

## **Space-sharing and Leasing for IDTFs: A Clarification of the Rules**

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Independent Diagnostic Testing Facilities (“IDTFs”) are subject to fairly onerous certification standards governing both what they must do and what they cannot do. One standard that has been in need of clarification is under what circumstances an IDTF can share space with another Medicare provider. IDTF certification standards explicitly state that IDTFs are prohibited from “sharing a practice location with another Medicare-enrolled individual or organization,” but the standard exempts two categories of providers from this rule: hospital-based IDTFs and mobile IDTFs. However, since the Centers for Medicare and Medicaid Services (“CMS”) had never defined what it meant to be a “mobile IDTF”, IDTFs sharing space with another Medicare provider risked the revocation of Medicare billing privileges.

There has been recently been some clarification of this issue by the Departmental Appeals Board (“DAB”) of the Department of Health and Human Services, which is the entity that hears appeals in CMS enforcement cases. A CMS Medicare contractor revoked billing privileges of an IDTF based on the allegation that the IDTF was a fixed-base IDTF “sharing a practice location and subleasing space from another Medicare-enrolled organization” in violation of the certification standards.

In addressing whether the IDTF was mobile or fixed-base, the DAB made clear that the manner in which an IDTF provides services is the determining factor in whether an IDTF is mobile, and thus not subject to the space-sharing prohibition. The DAB referenced the preamble to the applicable Medicare regulation indicating that a fixed-base IDTF is one that performs *all* of its testing at its home office. In this case, the IDTF performed ultrasound procedures at its home office, but also provided vascular diagnostic testing at multiple locations using portable equipment.

CMS argued that because the IDTF did not have a “mobile facility,” such as a mobile trailer where testing is performed, that the IDTF was actually a fixed-base IDTF. The DAB ruled that an IDTF having a mobile facility is irrelevant when making a determination whether or not an IDTF is “mobile.” Rather, as long as an IDTF is using portable equipment to provide services at locations other than its home office, an IDTF may be considered mobile.

Relying on language in the Program Integrity Manual, the DAB recognized two types of mobile IDTFs, a mobile-facility IDTF and a portable-unit IDTF. A provider is a mobile-facility IDTF when a trailer or mobile home has been converted and equipped to provide health care services to patients inside the vehicle. A provider is a portable-unit IDTF when its equipment is transported to another location, such as a physician office or nursing home, and the patients are seen at that location. The significance of the DAB’s decision is that both of these types of providers, a mobile-facility IDTF and a portable-unit IDTF, are considered mobile IDTFs and are therefore exempted from the space-sharing prohibition contained in the certification standards. This decision provided

needed clarification to allow IDTFs to structure their business models while having some degree of certainty as to whether they are a fixed-base or mobile.

Also addressed in the DAB's decision was the prohibition on IDTFs leasing space to another Medicare provider. In this case, the IDTF shared a waiting room/reception area with a physician from whom the IDTF leased its office. The decision reaffirms that the regulations only ban IDTFs and providers from sharing "practice locations," and not waiting rooms, hallways or parking lots. This language allows IDTFs and other providers to share nonclinical spaces as long as they are careful not to share anything that may be considered clinical space. Moreover, all IDTFs that lease space from another provider should verify that their leases explicitly state that the IDTF has exclusive use of all such clinical spaces in case this issue is ever raised by their Medicare contractor. While the DAB did not state that a contractual agreement between an IDTF and another Medicare provider that does not give an IDTF exclusive use of the practice space violates Medicare regulations as a matter of law, the fact that the IDTF's lease unambiguously stated that the IDTF had exclusive use of the suite clearly was an important factor in the DAB's decision to overturn the revocation of the IDTF's billing privileges.

Lastly, the DAB addressed the issue of whether an IDTF may lease space from a Medicare-enrolled individual without violating Medicare regulations. CMS argued that regulations barring an IDTF from leasing space *to* a Medicare-participating provider also meant that an IDTF could not lease space *from* a Medicare provider. The DAB rejected that argument, reasoning that the plain language of the regulation only banned an IDTF leasing to another Medicare provider, so the IDTF's lease from a doctor enrolled in Medicare did not implicate the prohibition. This ruling provides support for IDTFs who lease space from other providers, though IDTFs must be cautioned that they still cannot lease to other providers or they may face sanctions including the revocation of billing privileges.

This recent DAB decision sheds some light for providers on several issues including when an IDTF is considered a mobile, what space IDTFs may share with another provider without violating the IDTF space-sharing prohibitions, and clarifying that the prohibition on IDTFs leasing space to another provider does not impact an IDTF's ability to lease space from another provider. While there remains some open questions in the area of IDTF certification standards, this decision was an important step. Based on this ruling, IDTFs should contact their counsel to ensure that their business structure and leases are compliant and minimize the risk of revocation of billing privileges by CMS.

### Bios

Alicia Chandler is an attorney with Wachler & Associates, P.C. Ms. Chandler's healthcare practice focuses on Stark, fraud and abuse, and the Anti-Kickback statute. She also has significant experience in medical staff privileging, board certification disputes and commercial litigation.

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