

Blog Post

Year in Review/Year Ahead: The Eliminating Kickbacks in Recovery Act of 2018-The New All-Payor Anti-Kickback Statute

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The Akerman Healthcare Practice Group, as part of its ongoing informational blogs and Practice Updates, will be publishing a series of articles, each outlining a significant healthcare industry issue from 2018, with an eye towards what to expect in 2019. The following is the first in our series – The Year in Review/The Year Ahead:

The enactment, on October 24, 2018, of a federal law with a far too complicated name, i.e. the “Substance Use–Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act” or the “SUPPORT for Patients and Communities Act”, created an all-payor anti-kickback statute aimed at prohibiting certain marketing practices of the substance abuse treatment community. Specifically, within the Act is the Eliminating Kickbacks in Recovery Act of 2018 (‘EKRA”), which charts new ground for permissible ways to compensate employees and contractors engaged by “recovery homes,” “clinical treatment facilities,” and “laboratories.”

In the course of criminalizing certain payment arrangements, the Act has created a conflict with the federal Anti-Kickback Statute (“AKS”). The payment exceptions to the Act resemble the federal safe

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harbor regulations to the AKS. But, notably, the permissible compensation arrangements for employees and independent contractors diverge from the AKS and the safe harbor regulations. First, it treats employees and independent contractors the same. The exception to the AKS and the safe harbor regulation have often been cited to support compensation paid to a bona fide employee on a commission basis, notwithstanding divergent positions taken in case law and distinctions referenced by the Office of Inspector General in advisory opinions. But it would not be permissible under EKRA if the compensation is based on: (a) the number of individuals referred to a particular recovery home or clinical treatment facility; (b) the number of tests or procedures performed; or (c) the amount billed to or received from, the health care benefit program from the individuals referred. Unlike EKRA, Compensation paid to a bona fide employee in the provision of covered items and services is an exception to the payment proscription. Independent contractors do not enjoy that same exception.

In the earlier versions of the various federal bills which eventually became the SUPPORT Act and EKRA, clinical laboratories were not included. While some clinical laboratories servicing the substance abuse treatment community may have come under scrutiny for marketing practices in the past, it is not clear that clinical laboratories which do not service the substance abuse community will be subject to enforcement under EKRA if they are compliant with the AKS and its safe harbor regulations.

The Attorney General, in consultation with the Secretary of Health and Human Services, is authorized to promulgate regulations to clarify the exceptions to the Act. There may be two sets of federal regulations which provide guidance in the permissible forms of compensation for employees and independent contractors, especially those engaged in marketing services. But it may be Congress, with the aid of the affected trade

associations, which will eventually reconcile the Act with the AKS before regulations are drafted.

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