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Nation's First Conviction under EKRA

What appears to be the United States' first conviction under the Eliminating Kickbacks in Recovery Act ("EKRA") occurred last month when the United States District Court for the Eastern District of Kentucky accepted the guilty plea of a substance abuse clinic's office manager in Jackson, Kentucky. The office manager plead guilty to a charge of soliciting kickbacks from a toxicology laboratory in exchange for urine drug testing referrals. The office manager also plead guilty to lying to law enforcement agents about the kickback she received and to attempting to cover up the kickback by requesting the alteration of financial records.

EKRA took effect on October 24, 2018 as part of legislation aimed at combatting the opioid crisis. EKRA prohibits the solicitation of kickbacks in exchange for the referral of urine drug testing services. Although similar to the federal Anti-Kickback Statute, EKRA is broader in scope and is similar to certain state anti-kickback laws. EKRA provides, "whoever, with respect to services covered by a health benefit program… knowingly and willfully (1) solicits or receives any remuneration… directly or indirectly, overtly or covertly, in cash or in kind, in return for referring a patient or patronage to… a laboratory, or (2) pays or offers any remuneration… directly or indirectly, overtly or covertly, in cash or in kind (A) to induce a referral of an individual to a… laboratory or (B) in exchange for an individual using the services of that… laboratory, shall be fined not more than $200,000, imprisoned not more than 10 years, or both, for each occurrence." EKRA applies to services paid for by any payor (federal or private), has fewer safe harbors, and appears to prohibit activities that meet the Anti-Kickback Statute's safe harbors.

For over a year, toxicology laboratories, substances abuse clinics, and treating physicians have been awaiting clarification by CMS regarding various uncertainties, such as (1) whether EKRA will be enforced for activity that was previously permissible under the

Anti-Kickback Statute and (2) whether, because of the last-minute addition of EKRA to pending legislation, the failure to include exemptions was intended or a drafting error. For now, this conviction appears to be the only evidence of EKRA's enforcement. And, unfortunately, the conviction offers little no industry guidance, accept that courts will enforce EKRA's prohibitions, whether ambiguous or not.

Providers in the toxicology and substance abuse space may continue to sit on the sidelines and take a wait-and-see approach. While others, particularly those in states with state "patient brokering" laws mirroring EKRA, may desire to take a more risk-adverse approach by ensuring that their referral and compensation practices related to all claims (payable by private or government payors), not just government-reimbursed claims, are EKRA-compliant.

Contact the author or your Buchalter attorney to further discuss EKRA compliance. To access the DOJ's Press Release on this matter, click **HERE**.

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