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Developing a healthy real estate compliance program

- » Healthcare real estate arrangements are ripe targets for regulators.
- » It's important to educate team members on regulatory requirements—everyone is accountable.
- » The team should develop standardized policies, deal documents, and review processes.
- » For complex deals, empower staff to elevate to appropriate advisors.
- » It's essential to continuously track real estate portfolios and lease renewals and conduct regular audits.

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Today's healthcare environment is as complex and competitive as ever. In addition to changes resulting from the Affordable Care Act, ICD-10 classification codes, and bundled-payment programs, providers face an ever-changing regulatory environment. The federal government has enacted multiple regulations that seek to prohibit healthcare providers from engaging in potentially unscrupulous behaviors, with acute focus on referral relationships and protection of patients' best interests. The first of these regulations, the False Claims Act, dates back to 1863. The Anti-Kickback Statute and Stark Law were introduced in the 1970s and 1980s. Regulations promulgated under these statutes are regularly updated to reflect current issues and trends. These regulations are far-reaching and apply to financial relationships between hospitals and physicians (or other providers), including employment, call coverage, medical directorships, and, increasingly, real estate arrangements.

Notable settlements for real estate violations

- ▶ A Pennsylvania health system, in 2014, paid a \$1,529,281 settlement for leasing space to physicians at below market rates to induce referrals of patients;¹
- ▶ A Utah health system, in 2013, paid a \$25,500,000 settlement for 18 lease arrangements without written and executed leases, which were also inconsistent with fair market value;²
- ▶ A Tennessee health system, in 2012, paid a \$16,500,000 settlement for rental rates in excess of fair market value.³

As Judge Albert Diaz noted in his Opinion in the *Tuomey* case: "It seems as if, even for well-intentioned healthcare providers, the Stark law has become a booby trap rigged with strict liability and potentially ruinous exposure—especially when coupled with the False Claims Act."⁴ Thus, as healthcare organizations seek balance between the ability to advance their business initiatives, while staying within the lines and avoiding potentially crippling penalties, the implementation of compliance



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programs has become critical for hospitals and health systems of all sizes.

Central components of a healthcare real estate compliance program

Certain key components must lie at the center of any compliance program in order to cultivate a corporate culture that proactively seeks to avoid regulatory infractions.

Education

As noted above, the applicable statutes are complex and filled with specialized terminology. Team members with real estate responsibilities should be thoroughly educated on the applicable statutes and their application to day-to-day operations. Real estate transactions should be structured to meet the applicable exceptions and safe harbors, namely the Stark exceptions for rental of office space or timeshare licenses and the Anti-Kickback safe harbor for space rental. It is important for team members to be educated on the specific requirements in order to meet one of these exceptions and ensure that real estate leases are structured appropriately. Organizational best practices may include mandatory training for new staff, recurring annual training for all team members, and development of a compliance handbook that documents policies and procedures, including transaction checklists and other protocol documents.

Standardization

Standardization is a driving force behind all compliance programs, both to streamline processes and to help ensure consistency of outcomes, thereby decreasing the chances of an inadvertent regulatory misstep. The creation of standardized, systematic real estate processes can both simplify the preparation and review of transaction documents and ensure a defensible document trail if an arrangement were ever called into question.

Examples of standardized documents and processes may include:

- ▶ **Standard lease document** – A consistent form template that incorporates uniform legal and business provisions ranging from operating expense treatment to medical use restrictions. Certain standards may be adopted universally for all properties, but others may be market or property specific.
- ▶ **Standard leasing policies** – Inevitably, individual lease requirements will vary. Even tenants in the same building can have varied needs related to lease terms or tenant improvement allowances. Yet, the development of standard, market-based leasing policies is an important step to define certain boundaries for lease rates, tenant improvement allowances, and lease escalation methods. Instances that fall outside of these bounds should be carefully evaluated and documented.
- ▶ **Timeshare leases** – Timeshare leases, a common area of focus for regulatory review, should be carefully structured to ensure standard methodology for square footage allocation, rental rate calculation, standard furniture and equipment allocations, and minimum time blocks.
- ▶ **Formal review and approval process** – Real estate transactions often take a number of twists and turns, so legal review should take place throughout the transaction to avoid negotiations that may take the transaction down a non-compliant path. Even the most straightforward transactions should be subjected to a thorough review process in order to avoid inadvertent oversights. Empowered staff will feel more comfortable asking questions and escalating a potential issue for a second opinion.

External resources

Equally important to internal standards is knowing when to seek third-party expertise

to navigate complex regulatory requirements. Knowing the limits of internal resources and when to seek outside expertise are critically important.

- ▶ **External legal counsel** – The minutia of commercial leases can be daunting enough, but the added complexity of working within the healthcare real estate regulatory framework often requires guidance from external counsel. Take additional care with higher-risk agreements, such as timeshares, joint ventures, and development transactions; experienced legal counsel can help identify and navigate potential pitfalls.
- ▶ **Real estate advisors and valuation professionals** – The premises of fair market value and commercial reasonableness are key tenets of the Stark exceptions and Anti-Kickback safe harbors for real estate. Independent, qualified, and experienced real estate professionals should be engaged to help establish leasing policies and review individual transactions.
- ▶ **Architect of Record** – Architects are an important part of the design and construction team, but they can also be critical for ongoing building leasing, management, and compliance issues. An “Architect of Record” should be retained to ensure Building Owners and Managers Association (BOMA)-standard square footage measurements, to aggregate tenant construction documents, and to record tenant renovations and expansions accurately.

Information management and tracking

Knowledge is power. The use of a property management information system can greatly increase the quality and availability of information. For many health systems, the information system (or lack thereof) reflects the degree of organic growth over time. Spreadsheets may be functional, but they

require manual updates and often lack security features and reporting capabilities.

A property management information system can serve as a central repository for all owned and leased property information, facilitate ongoing lease administration and accounting (AP/AR) functions and provide a standard reporting “dashboard.” Current online or cloud-based platforms provide secure, real-time access to portfolio information, rent roll data, and tenant contact information.

Accountability

Once designed and implemented, a compliance program can only be effective when everyone on the team is held accountable for administering the program. Creating defined roles and assigning individual responsibilities often helps team members “own” (or, in this case, prevent) the problem. From simple tasks such as informal peer reviews, to periodic lease and space use audits, to the formation of a formal compliance committee, a system of checks and balances provides critical oversight to proactively identify potential issues.

Conclusion

Real estate compliance risk is a substantial, often-overlooked issue. An effective real estate compliance program is much more than a handbook on a shelf; it must actively engage and empower team members through education, standardization, resources, information, and accountability. Further, it must be an ongoing process that evolves in response to current issues and emerging trends. 📍

1. Department of Justice, press release: “1.5M Settlement With West Penn Allegheny Health System Resolves False Claims Act Allegations” March 19, 2014. Available at <http://bit.ly/2rq08hO>
2. DOJ, press release: “Intermountain Health Care Inc. Pays U.S. \$25.5 Million to Settle False Claims Act Allegations” April 3, 2013. Available at <http://bit.ly/2qH2SDb>
3. Settlement Agreement: *United States v. State of Tennessee, Hospital Corp of America, et al.* September 13, 2012. Available at <http://bit.ly/2seYhdo>
4. U.S. Court of Appeals Fourth Circuit: *United States ex rel Michael K. Drakeford, MD v. Tuomey, No. 13-2219.* July 2, 2015. Available at <http://bit.ly/2rVw5iF>