

Alert | Health Care & FDA Practice



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New Patient-Broking Prohibitions Affect Treatment Facilities and Laboratories

Congress passed the Eliminating Kickbacks in Recovery Act (the Act) in 2018 to prevent “patient brokering” in treatment for substance abuse disorders. The Act imposes criminal penalties against anyone who knowingly and willfully “solicits or receives any remuneration . . . in return for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory” or who knowingly and willfully “pays or offers any remuneration . . . to induce a referral of an individual to a recovery home, clinical treatment facility, or laboratory; or in exchange for an individual using the services of that recovery home, clinical treatment facility, or laboratory.”

Unlike the Federal Anti-Kickback Statute (applicable to only Federal-supported governmental programs such as Medicare, Medicaid, and TRICARE), the Act applies to all payors, even where no Federal program dollars are at play. Penalties are harsh and may include a fine up to \$200,000 and imprisonment for up to 10 years. Because the Act broadly defines the facilities that are subject to its restrictions, any entity or individual providing addiction-treatment and recovery services (even if only as a minor part of their service offerings) and clinical laboratories should evaluate arrangements with referral sources to ensure compliance with the Act. As to clinical laboratories, the Act’s prohibition covers *all* types of laboratory services – not only those related to individuals in treatment or recovery for substance abuse disorders, and not just stand-alone clinical laboratories that operate exclusively as laboratory service providers.

Among those arrangements that should be carefully evaluated for compliance are any incentive-based compensation plans for employees or independent contractors. While the Act protects payments made to independent contractors as compensation for services under an arrangement that complies with the requirements of the Federal Anti-Kickback Statute's personal services and management contract safe harbor, the Act does not follow the Federal Anti-Kickback Statute's safe harbor applicable to bona fide employment relationships.

To explain, the Federal Anti-Kickback Statute's employment safe harbor allows for, as an example, commission-based compensation models, so long as a bona fide employment relationship exists. To the contrary, the Act states that a payment to an employee or contractor is exempt from the criminal prohibition if the payment is not determined by and does not vary based on (1) the number of individuals referred to a particular recovery home, clinical treatment facility, or laboratory; (2) the number of tests or procedures performed; or (3) the amount billed to or received from the patient's insurance plan.

Accordingly, parties to a relationship involving employees or contractors who are paid on the basis of a productivity or commission-based methodology (or on some other basis related to the volume or value of business generated) in connection with marketing of recovery home, clinical treatment facility, or clinical laboratory services should immediately assess reformation of the relationship in order to come into compliance with the Act.

The full text of the law can be found [here](#). If you have questions about how the Act applies to your business, please contact a member of Greenberg Traurig's [Health Care & FDA Practice](#).

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