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2020 brings first guilty plea under the 2018 Eliminating Kickbacks in Recovery Act

By Jena M. Grady

On October 24, 2018, the Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (the "SUPPORT Act") including the Eliminating Kickbacks in Recovery Act ("EKRA") was enacted. EKRA extends to referrals reimbursed by both governmental and commercial insurers. EKRA prohibits knowingly and willfully soliciting, receiving, offering, or paying remuneration, directly or indirectly, in return for referring a patient to, or in exchange for, an individual using the services of a recovery home, clinical treatment facility, or laboratory with respect to services covered by a "health care benefit program." Notably, "health care benefit program" includes public health care benefit programs (e.g., Medicare and Medicaid) *and* private health care benefit programs (e.g., commercial payor programs). Therefore, unlike the Anti-Kickback Statute ("AKS"), EKRA also applies to referrals that are reimbursed by commercial payors.

The SUPPORT Act authorized the U.S. Department of Justice ("DOJ") to establish additional exceptions and to further explain exceptions to EKRA by regulation in consultation with the Department of Health and Human Services ("HHS"). However, the DOJ and HHS since the enactment of the SUPPORT Act have been silent in providing any clarification for EKRA. Many have sought guidance regarding in part business practices that have been considered permissible under AKS (e.g., commission-based payments for employed sales and marketing staff of laboratories) but would violate EKRA.

Given the lack of guidance by DOJ and HHS, many believed there would be no enforcement action under EKRA until further clarification about EKRA was made.

Nonetheless, the U.S. Attorney's Office for the Eastern District of Kentucky announced in a press release that the most likely first EKRA conviction occurred on January 10, 2020, when Theresa C. Merced pleaded guilty that day to one count of violating EKRA. Ms. Merced was an office manager of a substance use treatment clinic in Kentucky and admitted that during December 2018 through August 2019 she solicited kickbacks from a CEO of a toxicology lab for urine drug test referrals. Specifically, the press release provided the following:

> … the CEO delivered to Merced a $4,000 check as part of a larger package of promised inducements. Merced caused the check to be cashed. When Merced was questioned about the check by law enforcement agents in September 2019, she denied knowledge of it, and stated that the $4,000 was probably a loan from the lab CEO to her husband. Shortly after her interview with the agents concluded, Merced called the lab CEO and asked that he alter the lab's financial records so that the entry for the $4,000 check would say "rent/loan," consistent with the lie she told the agents.[i]

Based on the above actions, Ms. Merced pleaded guilty to one count of violating EKRA, one count of making false statements, and one count of attempted tampering with records. Notably, the U.S. Attorney's Office did not seek enforcement under the AKS for the above actions.

While this is the first EKRA enforcement action, this action was not considered controversial since such above actions by Ms. Merced would have also violated the AKS. It remains to be seen whether DOJ or HHS will seek enforcement for actions that violate EKRA but are acceptable under the AKS or whether DOJ or HHS will release guidance or clarification before such enforcement.

For more information on the content of this alert, please contact your Nixon Peabody attorney or:

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[i] Press Release, U.S. Attorney's Office Eastern District of Kentucky, "Jackson Woman Pleads Guilty to Soliciting Kickbacks, Making False Statements to Law Enforcement Agents, and Tampering with Records" (January 10, 2020).