services, cardiac catheterization and other invasive diagnostic and therapeutic procedures, and other medical services, medications, and durable items.

The Kentucky certificate of need and licensure rules do not present significant barriers to Kentucky physicians' provision of these services in many instances. The Kentucky statutes state that the Kentucky Cabinet for Health Services has no power to require providers to obtain a certificate of need or a special facility or service license if the new activity is offered through a "private office" or a "private clinic" of one or more physicians.

This exemption is subject to a significant exception if the amount spent by the physicians' "office" or "clinic" for certain equipment and related items exceeds an amount established by regulation. The current "capital expenditure minimum" is $1,831,594. There are all sorts of ragged edges to these rules regarding which expenses are counted against that amount and what exactly constitutes a "private office or clinic" of physicians. The Certificate of Need Office in the Cabinet for Health Services is always ready to respond to requests for clarification by stating its own views in advisory opinions. Appeals are available if an applicant disagrees with the opinion or an "affected person" believes the opinion strays from the proper application of Kentucky law.

An additional important issue rises, however, from the federal Stark Law. Kentucky Medical News readers know that the Stark Law provides, as a general matter (and subject to many exceptions), that a physician may not refer a patient to an entity for its provision of any of the "designated health services" ("DHS") listed in the Stark Law if the physician has an ownership interest in, or a compensation arrangement with, the entity, and if the entity is to receive payment from Medicare or Medicaid for its provision of the DHS.
Physicians' Ancillary Services-What is "Ancillary"?

The Stark Law contains a very important exception from this general rule for "in-office ancillary services" provided by an entity which qualifies as a physician "group practice."

The Centers for Medicare and Medicaid Services ("CMS") stresses in its Phase I regulations under the Stark Law which became final early this year that CMS believes the word "ancillary" is a vitally important part of the "in-office ancillary service exception." One portion of the regulations states that for this exception to apply the receipt of the DHS, whether an imaging service, a physical or occupational therapy service, or whatever, may not be the "primary reason the patient comes in contact with the referring physician or his or her group practice."

The CMS official commentary on the regulations states that CMS believes group practices may not use "the in-office ancillary services exception to operate enterprises that are functionally nothing more than self-referred DHS enterprises, providing minimal services that are not DHS so as to comply nominally with the exception and capture DHS profits."

If a physician group needs to use the in-office ancillary service exception to avoid a potential Stark Law problem, it must face up to this question: will the patients who use this new service really be coming to our office primarily just to use this service (bad answer under Stark Law) or is this new service truly ancillary to our existing practice (good answer under Stark Law)?

Physicians, be careful. Lawyers, get ready.

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