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EKRA's Interaction with the Anti-Kickback Statute: Just What the Government Intended

Labs, clinical treatment facilities, and recovery homes BEWARE!

If you are currently using marketers/distributors/sales personnel to market your services, you will need to evaluate your agreements with these people immediately.

This warning comes from the Eliminating Kickbacks in Recovery Act ("[EKRA](#)", codified at 18 U.S.C. § 220) which was signed into law as part of the [SUPPORT Act](#) on October 24, 2018 after being introduced by Representative Steve Knight (R-CA) in September. EKRA puts stricter requirements on arrangements with marketers than the [Anti-Kickback Statute](#) ("[AKS](#)", codified at 42 U.S.C. 1320a-7b(b)) and can penalize those involved in these arrangements even if they comply with a safe harbor to the AKS.

Some argue that EKRA has some drafting issues that are causing unintended problems, however, given the law's short length in text and the government's focus on the opiate epidemic and healthcare providers in the space, EKRA may have turned out just as the government intended. While the Attorney General, in consultation with the Secretary of Health and Human Services, has the ability to promulgate regulations to clarify exceptions in EKRA, there is no guarantee they will do so. Thus, it is important to know how the AKS and EKRA interact with one another.

Generally, the AKS prohibits paying remuneration to induce or reward referrals of *federal* health insurance program business, like [Medicare](#), Medicaid, TRICARE, etc.

EKRA, on the other hand, goes further and prohibits paying remuneration to induce or reward referrals of *any* health insurance program business (including all public/governmental health insurance programs and private/commercial health insurance programs) to laboratories, clinical treatment facilities, and recovery homes. Furthermore, EKRA applies to, and penalizes, conduct that is permitted under the AKS.

More specifically, EKRA penalizes anyone who, with respect to services covered by any health insurance program, knowingly and willfully:

- solicits or receives any remuneration in return for referring a patient to a laboratory, clinical treatment facility, or recovery home; or
- pays or offers any remuneration to induce a referral of an individual, or in exchange for an individual using the services of a laboratory, clinical treatment facility, or recovery home.

However, EKRA does not penalize a payment made by an employer to an employee or an independent contractor as long as the payment is not determined by or does not vary by—

- The number of individuals referred to a particular recovery home, clinical treatment facility, or laboratory;
- The number of tests or procedures performed; or
- The amount billed to or received from, in part or in whole, the health care benefit program from the individuals referred to a particular recovery home, clinical treatment facility, or laboratory.

Those who violate EKRA can be fined up to \$200,000 and/or imprisoned up to 10 years – for each violation.

As stated above, EKRA can penalize conduct that is permitted under the AKS. In other words, laboratories, clinical treatment facilities, or recovery homes utilizing marketing agreements with employees and independent contractors that comply with an AKS safe harbor – like the [employee-compensation safe harbor](#) or [the personal services and management contracts safe harbor](#) – need to ensure such agreements comply with EKRA as well.

For example, the [employee-compensation safe harbor](#) to the AKS would permit a laboratory to give remuneration to an employee that varies with the number of individuals referred to that laboratory. However, EKRA would not allow this arrangement because it would be a payment that varies based on the number of individuals referred to the laboratory; thus, each party involved in such an arrangement could be penalized.

While some remain confused about the law, ignorance is no excuse, and those affected should analyze their arrangements to ensure EKRA compliance. If you need help understanding EKRA and how it combines with the AKS to affect your business, contact a member of Frost Brown Todd's [Health Care Innovation Team](#). You can also visit our [Health Law Matters blog](#) for more insight into legal issues impacting the health care industry.

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