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The Admera Health Settlement Is a Cautionary Tale for Paying Outside Sales Staff on a Commission Basis

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The Office of Inspector General recently announced the more than $5.5 million settlement of a qui tam action brought against Admera Health, LLC (Admera). In addition to the fine incurred, the legal fees typically incurred for defending such claims and negotiating such settlements often reach six figures or more.

Admera is a New Jersey-based company that provided clinical laboratory testing services to healthcare providers relating to pharmacogenetics until 2021. Pharmacogenetics analyzes how a patient's genetic attributes affect their response to therapeutic drugs. State Medicaid programs reimbursed for these laboratory tests. The settlement agreement summarized that, from September 1, 2014, through May 21, 2021, Admera made commission-based and per-sale payments to independent contractor marketers in return for recommending or arranging for the ordering of genetic testing services in violation of the anti-kickback statute (AKS). Determinations that such payments are kickbacks can also trigger violations of the False Claims Act. So, in addition to the $25,000 fine under the AKS and possible exclusion, a violator could also be assessed an $11,000 per-claim fine plus treble damages. In addition to these civil violations, both laws also allow for criminal prosecution.

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It’s been well settled for some time that healthcare providers risk violations of these laws for paying commissions to outside sales staff. Yet, providers regularly get into deep trouble for making commission payments to marketers. Indeed, the settlement agreement specifically notes that Admera had previously been advised of the problematic payments, “but continued to enter into contracts with [m]arketers and approve millions of dollars in commission payments to them to arrange for and recommend that healthcare providers order Admera’s genetic tests.” Perhaps these providers and marketers focus only on the “referral” portion of the prohibition and think they are safe if payments are not made to referring physicians. However, the AKS prohibits not only referrals but also offering or paying remuneration, specifically including commissions, in return for arranging for or recommending items or services covered by Medicare, Medicaid, and TRICARE. It is this aspect of the statute that implicates marketing activities. Any payment that varies based on the value or volume of federal healthcare business generated is suspect. According to the settlement agreement, Admera was paying the independent marketers 33–50 percent of the Medicaid reimbursement, or in some cases a flat fee per test ordered.

There are applicable safe harbors to the AKS that may cover payments for marketing activities. One such way is for the healthcare provider to pay their own employees to conduct the marketing activities. The employee safe harbor to the AKS allows “any amount paid by an employer to an employee (who has a *bona fide* employment relationship with such employer) for employment in the provision of covered items or services.” The narrative to the federal register drafted when this safe harbor was adopted explains that it was intended to apply to sales and marketing staff. The idea is that a properly trained and supervised employee will follow the law. However, in order for the safe harbor to apply, the provider has to make sure that the person is in fact a *bona fide* employee for IRS purposes. The employee must be trained, supervised, receive benefits, and otherwise act as an actual employee in all respects to satisfy the IRS requirements. Furthermore, the employees themselves must not engage in any improper activities, such as improper remuneration or gifts to patients or referral sources.

Another applicable safe harbor to the AKS that may cover payments for marketing activities is the personal services safe harbor. This safe harbor requires that an agreement with a marketer must satisfy various requirements, including that the healthcare provider pays the marketer a fair market value fee for the marketing services. The fee cannot vary by the amount of recommendations or by the business generated. Commonly, the fee is instead based on a time period, such as hours expended, or a flat monthly fee. Since any payment above fair market value could be deemed a kickback, it is a best practice for a healthcare provider to engage an appraiser to determine fair market value of such services.

Florida has its own anti-kickback law, the Patient Brokering Act (817.505, FL Statutes). Florida's law is an "all payer" statute, meaning that it applies regardless of how or by whom the claims for such healthcare goods and services are reimbursed. While it does not include the "arranging for or recommending" language utilized in the AKS, it does prohibit paying remuneration, directly or indirectly, to persons to induce "patronage," and this could possibly implicate payments to a marketing company. However, the Florida statute contains language indicating that if the arrangement wouldn't run afoul of the AKS, it should not violate the Patient Brokering Act. So, by meeting an AKS safe harbor, the healthcare provider would also be exempt from Florida's Patient Brokering Act. Before engaging in marketing activities, providers should consult their healthcare counsel to make sure the arrangements are properly structured.
