



Congress enacts all payor kickback law for recovery homes, clinical treatment facilities and clinical laboratories, despite concerns about overbreadth and uncertainty of law

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Effective October 24, 2018, Congress enacted the Eliminating Kickbacks in Recovery Act of 2018 (EKRA) as part of the “Substance Use–Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act” (known as the SUPPORT Act). EKRA is an anti-kickback law that prohibits referrals to recovery homes, clinical treatment facilities or clinical labs in exchange for payment or remuneration. EKRA is designed to curtail the practice of patient brokering in the private pay substance abuse treatment facility industry by criminalizing kickbacks involving the payment or offer of remuneration to induce referrals of patients with substance abuse issues to the providers.

Significantly, EKRA covers *all* payors, both private and public, whereas services reimbursed by private payors are generally exempt from existing federal fraud and abuse law, such as the federal Anti-Kickback Statute (AKS). As a result, *all* addiction treatment providers, including those who only accept private payment, need to make sure that their financial arrangements with referral sources, such as sales representatives, group purchasing organizations and others are compliant with EKRA.

Critics of EKRA have raised concerns that the law is overbroad, because the language of the statute applies to *all* recovery home, clinical treatment facility or clinical lab services covered by a health benefit program, not just those that are providing services related to substance abuse treatment or recovery services.

EKRA includes several exceptions to the referral prohibition, including:

- Discounts or reductions in price to providers or other entities if they are properly disclosed and reflected in the costs claimed or charges made
- Medicare coverage gap drug discounts
- Payments to employees and independent contractors that are not determined by or do not vary with:
 - The number of individuals referred to the recovery home, clinical treatment facility or clinical lab
 - The number of tests or procedures performed
 - The amount billed to or received from the health care benefit program from the individuals referred
- Discounts in the price of an applicable drug furnished under the Medicare coverage gap program
- Payments that meet the requirements of the AKS safe harbor for personal services and management contracts
- Good faith, non-routine waivers or discounts of certain co-insurance or copayments by a health care benefit program
- Transfers to Federally Qualified Health Centers under the AKS
- Remuneration made pursuant to approved Alternative Payment Models

In addition, EKRA expressly states that it does not supersede or preempt other applicable federal or state laws, such as the AKS. However, it remains uncertain how EKRA will be interpreted to the extent that it is more restrictive than the AKS. For example, the AKS bona fide employment safe harbor permits commission-based payments to sales personnel who are W-2 employees, whereas such commission-based compensation arrangements appear to violate EKRA, because they are based on the volume of business generated. Criminal sanctions for violation of EKRA include fines up to \$200,000, 10 years imprisonment or both.

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