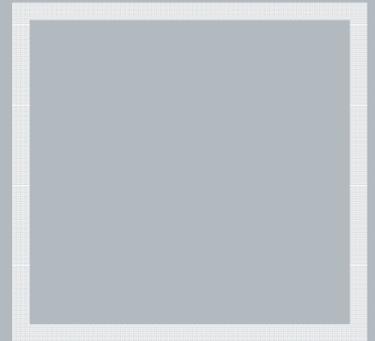
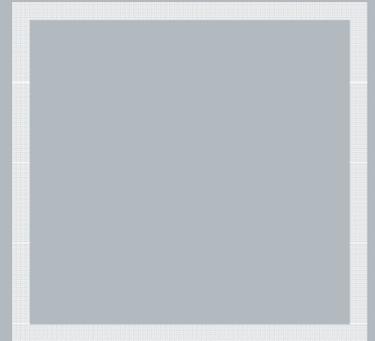


Patient Brokering Prohibitions

Presented by

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What is Patient Brokering?



Patient Brokering Defined

- Patient brokering is a specific type of kickback. It is the illegal practice of a healthcare entity or provider paying a fee (typically on a per patient basis) to a third party for bringing them patients.
- Florida prohibits anyone from “offer[ing] or pay[ing] a commission, benefit, bonus, rebate, kickback, or bribe... to induce the referral of a patient or patronage to or from a health care provider or health care facility.”
- Note that the practice of paying anyone for patient referrals (including healthcare practitioners and current or former patients) would fall under this definition as well.

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Florida Patient Brokering Prohibition

- It is unlawful for any person, including any health care provider or health care facility, to:
 - A. Offer or pay a commission, benefit, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, **to induce the referral of a patient or patronage to or from a health care provider or health care facility;**
 - B. Solicit or receive a commission, benefit, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, **in return for referring a patient or patronage to or from a health care provider or health care facility;**
 - C. Solicit or receive a commission, benefit, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, **in return for the acceptance or acknowledgment of treatment from a health care provider or health care facility;** or
 - D. Aid, abet, advise, or otherwise participate in the above prohibited conduct
- Fla. Stat. § 817.505

Recent Updates

- The “old” Patient Brokering Act contains a “safe harbor” of enumerated practices that are exempt from the Act’s prohibitions.
- This exception, which references the Federal AKS, recently changed for the worse for Florida healthcare providers. Specifically, on July 1, 2019, the following changes to the exceptions became effective:
 - Old Language
 - (3) This section shall not apply to... (a) Any discount, payment, waiver of payment or payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder.
 - New Language
 - (3) This section shall not apply to the following payment practices... (a) Any discount, payment, waiver of payment, or payment practice expressly authorized by 42 U.S.C. s. 1320a-7b(b)(3) or regulations adopted thereunder.

Recent Updates Cont.

- The new language requires that the arrangements meet a Federal AKS safe harbor and it is broadly applicable to any health insurer patient brokering, not just federal health care program patient brokering.
- The Florida's Legislature likely only intended to ensure that there was parity in treatment of financial relationships regardless of whether patients were commercial or federal health care program beneficiaries.
- However, the unintended result is a far broader criminalization of previously accepted and commonplace arrangements in place nationally and in Florida today that do not violate the Federal AKS.

Why should we care?

- In some industries, the practice of brokering is extremely common and legal:
 - Travel agent splits fees with vendors (airlines, hotels, tour guides, etc.)
 - Real estate brokers who take a cut of the ultimate payment (1 months' rent, % of the total sale price of the home)
- So why should we care in the context of healthcare? Financial penalties? Exclusion?

Policy Concerns

- You are not feeling well and go to the doctor. She tells you that you need to see a specialist and gives you a name. Relying on your doctor, you make an appointment with the recommended specialist.
- What if you discovered that your doctor was paid to send you to that particular specialist?
- What if you asked about another specialist and your doctor still pushes their specialist?



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Policy Concerns

- Who is your patient population? How can we protect them?
- According to the US Department of Health and Human Services Office of Inspector General, kickbacks in health care can lead to:
 - Overutilization
 - Increased program costs
 - Corruption of medical decisionmaking
 - Patient steering
 - Unfair competition
- As such, no one should receive payment for influencing a patient to pick one healthcare provider, facility or service over another.

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Federal Laws: Stark

- Prohibit physicians from referring Medicare and Medicaid beneficiaries to entities providing reimbursable designated health services with which the physician or an immediate family member have a financial relationship.
 - These referrals may still take place if an exception is met.
 - Uses a strict liability standard that does not require intent.
- Exceptions include:
 - Bona fide employment,
 - Personal services arrangements,
 - Incidental medical staffing benefits such as pagers and internet access,
 - Space and equipment rental,
 - Electronic prescribing items and electronic health record items.

Federal Laws: The Anti-Kickback Statute

- Illegal to knowingly offer or receive remunerations for the purpose of inducing referrals for services or items reimbursable by Medicare or Medicaid.
- Although the AKS prohibition is broader than the Stark law, there are safe harbors that protect certain arrangements from implicating the AKS statute.
 - Example: safe harbors surrounding personal services and management contracts, sale of a practice, and waiver of certain beneficiary coinsurance and deductible amounts.

Referral Safe Harbors 42 CFR § 1001.952(f)

- The program must be open to federal beneficiaries.
- Payments must be solely based only on the cost of operating the referral service, and not on the volume or value of any referrals to or business otherwise generated by either party.
- The referral service must make the following disclosures to each person seeking a referral:
 - How it selects the group of participants in the referral service to which it could make a referral;
 - Whether the participant has paid a fee to the referral service;
 - How it selects a particular participant from this group for that person;
 - The relationship between the referral service and the group of participants;
and
 - The nature of any restrictions that would exclude such an individual or entity from continuing as a participant.

Federal Laws: The Civil Monetary Penalties

- Prohibits anyone from presenting false claims or causing false claims to be presented to a government agent or employee.
- The beneficiary inducement provision prohibits offering or transferring remunerations to a Medicare or Medicaid beneficiary that (s)he knows or should know **is likely to influence the patient when choosing a healthcare provider or service** that Medicare or Medicaid will pay for in part or full.
- Exceptions to the CMP include gifts of nominal value given to patients, promotions to incentivize preventable care activities, and certain co-pay assistance.
- The CMPs are intended to promote patient freedom of choice and discourage patient steering.

The Eliminating Kickbacks in Recovery Act of 2018

- EKRA was signed into law on October 24, 2018 as a part of the Substance Use-Disorder Prevention that Promotes Recovery and Treatment for Patients and Communities (“SUPPORT”) Act.
- The SUPPORT Act is a combination of 70 separate bills addressing the opioid epidemic. Section 8121 of the SUPPORT Act is separately referred to as EKRA and is codified in the criminal code at 18 USC §220.
- It is expected that guidance will be promulgated that limits the applicability of EKRA to the opioid arena. To date, no such guidance has been issued.

EKRA Cont.

- EKRA prohibits any person, with respect to services covered by a health care benefit program, in or affecting interstate or foreign commerce, from “knowingly and willfully”:
 - soliciting or receiving any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind, in return for referring a patient or patronage to a recovery home, clinical treatment facility, or laboratory; or
 - paying, offering to pay, soliciting or receiving any remuneration to: a) induce a referral of an individual to a recovery home, clinical treatment facility or a laboratory; or, b) in exchange for an individual using the services of a recovery home, clinical treatment facility or laboratory.

EKRA Penalties

- Violations of EKRA can result in criminal prosecution with fines of up to \$200,000 and imprisonment for up to 10 years, or both.
- However, EKRA includes preemption language so that it will not apply to conduct that is already prohibited and subject to claims under the AKS. Further, EKRA affirmatively states that does not intended to preempt any state laws prohibiting the exchange of remuneration for referrals. As such, providers must continue to maintain compliance with AKS and any overlapping state law.

State Fraud & Abuse Laws

- Many states indirectly prohibit patient brokering.
- Some states integrate the federal laws into their state Medicaid statutes whereas other states expand the scope of the federal laws to apply to private payors.
- Similarly, some states also have laws prohibiting fee splitting among practitioners who refer patients to each other.
- States want to protect their residents and patient brokering preys on the vulnerable by inhibiting their freedom to choose a healthcare provider.
- As such, long term care providers should be careful in their efforts to recruit new business not to run afoul of established lines of legal behavior.

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Connecticut

- Receiving kickbacks is a class D felony punishable by up to 5 years in prison. Note that the Connecticut prohibitions is under Connecticut's penal code.
- Except as expressly permitted under the federal Anti-kickback Statute safe harbor regulations, a person is guilty of receiving a kickback when (s)he “knowingly solicits, accepts or agrees to accept any benefit, in cash or in kind, from another person upon an agreement or understanding that such benefit will influence such person's conduct in relation to referring an individual or arranging for the referral of an individual for the furnishing of any goods, facilities or services to such other person under contract to provide goods, facilities or services to a local, state or federal agency.”
- Refer includes sending, directing or recommending. Conn. Gen. Stat. § 53a-161c.

Connecticut Cont.

- Paying kickbacks is a class D felony punishable by up to five years in prison. Conn. Gen. Stat. § 53a-161d.
- No one may knowingly to offer or pay any benefit, “in cash or kind, to any person with intent to influence such person: (1) To refer an individual, or arrange for the referral of an individual, for the furnishing of any goods, facilities or services for which a claim for benefits or reimbursement has been filed with a local, state or federal agency; or (2) to purchase, lease, order or arrange for or recommend the purchasing, leasing or ordering of any goods, facilities or services for which a claim of benefits or reimbursement has been filed with a local, state or federal agency.”

Maine

- Maine Medicaid includes rebating or accepting a fee or portion of a fee or charge for a MaineCare member referral as grounds for sanctioning.
- The MaineCare Benefits Manual also requires provider to maintain compliance with the federal Anti-Kickback Statute and includes soliciting, offering, or receiving a kickback, bribe, or rebate as an example of fraudulent conduct.

Massachusetts All Payor

- It is illegal to solicit, receive, offer, or pay any remuneration “for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering of any good, facility, service or item for which payment is or may be made in whole or in part by a health care insurer.” This includes a bribe or rebate. Mass. Gen. Laws ch. 175H, § 3.
- “Health care insurer” is defined as as “any insurance company authorized to provide health insurance in this state or any legal entity which is self-insured and providing health care benefits to its employees.” Mass. Gen. Laws ch. 175H, § 1.

Massachusetts All Payor Cont.

- The Massachusetts Attorney General is the tasked with prosecuting these offenses.
- Penalties include fines up to \$10,000, or imprisonment of up to two-and-a-half years in jail or five years in state prison, or both fines and imprisonment. Mass. Gen. Laws ch. 175H, § 2.
- If convicted, there are additional civil liabilities including restitution for the full amount of the benefit or payment made, reasonable attorneys' fees and costs, and the costs associated with the government's investigation. Mass. Gen. Laws ch. 175H, § 7.

Massachusetts Medicaid

- It is a crime to knowingly and willfully charge, solicit, accept, or receive “any gift, money, donation, or other form of consideration as a precondition or guarantee” of admitting a Medicaid recipient to, or keeping a Medicaid recipient in, a hospital or nursing facility. Mass. Gen. Laws ch. 118E, § 43.
- Criminal penalties: fines of up to \$10,000, or imprisonment of up to 2.5 years in jail or 5 years in state prison, or both fines and imprisonment. In addition to criminal penalties, the AG or any district attorney may pursue a civil recoupment action against a provider or other entity. Pursuant to law, the state may recover up to 3X the amount of actual damages, including the costs of investigation and/or litigation. The statute of limitations on civil is 6 years. Mass Gen. Laws. ch. 118E, § 44.

Massachusetts Medicaid

- It is a felony to solicit or receive any form of remuneration in exchange for “purchasing, leasing, ordering, arranging for, or recommending the purchase, lease, or ordering of any good, facility, service, or item” for which Medicaid (or another state health benefit program) pays, in whole or in part.
- Penalties: fines of up to \$10,000, imprisonment of up to two-and-a-half years in jail or five years in state prison, or both fines and imprisonment. Mass. Gen. Laws ch. 118E, § 41.

Massachusetts Exceptions

- Both the all payor and Medicaid anti-kickback statutes contain specific exceptions for discounts.
- Note that the all payor exception is narrower than its Medicaid counterpart.

New Hampshire Medicaid

- It is a criminal offense to knowingly solicit or receive any remuneration, including any bribe or rebate, directly or indirectly, overtly or covertly, in cash or in kind:
 - (1) in return for purchasing, leasing, ordering, or arranging for or recommending the purchase, lease, or ordering of any good, service, accommodation, or facility; or
 - (2) as a precondition of admitting or expediting the admission of a patient to a hospital, skilled nursing facility, or intermediate care facility for which payment may be made by the New Hampshire Medicaid Office.
- Violation of these provisions by a natural person constitutes a Class B felony. A violation by any other person is a felony. N.H. Rev. Stat. Ann. 167 . § 167:61-a, I, i-j.

Rhode Island R.I.G.L. 5-48.1-3

- Under the Patient Protection Act, no one may knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind:
 - (1) In return for referring an individual to a person for the furnishing, or arranging for the furnishing, of any healthcare service or item; or
 - (2) In return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering, any healthcare good, facility, service, or item is guilty of a misdemeanor, and upon conviction
- Penalty: fine of not more than one thousand dollars (\$1,000), or imprisoned for not more than one year, or both.

Rhode Island R.I.G.L. 5-48.1-5

- In addition to the fines, noncompliance or violation constitute grounds to revoke or suspend the license of, or discipline, a licensed healthcare provider, or to deny an application for licensure.
- Note that the definition of healthcare provider includes a physician, hospital, nursing facility, intermediate-care facility or other healthcare facility, dentist, nurse, optometrist, podiatrist, physical therapist, psychiatric social worker, or psychologist.

Rhode Island – Medicaid Specific

- It is unlawful for any person to intentionally “[s]olicit, receive, offer, or pay any remuneration, including any kickback, bribe, or rebate, directly or indirectly, in cash or in kind, to induce referrals from or to any person in return for furnishing of services or merchandise or in return for referring an individual to a person for the furnishing of any services or merchandise for which payment may be made, in whole or in part, under the Rhode Island Medicaid program.”
- Violators of this prohibition may be barred or suspended from participation in the Medicaid program and face civil and/or criminal penalties in accordance with R.I. Gen. Laws §§ 40-8.2-5, 6, 10, 11, and 12.

Vermont

- According to the Vermont Board of Medical Practice, it is considered unprofessional conduct for a physician to willfully exercise undue influence on or take improper advantage of a person using professional services, or promoting the sale of services or goods in a manner that exploits a person for the financial gain of the practitioner or a third party. 3 V.S.A. § 192a(a)(12).
- This includes promotion by a treatment provider of the sale of drugs, devices, appliances, or goods provided for a patient or client in such a manner as to exploit the patient or client for the financial gain of the treatment provider, or selling, prescribing, giving away, or administering drugs for other than legal and legitimate therapeutic purposes. 3 V.S.A. § 192a(a)(18).

Vermont Cont.

- In addition, any division of fees or an agreement to split or divide the fees received for professional services based on referrals is considered unprofessional conduct. 26 V.S.A. § 1354(a)(12).

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Jail Time

- In the first patient brokering case to go to trial, Nicholas Cirio was sentenced on March 25, 2019 to 3 year after a six-person jury found him guilty of 10 counts of patient brokering.
- The maximum jail-time for his offense was up to 50 years!
- This case was brought as a result of the State Attorney's Office's 2016 Task Force



Florida Case

- The defendant was charged with over 100 counts of patient brokering in relation to what the Palm Beach Post called “a cash-for-patients scheme” for recovering addicts.
- On August 7, 2019, Florida’s Fourth District Court of Appeal held that “advice of counsel” is not a defense to the Patient Brokering Act because it is a general intent crime. See [State v. Kigar](#), No. 4D19-0600 (Fla. 4th DCA Aug. 7, 2019).

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New England Enforcement Landscape

- On March 13, 2019, Massachusetts Attorney General Healey announced 7 Settlements resulting from investigation into nursing home facilities.
- In her announcement, the AG stated that “these settlements hold facilities accountable and will help restore the trust families need when making critical decisions about the care of their loved ones.”
- “The Department of Public Health monitors the health and safety of residents in long-term care facilities throughout Massachusetts,” said Department of Public Health Commissioner Monica Bharel, MD, MPH. “We will continue to investigate complaints of substandard care or violations to ensure that individuals residing in nursing homes are receiving high quality care.”

What *can* you do?

- Pay on an hourly, fair market value fee, preferably capped, for someone to help with relocation.
- Talk to your legal counsel – this will help document your proper intent and demonstrate you have thought through any potentially sticky relationships.

Transfer Agreements & Bed Saving Arrangements with Hospitals

- Transfer agreements should not include payment for referral of patients.
- These agreements ensure there is a mechanism in place to aid in the smooth and proper transfer of patients from one facility to the other.
- In certain, limited situations, a hospital may pay a long term care provider to hold open or guarantee a certain number of beds will be available for its discharges.

Complex Patient Discharges

- Often, hospitals have difficulty discharging patients due to the complex and expensive nature of their continued care.
- In these situations, hospitals have offered to continue paying for certain expensive drugs to alleviate the financial burden on the facility potentially receiving the patient.
- Generally speaking, such arrangements are prohibited, however, one-off exceptions may be appropriate as part of a specific, individualized compassionate care discharge.

Questions?

Thank You



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