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## **Medical Leasing: Essential Aspects and Peculiarities**

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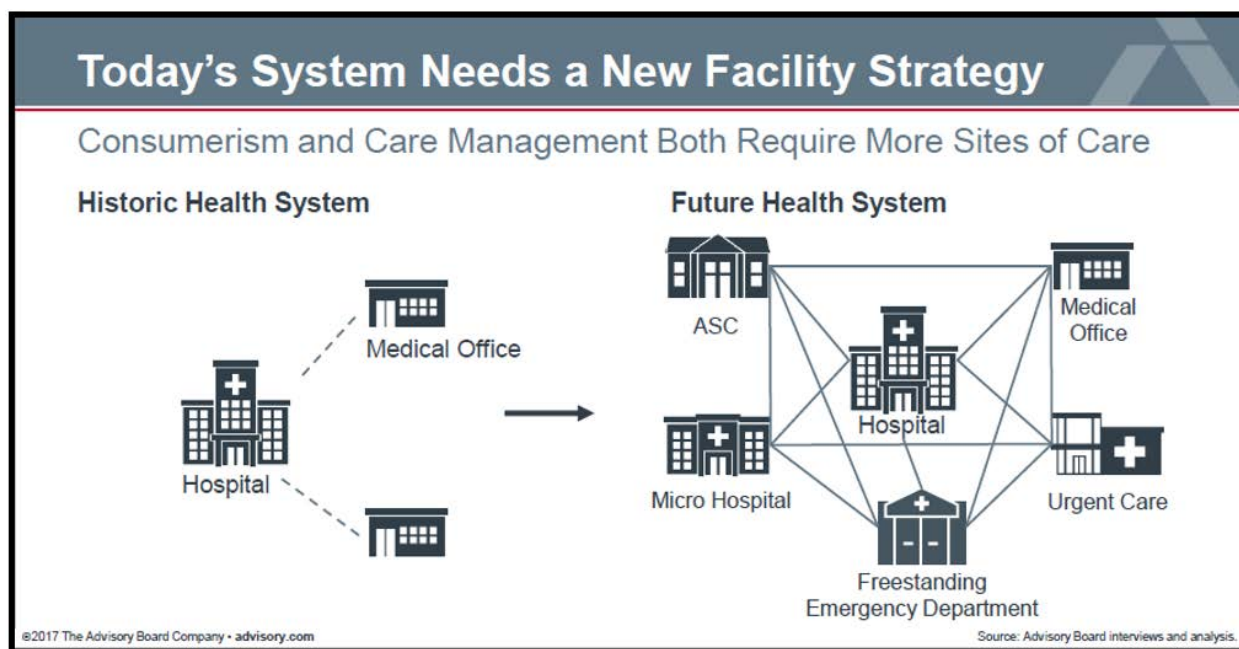
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**MEDICAL LEASING: ESSENTIAL ASPECTS AND PECULIARITIES****(Bernard O. Dow Leasing Institute)****November 9, 2018*****Marni Dee Zarin******Winstead PC***

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**MEDICAL LEASING: ESSENTIAL ASPECTS AND PECULIARITIES****(Bernard O. Dow Leasing Institute)****November 9, 2018****I. INTRODUCTION**

As the health care industry evolves to satisfy ever-changing legislation and to ensure profitability for the health care providers in a time of increasing competition, health care real estate must continue to evolve to meet the needs of the health care providers. Hospitals, health care systems and medical providers seek to expand their brand and their ability to serve patients in convenient locations. Health care leasing options have greatly expanded – from traditional hospital campus and medical office buildings to suburban urban care facilities, ambulatory surgery centers, freestanding emergency rooms, and micro-hospitals.



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So the question becomes: Where are these suburban urban care facilities, ambulatory surgery centers, freestanding emergency rooms, and micro-hospitals going to be located? The health care provider is repurposing grocery stores and other "big-box" retail, moving into corners of shopping malls, leasing space within freestanding general office buildings, and providing services from industrial sites.

Spaces previously reserved for typical retail uses or general office use are being leased and utilized for medical purposes. Unintended consequences and issues arise from the difference in the use. This paper will (i) discuss some of the peculiarities in medical or health care leasing,

<sup>1</sup> Presented by Abby Burns and Matt Pesesky, at Advisory Board, Facility Planning Forum, July 13, 2017

considerations that Landlords need to contemplate when leasing to health care providers, and (ii) how the lease documentation may need to be revised to reflect these considerations.

## **II. REGULATORY ISSUES**

For the most part, the health care regulations affect leases to physicians or physician practices where the building is owned by a group of physicians or a hospital that is physician-owned. This is common for medical office buildings; however, a few of the regulations pertain to all medical-related leasing.

### **A. Stark Law**

Stark Law (42 USCS § 1395nn; 42 C.F.R. § 411.35-411.389) applies to landlords which have an ownership structure consisting of physicians or medical providers. It prohibits physicians from making referrals for certain "designated health services" (including both inpatient and outpatient services, with very few exceptions) to entities which the physician has a financial relationship. Stark Law is intended to regulate referral payments, such as rental payments based on per-capita or per-procedure volume. Percentage rent could be prohibited based on Stark Law.

Stark Law is a strict liability law, where intent is not required for a violation. There are civil penalties for violation of Stark Law, such as: denial of payment from Medicare, Medicaid, patients or third-parties; repayment of any payment received; monetary penalties of up to \$15,000 per service; monetary penalties of up to \$100,000 for circumvention schemes (principal purpose of ensuring referrals to an entity in violation of the law); exclusion from participating in Medicare and Medicaid.

The statute provides for a Safe Harbor for Rental of Office Space (see 42 C.F.R. § 411.357(a)). This applies to the use of office space by a landlord to a tenant if the arrangement meets the following requirements:

1. The Lease arrangement is in writing, signed by the parties and specifies the Premises.
2. The term of the Lease is at least one (1) year. If the Lease is terminated (with or without cause), the parties may not enter into a new lease during the first year of the original term.
3. The Premises does not exceed that which is reasonable and necessary for the legitimate business purpose and is used exclusively by the tenant (i.e., not shared with landlord or its affiliates). This does not prohibit the tenant paying a portion of common area expenses so long as such payments do not exceed tenant's prorata share based on space leased by tenant to the total amount of leasable space in the building.
4. Rental charges over the term are set in advance and are consistent with fair market value.

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