



## Post-acute providers beware: Providing free staff or services to hospitals could land you in hot water...or worse!

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The federal Anti-Kickback Statute prohibits the practice of knowingly and willfully offering, paying or receiving anything of value to encourage the referral of, or the recommendation of or arranging for the referral of, items or services reimbursable by Medicare, Medicaid or other federal health care programs.<sup>1</sup> It applies to any individual or entity, and violation of the Anti-Kickback Statute is a felony that is punishable by fines up to \$25,000 per violation and prison up to five years, or both. Another fraud and abuse law, the Stark Law, prohibits a hospital or other entity from billing Medicare for certain services, known as “designated health services,” referred by a physician if the hospital or entity has a financial relationship with the physician that does not meet all the requirements of an applicable Stark exception.<sup>2</sup> The purpose of both of these fraud and abuse laws is to protect against improper financial influences on medical decision-making. They also ensure that medical decisions are based solely on what is in the patient’s best interest.

One practice that has been found to run afoul of these laws occurs when post-acute providers, such as hospices, skilled nursing facilities, assisted living facilities and other post-acute providers, provide staff or services to a hospital to perform functions that the hospital would otherwise perform on its own and at its own cost. If

the post-acute provider is relieving the hospital of a cost or obligation that is really the hospital's own responsibility, it could violate the Anti-Kickback Statute. And if a physician is involved, such as if a physician group provides free services to an SNF or hospice provider in order to induce referrals of the SNF or hospice provider's patients to the physician group, it could violate the Stark Law.

In the past, the Department of Health and Human Services, Office of Inspector General (OIG) has issued Compliance Program Guidance for different types of health care providers and suppliers identifying risk areas they should watch out for to avoid violating the fraud and abuse laws. For example, in the Hospice Compliance Program Guidance, the OIG identifies that hospices may be at risk of violating the Anti-Kickback Statute if they provide "nursing, administrative, and other services for free or below fair market value to physicians, nursing homes, hospitals and other potential referral sources with the intent to induce referrals."<sup>3</sup> Similarly, in the Home Health Compliance Program Guidance, the OIG identifies that home health agencies that provide hospitals with free or below fair market value discharge planners, home health coordinators or home care liaisons may violate the Anti-Kickback Statute if they do so with the intent to induce referrals to their home health agencies.<sup>4</sup>

Another risk area for post-acute providers, such as nursing homes, involves giving free items, including gifts, sporting tickets, gift cards, lunches or food, or other items of value to hospital personnel, such as discharge planners, in an effort to encourage them to direct referrals to their nursing homes. This type of activity has been the subject of federal Department of Justice prosecutions for violation of the Anti-Kickback Statute, and nursing home providers have paid large settlements to resolve these types of concerns.<sup>5</sup> Generally, post-acute providers should not supply personnel, services or other items to hospitals for free or below fair market value. And they should also make sure that the business terms of any contract or agreement to perform any service for or with a hospital are commercially reasonable. They should not include terms more favorable to the hospital because the post-acute provider is trying to give a benefit to the hospital in exchange for patient referrals.

If a post-acute provider enters into a contract with a hospital to provide services or to work on a quality program or any other initiative, it should do so for reasons that are not related to actual or expected referrals from the hospital (or vice versa). Keeping these compliance guidelines in mind should keep post-acute providers out of trouble with these laws. And seeking advice from an experienced health care attorney can help clarify the rules and avoid violating these laws.

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<sup>1</sup> 42 USC 1320a-7b(b)(1)-(2).

<sup>2</sup> 42 USC 1395nn(a).

<sup>3</sup> OIG Compliance Program Guidance for Hospices, 64 Fed. Reg. 54031 at 54035-36 (Oct. 5, 1999).

<sup>4</sup> OIG Compliance Guidance for Home Health Agencies, 63 Fed. Reg. 42410 at 42414 (Aug. 7, 1998).

<sup>5</sup> See United States Department of Justice Press Release, San Diego Nursing Homes Owned by L.A.-Based Brius Management to Pay up to \$6.9 Million to Resolve Kickback and Fraud Allegations, Nov. 16, 2017.