



**A LOOK AT SOME LEGAL IMPLICATIONS OF
COVID-19 ON HEALTHCARE REAL ESTATE**



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Complex Challenges, Smart Solutions
For Healthcare Real Estate

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Healthcare Landlords and Tenants are Facing a Number of Critical, Immediate Issues

- How should parties address a tenant's business closure or workforce reduction and revenue losses affecting its ability to operate, pay rent and repair its leased space?
- How should a landlord respond to a tenant's default or request for rent or other relief, taking into account the landlord's own responsibilities to pay maintenance costs, real estate taxes and debt service on the property?
- How do Stark and Anti-Kickback restrictions impact these decisions if there is a referral relationship between the landlord and tenant?

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Lease Review

- Force Majeure
- Business Interruption/Rent Loss Insurance
- Impossibility of Performance

Type of Relief Requested

- Temporary reduction or deferral to be repaid over time
- Temporary abatement with no repayment
- Permanent rent reduction
- Permanent lease termination

Healthcare Industry Impacted

- Executive Orders Prohibiting Elective Surgeries
- Dentists
- Any physician practice not directly involved in treatment of COVID-19

How to Determine if Rent Relief is Appropriate

Get detailed information from the tenant

- Find out the type of services a practice provides
- What percentage of business elective versus non-elective
- Dig into tenants business and financial status
- Show math on impossibility of performance
- State other types of relief sought such as thru SBA
- YTD financial statements for tenants and guarantors
- Provide previous two years audited financial statement for tenant and guarantors

How to Determine if Rent Relief is Appropriate

Prepare a checklist to send to tenant

- Provide copies of state and federal income tax returns
- Ask if any principals are foregoing compensation
- Are any other vendors or creditors or suppliers giving relief?
- Ask for business plan
- Ask for operating budget for remainder of the year

Pre-Negotiation Letter

Consider pre-negotiation letter encouraging frank and honest discussions

- No obligation to restructure
- No waiver of rights or remedies
- Confirmation that lease and guaranty remain in full force and effect
- No reliance on statements made in negotiations
- Not admissible as evidence in litigation
- Confidentiality provisions

Capital Stack Considerations

- Landlord must work with lender and any equity capital providers to obtain approvals
- Caution to avoid default under loan obligations or equity documents
- May require loan modification or amendment to JV Agreement
- If aggregate rent relief would limit ability to service debt, then landlord must seek corresponding mortgage relief

Practical Considerations Regarding Enforcement

- Moratorium on Evictions
- Hurdles to Enforcement

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Fraud & Abuse Considerations

- Federal Anti-Kickback Statute
 - Applies to Medicare, Medicaid, TRICARE & certain other federal healthcare programs
 - OIG Policy Statement re COVID-19
- Stark Law (federal Physician Self-Referral Prohibition)
 - Narrower in scope than AKS
 - Applies to Medicare and Medicaid (FFS)
 - Stark Law Blanket Waivers re COVID-19

Anti-Kickback Statute

- In general, prohibits any exchange of value in return for referrals or other business payable by federal governmental healthcare programs
- Intent-based statute
- Safe harbors
 - Lease of space
 - Lease of equipment
- OIG Policy Statement (4/3/2020)
 - Protects arrangements that qualify for Stark Law Blanket Waivers
 - Not retroactive and expires with end of COVID-19 emergency

Stark Law

- Only applies to Medicare and Medicaid (FFS)
- Prohibits physician from making patient referrals for DHS payable by Medicare to an entity the physician (or immediate family member) has a financial relationship with
- Cannot refer DHS or submit Medicare claim for referred DHS, unless Stark Law exception is satisfied
- Primary exceptions at play for current discussion
 - Space Lease
 - Equipment Lease

Stark Law – Blanket Waivers

- Apply nationwide and enacted (3/30/2020) to:
 - Ensure availability of healthcare services for Medicare and Medicaid beneficiaries during COVID-19 emergency
 - Allow healthcare providers to receive payment for certain claims that, absent a waiver, would violate Stark Law
- Covers a variety of arrangements, including lease of space
- Only apply to arrangements linked to a valid COVID-19 Purpose
 - Broad definition, but not unlimited
 - No need to make specific request to CMS to use waiver
 - NOTE—Not needed when arrangement meets existing Stark Law exception
- Retroactive to 3/1/2020; expires with end of COVID-19 emergency



What to Do

- Document how arrangement is appropriate as relief because of COVID-19
- Document specific terms and reasons for the arrangement
- Best practices include:
 - Policies & procedures to ensure consistent evaluation and no tie of relief to volume or value of referrals or other business between the parties
 - Development and documentation of business case
 - Third-party opinion on FMV and commercial reasonableness, as warranted
- Not permanent—Terminate, or restructure to comply, when COVID-19 emergency ends

Important to Remember

- AKS broader than Stark Law
- OIG deferral of enforcement only tied to ability to show compliance with Stark Law Blanket Waivers
- Blanket Waivers retroactive to 3/1/2020; OIG Policy Statement effective for arrangements after 4/3/2020
- OIG will continue to enforce against truly fraudulent arrangements
- AKS/Stark Law relief expires with COVID-19 emergency declaration
- **Document, document, document!!!**

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POLICY AND PROCEDURE AND COMMERCIAL
REASONABLENESS OPINIONS FOR RENT CONCESSION
REQUESTS IN RESPONSE TO COVID-19



Rent Concession Requests

- Tenants initiated requests for rent concessions immediately, even before the financial economic impacts were widely felt
- Important to treat tenants consistently when it comes to addressing Rent Concession Requests
- Develop specific policy and procedure on how to address Rent Concession Requests

Policy and Procedure for Rent Concession Requests

- Determine available remedies for Rent Concession Requests
- Create a method to track and process all Rent Concession Requests
- Obtain supporting documents from qualified third-party advisors

Commercial Reasonableness Opinions – Qualifications of the Third-Party Expert

- What education, training, and professional credentials do they have?
- How many years of experience do they have in healthcare real estate?
- What kind of experience do they have in healthcare real estate?

Commercial Reasonableness Opinions – Information that will be evaluated

- Tenant's lease
- Information about the tenant's business
- Information about the business impacts to tenant's business as a result of COVID-19
- Alternative funding arrangements
- Relief sought

Commercial Reasonableness Opinions – Analysis

- More likely to be found commercially reasonable if the need for the Rent Concession Request can be linked directly to COVID-19
- More likely to be found commercially reasonable if other possible remedies have been exhausted
- More likely to be found commercially reasonable if the appropriate remedy has been sought
- More likely to be found commercially reasonable if it can be shown that the landlord is getting something in return for the Rent Concession

Questions?

At this time, we will answer any questions that have been submitted during the webinar.



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