

# Health Law Bulletin

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## Avoiding Liability Under the Anti-Kickback Statute

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State and federal governments have many mechanisms available to fight and prosecute health care fraud. One of the most potent tools at the federal level is the Anti-Kickback Statute. The Anti-Kickback Statute (AKS) makes it a felony to knowingly solicit or receive remuneration “in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal healthcare program.” The AKS also covers the “other side” of a kickback arrangement—knowingly offering or paying remuneration to a person to induce them to make the referral or other arrangement described above. Penalties for violations of the AKS include a maximum fine of \$25,000, imprisonment for up to five years, or both. It is easy to see why the AKS is an effective tool for preventing and prosecuting health care fraud and abuse.

Notice that the AKS is not limited to payments for referrals by physicians or referrals for a specified set of services. It covers referrals by any person to any other person for the purpose of inducing a referral. This makes the AKS much broader in scope than the Physician Self-Referral Law, commonly known as the Stark Law. Also, notice that the AKS applies to any Federal healthcare program—Medicare, Medicaid, CHAMPUS and TRICARE, maternal and child health block grant programs, social service block grant funded programs, etc. Virtually any healthcare program that receives any federal funds is subject to the broad sweep of the AKS. And the term “remuneration” in the AKS means more than just cash payments. Any exchange of something of value may be considered remuneration and could potentially be a kickback if provided for the purpose of inducing referrals.

Congress recognized that there would be some financial arrangements that would technically be prohibited by the AKS, but that do not present any significant risk of fraud or abuse. Therefore, Congress included in the AKS certain “safe harbors” and also authorized the Secretary of the federal Department of Health and Human Services to develop more safe harbors. If a financial arrangement completely meets all of the criteria of one of the safe harbors, then the arrangement is not a violation of the AKS. The safe harbors include:

- Payments made to bona fide employees;
- Certain investments in health care entities;
- Lease of space;
- Rental of equipment;
- Personal services and management contracts;
- Recruitment of practitioners to underserved areas; and
- Investments in group practices.

This is only a partial list of the safe harbors that are available. Each safe harbor has a number of specific criteria that must be met in order to qualify for that safe harbor. Some of the common features of the safe harbors are ensuring that payments for goods or services are “fair market value,” requiring compensation under the arrangement to be set in advance, and requiring a one-year written agreement between the parties. Only complete compliance with each requirement of a safe harbor can ensure that an arrangement will not be considered a violation.

Even if a proposed arrangement does not completely meet the criteria of a safe harbor, it is not necessarily a violation of the AKS. If a proposed arrangement does not fit squarely into one of the safe harbors, then you should take all possible actions to structure the arrangement so that there is no appearance of any kickbacks and include protections against the possibility of kickbacks.

You may be thinking, “This doesn’t apply to me. I don’t pay or receive kickbacks for referrals.” However, the language of the statute is so broad that many arrangements that are not classic “kickback” schemes potentially fall within the scope of the AKS. And courts have stated that if *even one purpose* of an arrangement involving federally-funded health care is to induce referrals, then the AKS potentially applies.

Given the scope of the AKS, how can a provider protect him or herself against possible federal prosecution? In short, make sure that every transaction that involves patient referrals or investments with another organization is reviewed by your attorneys. They will analyze the arrangement to determine whether it meets one of the safe harbors and provide you with options for how the arrangement can be structured to fit the safe harbor or, if it can’t fit the safe harbor, how it can be structured to minimize your exposure to prosecution under the AKS.