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A Survey of Health Care Anti-Kickback Law at the State Level

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The federal health care Anti-Kickback Statute ("Federal AKS") targets bribery and corruption in the health care industry. There are two core provisions of the Federal AKS: one targeting the bribe recipient and one targeting the bribe payer. Specifically, the statute prohibits receiving "any remuneration . . . in return for" health care referrals or purchases reimbursable under a federal health insurance program, such as Medicare.[1] And it prohibits paying any remuneration "to induce" health care referrals or purchases reimbursable under such a federal program.[2]

The Federal AKS is an incredibly far-reaching law giving federal enforcement agencies an arsenal of weapons to target questionable business arrangements in the health care industry. The term "remuneration" is defined open-endedly to mean "anything of value."[3] And "anything of value" means just that: There is no de minimis remuneration under the Federal AKS.[4] To prove a violation of the statute, the government need only demonstrate that one of the many possible purposes of paying remuneration was the inducement of the purchase of the federally reimbursable goods or services.[5] Additionally, courts generally will not engage in a "splitting of hairs" when it comes to discerning the meaning of words such as "refer" and "recommend," relying instead on the broad, prophylactic purposes of the statute.[6] Also, the plain language of the Federal AKS suggests that a quid pro quo is unnecessary for a payer of remuneration (i.e., a bribe payer) to violate the statute, raising the possibility that a health care company, provider, or individual could violate the statute simply by paying money to induce product usage, even if the recipient has not agreed to use the product in return for the money (i.e., even if the recipient of the "bribe" does not know he or she is being bribed).[7]

Given the expansive reach of the Federal AKS, there are a number of statutory and regulatory exceptions and "safe harbors" to the law. For example, the statute's restrictions do not apply to "a discount or other reduction in price" if a

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[1] 42 U.S.C. § 1320a-7b(b)(1).
[2] 42 U.S.C. § 1320a-7b(b)(2).
[3] *E.g., United States v. Narco Freedom, Inc.*, 95 F. Supp. 3d 747, 756 (S.D.N.Y. 2015) (citing *Klaczak v. Consol. Med. Transp.*, 458 F. Supp. 2d 622, 678 (N.D. Ill. 2006)).
[4] *See* Medicare and State Health Care Programs: Fraud and Abuse; Revisions to the Safe Harbors Under the Anti-Kickback Statute and Civil Monetary Penalty Rules Regarding Beneficiary Inducements, 81 Fed. Reg. 88368, 88379 (Dec. 7, 2016) ("[T]he anti-kickback statute does not have any exceptions for items or services of nominal value."); Medicare and State Health Care Programs: Fraud and Abuse; OIG Anti-Kickback Provisions, 56 Fed. Reg. 35952, 35954 (July 29, 1991) (rejecting commentators' call for *de minimis* safe harbor).
[5] *See, e.g., United States v. Nagelvoort*, 856 F.3d 1117, 1130 (7th Cir. 2017); *United States v. Borrasi*, 639 F.3d 774, 781-82 (7th Cir. 2011); *United States v. Kats*, 871 F.2d 105, 108 n.1 (9th Cir. 1989); *United States v. Greber*, 760 F.2d 68, 71-72 (3d Cir. 1985); *Polk County v. Peters*, 800 F. Supp. 1451, 1455-56 (E.D. Tex. 1992) (holding that an agreement by a hospital to give a doctor an interest-free loan in exchange for the doctor's exclusive use of the hospital for his patients was illegal and thus unenforceable, notwithstanding that "the hospital may well have been motivated to a greater or lesser degree by a legitimate desire to make better medical services available to the community").
[6] *United States v. Polin*, 194 F.3d 863, 866 (7th Cir. 1999) (upholding conviction of defendants operating a pacemaker monitoring company who offered to pay a pacemaker sales representative to direct patients to the company, even though the sales representative was not the ultimate decision-maker on which company was selected to monitor the pacemaker); see also *United States v. Patel*, 778 F.3d 607, 612-16 (7th Cir. 2015) (rejecting a doctor-defendant's argument that a "referral" cannot by definition occur when a patient "independently chooses a provider" without any "input from the physician," reasoning that the purpose of the statute extends the meaning of "referral" to the doctor-defendant's certifications and recertifications of medical necessity for services provided by a home health care service that was paying him kickbacks); *cf.* OIG Advisory Op. No. 99-8, July 13, 1999 (referring loosely to new patients of podiatrists obtained as a result of free screenings at shoe stores as "referrals").
[7] *See Hanlester Network v. Shalala*, 51 F.3d 1390, 1397 (9th Cir. 1995); *Vana v. Vista Hosp. Sys., Inc.*, No. 233623, 1993 WL 597402, at *7 (Cal. Super. Ct. Riverside Cty. Nov. 15, 1993) (finding that an agreement can be unlawful even if only one party has the improper intent).

number of requirements are met.[8] Likewise, "bona fide employment relationship[s]" are insulated from the statute's prohibitions,[9] as are "personal services and management contracts,"[10] as well as formal "referral services."[11] But even these safe harbors typically have numerous and cumbersome requirements, and if each such requirement is not strictly met, the conduct is subject to criminal prosecution or other enforcement measures.

Compliance with the Federal AKS is something of an industry unto itself, but the federal statute represents only part of the risk for health care companies, providers, and individuals. All but one of the 50 states, as well as the District of Columbia, have analogous commercial bribery laws on the books that target corruption in the health care industry.[12] And of these 50 jurisdictions, 35 proscribe kickbacks and the like in the health care industry even if the goods or services are reimbursable only by private health insurance and involve no public money at all.

Click here to access a chart outlining these state law analogues.

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[8] 42 U.S.C. § 1320a-7b(b)(3)(A); 42 C.F.R. § 1001.952(h).
[9] 42 U.S.C. § 1320a-7b(b)(3)(B); 42 C.F.R. § 1001.952(i).
[10] 42 C.F.R. § 1001.952(d).
[11] 42 C.F.R. § 1001.952(f).
[12] Some of these are arguably even more onerous than the federal law. *E.g.*, N.J. Admin. Code § 13:45J-1.3(c) (prohibiting a physician from accepting from a pharmaceutical company "any item of value that does not advance disease or treatment education," including "pens, note pads, clipboards, mugs, or other items with a company or product logo, [as well as] floral arrangements").

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