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Alert | Health Care & FDA Practice

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Eliminating Kickbacks in Recovery Act (EKRA): 2021 Highlights

This GT Alert covers the following:

- Court holds that certain commission-based payments to employees do not violate EKRA.
- Owners of two South Florida addiction treatment facilities convicted of a $112 million scheme involving EKRA violations.
- DOJ Sober Homes Initiative leads to arrests of 10 defendants involving EKRA violations.

The Eliminating Kickbacks in Recovery Act (EKRA), 18 U.S.C. § 220, has caused confusion since its enactment in 2018. It prohibits the payment of remuneration in return for referring a patient to a recovery home, clinical treatment facility or laboratory. EKRA is based on the Anti-Kickback Statute (AKS), which applies only to federally funded health insurance programs, such as Medicare and Medicaid. EKRA, however, broadly applies to any "health care benefit" program, including commercial insurance.

Shortly after the enactment of EKRA, the Department of Justice (DOJ) created the Sober Homes Initiative in 2020 to focus on fraud schemes in the substance-abuse-treatment industry. Seeking to enforce EKRA, the Sober Homes Initiative focused on bringing criminal charges against medical providers believed to feed patient addictions in order to continue billing for their recovery.

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Unlike the AKS upon which EKRA is based, there is little guidance on how to interpret EKRA. That changed, to some extent, when EKRA presented itself in various federal courts at the end of 2021.

A common issue related to the interpretation of EKRA is how it applies to employee compensation. In contrast to the AKS, which has both a statutory exception for payments made to employees and a separate regulatory Safe Harbor governing employment agreements, EKRA's provision is drafted ambiguously.

The U.S. District Court for the District of Hawaii recently addressed this issue of whether commission-based payments to employees violate EKRA. *See S&G Labs Hawaii, LLC v. Graves*, No. 1:19-cv-310, 2021 WL 4847430 (D. HI Oct. 18, 2021). There, the court held that a commission-based payment to an employee did not violate EKRA.

The issue arose in a trade secret matter brought by a laboratory against one of its former employees. The lab contended the employee breached a noncompete agreement and solicited laboratory employees and customers to move to a competing lab. The employee filed a counterclaim for breach of an employment contract.

The lab, citing EKRA, argued that the agreement was illegal and that it had previously attempted to negotiate a new contract with the employee. Presumably, at the heart of the dispute was that the lab, deeming the commission-based payment improper, began paying the employee a fixed salary that turned out to be less than what the employee would have received under the commission-based agreement. The employee and lab were unable to negotiate a new contract, resulting in the employee leaving the lab and working for a competitor.

The court began by analyzing the language of EKRA that prohibits the receipt of renumeration in return for referring patients to a laboratory and the payment of remuneration to induce the referral of an individual to a laboratory. Finding that the commission structure was "remuneration" the court turned its attention to whether such remuneration was to induce the referral of an individual. Here, the court concluded there was no such referral of an individual. According to the court, the employee's job was to expand the lab's business by convincing physicians – not individuals or patients – to use the lab's services. The court distinguished the referral of patients by physicians to the lab from the act of marketing by the employee to physicians to convince them to use the lab. As the lab was not paying the physicians for the referrals but was instead paying the employee for his services, the court found no EKRA violation. Because the court found no violation of the referral prohibition, it concluded there was no need to consider the employee exception.

The decision is applicable only to the parties and is not precedential. Accordingly, other courts could reach a different position. Nevertheless, in light of the lack of regulations interpreting EKRA, *S&G Labs* provides some positive guidance for laboratories as to how EKRA might be interpreted. However, given the context of a lab attempting to get out of a contract with an employee, the decision's effect might be limited.

Shortly after the *S&G Labs* decision, a South Florida jury returned a verdict convicting two owners of addiction treatment facilities for, among other things, conspiracy to violate EKRA. In *United States v. Markovich, et al.*, No. 21-cr-60020 (S.D. Fla.), the jury found that two owners of a South Florida addiction treatment facility violated EKRA by engaging in the following conduct:

- Giving illegal drugs to patients before admission and readmission to cause the patients to test positive for drugs and qualify for the highest and most expensive level of care;

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- Paying patients and providing them free transportation, including long-distance flights, to the addiction treatment facility;
- Splitting fees with clinical laboratories that performed laboratory tests on patients referred from the addiction treatment facility; and
- Using social media to target potential patients by offering them cash to go to the addiction treatment facility.

Unlike in AKS cases, the *Markovich* defendants defrauded commercial insurance companies, not federal health care programs. *Markovich* shows not only the types of marketing practices that would give rise to an EKRA violation but also that EKRA extends to private insurance.

Similarly, the DOJ recently announced that it filed charges against 10 defendants for allegedly violating, among other things, EKRA. The defendants include substance-abuse-facility owners and patient recruiters, who, according to the government, allegedly assigned a value to patients depending on the type of commercial insurance the patients had, and then paying the patient recruiters kickbacks for each patient the recruiters referred. These cases are currently pending in the U.S. District Court in the District of Central California.

Federal courts have begun providing some color on the types of conduct that could be deemed to violate EKRA. In light of these developments, substance-use-disorder providers and laboratories should carefully scrutinize their relationships with marketers and referral sources to ensure that they comply with EKRA.

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