

How Kickbacks Result in Civil False Claims Fraud Actions

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Overview

A continual enforcement priority for both the Department of Health and Human Services Office of Inspector General (OIG) and the Department of Justice (DOJ) is False Claims Act (FCA) cases that involve violations of the Anti-Kickback Statute (AKS) where remuneration is given in return for referrals. The AKS prohibits offering, paying, soliciting or receiving anything of value to induce or reward patient referrals or to generate any federal health care program business involving any item or service payable by federal health care programs. Many cases that fall under the AKS are brought to the DOJ by whistleblowers who are oftentimes physicians or others who have seen or been part of unlawful or unethical arrangements. AKS cases occur in all types of health care organizations, from physician practices to hospitals, skilled nursing facilities, emergency transportation companies, durable medical equipment suppliers, and others. But what exactly is the connection between kickbacks and being charged with submitting false claims to federally-financed health care programs?

From Kickbacks to False Claims

The AKS was created to ensure that physicians make treatment decisions based on the medical needs of the patient rather than the physicians' own financial gain. The law was designed to eliminate the corrupt influence of money on patient care decisions, thus any arrangement that has a purpose to induce or reward referrals violates the AKS. The DOJ and OIG have long held the view that all claims arising from a corrupt arrangement under the AKS are false and fraudulent. The Patient Protection and Affordable Care Act (Affordable Care Act) reinforces this position in stating that a claim that originates from a referral in violation of the AKS constitutes a false claim. In addition to violating the AKS, such fraudulent claims can also be the basis for liability under the FCA. Under the provisions of the Affordable Care Act, the OIG and DOJ have increased their enforcement actions against false claims, employing the FCA in connection with the AKS.

Implications for Compliance Officers

What does this mean for Compliance Officers? In order to prevent violations of AKS and FCA, Compliance Officers should increase their efforts to ensure ongoing monitoring and auditing of arrangements with referral sources. Those responsible for monitoring and managing physician arrangements should (a) be aware of existing applicable laws and regulations relating to such

arrangements; (b) develop policies and procedures for ensuring compliance with this; (c) ensure that those overseeing development of these type of arrangements are trained on the written guidance; and (d) verify that the written guidance is being properly followed. In order for effective ongoing auditing, Compliance Officers should seek outside oversight of the process to validate that ongoing monitoring is achieving the right objectives.

Although many Compliance Officers may be inclined to defer AKS violations to legal counsel, they should instead turn to outside experts to help them address AKS and false claims internally before seeking advice from legal counsel. Compliance Officers should consider the following when reviewing physician arrangements:

1. Ensure there is an “Arrangements Database” that tracks all arrangements and includes the key terms and conditions.
2. Examine existing medical needs for arrangements and how such needs were determined.
3. Examine the “four corners”, or complete meaning, of the agreement for compliance with both AKS and Stark Laws, especially in the determination of fair market value and the commercial reasonableness of the work to be performed.
4. Audit the process and controls to ensure that performance under the contract was evidenced before payments were made.

In Review

Based on statements from the OIG and provisions under the Affordable Care Act, physician referrals that are in violation of the AKS can be considered false claims and thus fall under the FCA. Because violations of this nature are connected to both federal laws, the implications of leaving such violations unaddressed or deferring them to outside legal counsel can create problems for Compliance Officers and weaken an organization’s compliance. However, Compliance Officers can take matters into their own hands to prevent violations of AKS and FCA by ensuring ongoing monitoring and auditing of physician arrangements.

About the Author

Richard P. Kusserow is currently the President and CEO of Compliance Resource Center. He served as the Inspector General of HHS for 11 years and brings decades of valuable experience from the government sector to Compliance Resource Center. Mr. Kusserow’s expertise on compliance policy and regulation as well as his extensive knowledge of compliance solutions enables Compliance Resource Center to effectively help health care organizations best manage their compliance programs.

About Compliance Resource Center

Compliance Resource Center has been leading the compliance industry since 2010 with our complete suite of solutions that are geared towards improving compliance program operations. Our solutions ensure that organizations regularly meet federal and state laws and supply the necessary resources to sustain long-term compliance.