



UNLAWFUL REFERRALS AND KICKBACKS

The False Claims Act has been used with great success in combatting kickbacks in the health care industry and illegal referrals between providers. Kickbacks are prohibited by law because they cause overutilization of health services, increase costs to the Medicare and Medicaid programs, and interfere with a patient's freedom of choice.

The Anti-Kickback Statute ("AKS"), a federal criminal statute, prohibits the knowing and willful offering, payment, solicitation, or receipt of anything of value in exchange for a federal healthcare program referral. For purposes of the AKS, anything of value that is used to induce a referral can be a kickback—this includes money, gifts, rebates, discounts, equipment, services, below market rent or lease payments, and waivers of payments due.

The AKS applies to everyone – not just healthcare providers or physicians. It prohibits not only payments made to induce referrals of healthcare items and services, but also payments to induce the arranging or recommending federal healthcare program referrals. Additionally, the AKS prohibits payments made to induce the purchasing, leasing, ordering, arranging, or recommending of any good, facility, service, or item for which payment can be made under a federal healthcare program.

To be held liable under the AKS, an individual or entity's violation of the AKS must be "knowing" and "willful". Generally, if one purpose of a defendant's payment is made to induce federal healthcare program referrals, they can be found guilty of violating the AKS. Individuals and entities that violate the AKS are guilty of a felony and can be sentenced to five years in prison and face fines of up to \$25,000. They also face exclusion from participating in federal healthcare programs.

Violations of the AKS trigger FCA liability. Claims for healthcare services or items that are tainted by kickback arrangements are "false" for purposes of the FCA and are not eligible for reimbursement under federal healthcare programs.

In addition to unlawful kickback arrangements, improper self-referrals are another major area of fraud and abuse in the healthcare industry. The physician self-referral law ("Stark law") prohibits a physician from referring a Medicare or Medicaid patient for certain types of healthcare services (called "designated health services" or "DHS") to an entity with which the physician (or

the physician's immediate family member) has a financial relationship, unless a specific exception applies.

For purposes of the Stark law, designated health services ("DHS") include:

- Clinical laboratory services
- Physical therapy
- Occupational therapy
- Radiology (including MRIs, CTs, x-rays, and ultrasounds)
- Radiation therapy
- Durable medical equipment and supplies
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- Parenteral
- Prosthetic devices
- Home health services and supplies
- Outpatient prescription drugs
- Inpatient and outpatient hospital services

A physician has a "financial relationship" for purposes of the Stark law if the physician (or an immediate family member of the physician) has an ownership and investment interest in the entity providing the DHS; or if there is a compensation arrangement between the physician (or an immediate family member) and the entity providing the DHS.

Unlike the AKS, the Stark law is not a criminal statute and does not require proof of specific intent. All that is required for a violation of the Stark law is an act of making a prohibited referral and a request for payment from a federal healthcare program. Physicians who violate the Stark law are subject to denial of payment for the DHS and may also face additional civil monetary penalties based on their knowledge of the scheme.

The Stark law does contain statutory exceptions to the general self-referral ban, however. These include exceptions for physician services and in-office ancillary services furnished by group and solo practices. Qualification for a Stark exception, however, requires strict adherence to the statutory criteria of the exception. Physicians who fail to follow an exception's criteria will not qualify for the exception regardless of intent.

Claims submitted to the Medicare or Medicaid programs in violation of the Stark law are not eligible for payment. Thus, providers who knowingly submit such claims can be held liable under the False Claims Act.

If you are aware of a potential violation of the AKS and would like to confidentially speak with one of our attorneys, please email us at

wbinfo@ktmc.com or call us at (610) 667-7706. All case evaluations are confidential and free.