

What anti-kickback and fee-splitting legal issues arise when physicians or other healthcare providers lease space?

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Many physicians, chiropractors, acupuncturists, and other healthcare practitioners want to know whether they are **fee-splitting** when they rent a room hourly from a medical practice or other healthcare facility or practitioner. The answer, of course, depends on the arrangement, including whether other aspects of it raise **fee-splitting**, **Stark**, or **anti-kickback** considerations. Let's focus for now just on the hourly rental. The problem with this is that the payment for the space varies by volume or value of patients seen. On its face, that raises anti-kickback enforcement red flags. We have to think through these potential anti-kickback and fee-splitting legal issues when drafting a sublease for the healthcare practitioner. Note that there are pros and cons to having a separate sublease with the LLC/Management Company as lessor and practitioners as lessees. In part, this depends on whether your landlord for the overall space requires that the practitioners sign a separate sublease (which typically has space for landlord consent), or, can simply sign a consent to sublease arrangements that are agreed to by practitioners in the management agreement. As to the terms of the sublease, OIG addressed rental arrangements in its [Special Fraud Alert on Rental of Space in Physician Offices by Persons or Entities to Which Physicians Refer](#). States such as California, New York, Massachusetts, Texas, Arizona, and so on, often look to federal law as guidance when interpreting or applying their own fee-splitting and anti-kickback law. In this case, the anti-kickback Fraud Alert restates the space rental safe harbor to federal anti-kickback law (42 CFR §1001.952(b)). In this safe harbor, all of the following criteria must be met:

- The agreement is set out in writing and signed by the parties.
- The agreement covers all of the premises rented by the parties for the term of the agreement and specifies the premises covered by the agreement.
- If the agreement is intended to provide the lessee with access to the premises for periodic intervals of time rather than on a full-time basis for the term of the rental agreement, the rental agreement specifies exactly the schedule of such intervals, their precise length, and the exact rent for such intervals.
- The term of the rental agreement is for not less than one year.
- The aggregate rental charge is set in advance, is consistent with fair market value in arms-length transactions, and is not determined in a manner that takes into account the volume or value of any referrals or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare or a State health care program.
- The aggregate space rented does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental.

Elaborating on the space rental safe harbor, in its Fraud Alert, the OIG expressed concern that rental payments may be disguised kickbacks to induce referrals. The OIG pointed to three “questionable features” of rental arrangements:

- The appropriateness of rental arrangements.
- The rental amounts.
- Time and space considerations.

With respect to rental amounts, OIG states that rent should be:

- At FMV. This means that among other things:
 1. The rent should not exceed the amount paid for comparable property.
 2. Moreover, where a physician rents space, the rate paid by the supplier should not exceed the rate paid by the physicians in the primary lease for their office space, except in rare circumstances.
- Fixed in advance.
- Not take into account, directly or indirectly, the volume or value of referrals or other business generated between the parties.

Thus, an *hourly* rental arrangement would raise enforcement concerns, as it would not be “fixed in advance” (i.e., as compared with an annual lease), and, the overall rent would vary based on the volume of patients, unless the total number of leased hours over the 12-month period is set forth in the sublease and is treated on a “use it or lose it” basis. To give an example of “use it or lose it:” the sublease could specify that the sublessee practitioner is leasing 10 hours per month, with a schedule mutually agreed-upon in advance of each month; if the parties cannot agree on a schedule for a particular month, the prior month’s schedule would remain in place; if, during a given month, the sublessee needs the space for only 5 hours, the sublessee would still need to pay for the full 10 hours (i.e., still pay for 5 unused hours); conversely, if during a given month, the sublessee needs the space for more than 10 hours, the sublessee would not be able to use the space for any excess time beyond 10 hours during that month. The sublease can specify that the number of hours can be adjusted by mutual agreement prospectively (and not retroactively to account for any “unused hours”) but only on an annual basis (i.e., every 12 months). “Use it or lose it” arrangements can reduce the risk of scrutiny regarding hourly arrangements. OIG notes that suspect arrangements include, among others:

- rental amounts in excess of amounts paid for comparable property rented in arms-length transactions between persons not in a position to refer business;
- rental amounts for subleases that exceed the rental amounts per square foot in the primary lease;
- **rental amounts that are subject to modification more often than annually;**
- **rental amounts that vary with the number of patients or referrals;**
- **rental arrangements that set a fixed rental fee per hour, but do not fix the number of hours or the schedule of usage in advance (i.e., “as needed” arrangements);**
- rental amounts that are only paid if there are a certain number of Federal health care program beneficiaries referred each month; and
- rental amounts that are conditioned upon the supplier’s receipt of payments from a federal health care program.

(We have added the bold for emphasis). With respect to time and space considerations, OIG notes that: Suppliers should only rent premises of a size and for a time that is reasonable and necessary for a commercially reasonable business purpose of the supplier. Rental of space that is in excess of suppliers’ needs creates a presumption that the payments may be a pretext for giving money to physicians for their referrals. Examples of suspect arrangements include:

- rental amounts for space that is unnecessary or not used...
- rental amounts for time when the rented space is not in use by the supplier...
- non-exclusive occupancy of the rented portion of space. For example, a physical therapist does not rent space in a physician's office, but rather moves from examination room to examination room treating patients after they have been seen by the physician. Since no particular space is rented, we will closely scrutinize the proration of time and space used to calculate the therapist's "rent."

Thus, having different practitioners with non-exclusive occupancy of various rooms, is problematic. OIG goes on to note that: In addition, rental amount calculations should prorate rent based on the amount of space and duration of time the premises are used. The basis for any proration should be documented and updated as necessary. Depending on the circumstances, the supplier's rent can consist of three components: (1) exclusive office space; (2) interior office common space; and (3) building common space. OIG details these three components as follows: 1. Apportionment of exclusive office space – The supplier's rent should be calculated based on the ratio of the time the space is in use by the supplier to the total amount of time the physician's office is in use. In addition, the rent should be calculated based on the ratio of the amount of space that is used exclusively by the supplier to the total amount of space in the physician's office. For example, where a supplier rents an examination room for four hours one afternoon per week in a physician's office that has four examination rooms of equal size and is open eight hours a day, five days per week, the supplier's prorated annual rent would be calculated as follows:

Physician Office Rent Per Day	% of Physician Office Space Rented by Supplier	% of Each Day Rented by Supplier	No. of Days Rented by Supplier Per Year	
annual rent of primary lease no. of work days per year	sq. ft. exclusively occupied by supplier total office sq. ft.	4 hours 8 hours	52 days (i.e., 1 day per week)	Supplier's annual rent for exclusive space

2. Apportionment of interior office common space – When permitted by applicable regulations, rental payments may also cover the interior office common space in physicians' offices that are shared by the physicians and any subtenants, such as waiting rooms. If suppliers use such common areas for their patients, it may be appropriate for the suppliers to pay a prorated portion of the charge for such space. The charge for the common space must be apportioned among all physicians and subtenants that use the interior office common space based on the amount of non-common space they occupy and the duration of such occupation. Payment for the use of office common space should not exceed the supplier's pro rata share of the charge for such space based upon the ratio of the space used exclusively by the supplier to the total amount of space (other than common space) occupied by all persons using such common space. 3. Apportionment of building common space – Where the physician pays a separate charge for areas of a building that are shared by all tenants, such as building lobbies, it may be appropriate for the supplier to pay a prorated portion of such charge. As with interior office common space, the cost of the building common space must be apportioned among all physicians and subtenants based on the amount of non-common space they occupy and the duration of such occupation. For instance, in the example in number one above, the supplier's share of the additional levy for building common space could not be split 50/50. Note that the OIG will have enforcement authority over those practitioners billing under Medicare/Medicaid, although the OIG alert will be influential to state authorities as well. We recommend using the OIG formula and criteria to guide your renting arrangements with practitioners, as a risk management strategy with regard to potential anti-kickback enforcement by state authorities, even where practitioners are not billing Medicare/Medicaid and therefore not subject to federal anti-kickback law. [Contact](#) our fee-splitting and anti-kickback attorneys whenever you have legal questions such as whether you can rent a room hourly from a medical practice for your professional healthcare practice. Whether you are a physician, physician assistant, physical therapist, nurse, chiropractor, acupuncturist or massage therapist; or whether you operate a medical practice, medical spa, or other kind of healthcare practice, it's good to know the law.



Contact our [healthcare law](#) and [FDA attorneys](#) for legal advice relevant to your healthcare venture.