

HEALTH CARE PROVIDER ALERT

1/3/2019

New Anti-Kickback Provisions for Certain Facility and Laboratory Referrals

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Recently, Congress passed the Eliminating Kickbacks in Recovery Act of 2018 (the “Recovery Act”). The Recovery Act is a part of the larger SUPPORT Act (in particular, Section 8122) comprised of a number of different legislative initiatives designed to combat the ongoing opioid epidemic. The provisions in the Recovery Act supplement the federal Anti-Kickback Statute (“AKS”) and also appear to be far more expansive than AKS.

Under the Recovery Act, it is a criminal offense to (1) solicit or receive remuneration (i.e., bribes, kickbacks, or rebates) in return for referring a patient or patronage to a recovery home, clinical treatment facility (i.e., any non-hospital licensed facility providing substance abuse treatment), or laboratory; or (2) pay any remuneration to induce referrals to a recovery home, clinical treatment facility, or laboratory. The statute covers all types of referrals to the aforementioned facilities (not just those that are opioid related) and extends to services provided by all payors (including private insurers and not just Medicare and Medicaid), exceeding the scope of the AKS. The penalty for each violation is a maximum of \$200,000 and 10 years in prison.

While the Recovery Act casts a wider net with harsher penalties, it does allow for several safe harbors, many of which mirror those of AKS, including exceptions for:

- Provider discounts if such discounts are disclosed and included in provider charges
- Medicare drug gap coverage discounts
- Individual compensation to both contractors and employees
- Compensation received for personal services and management contracts
- Good faith copayment waivers
- Transfers of goods and services to federal qualified health centers serving a medically underserved population
- Certain alternative payment models (e.g., Shared Savings Program, DHHS approved model)
- Any other Attorney General approved payments or discounts

Of particular note is the individual compensation exception. Unlike AKS, employees and contractors are covered under the safe harbor. Additionally, this exception also specifically prohibits payments made based on the number of tests, amount of individuals referred, or amounts billed to the patient’s plan. The law grants the Attorney General (in consultation with the Secretary of Health and Human Services) the ability to promulgate regulations in this area. Until further guidance is released, providers should take steps to ensure they stay within the letter of the statute.

Identifying and analyzing compensation and referral arrangements is complex. If your practice maintains these types of relationships with a laboratory, clinical treatment facility, or recovery home, we encourage you to contact one of the listed Roetzel attorneys to discuss your responsibilities.

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