

HEALTHCARE CONTRACTS

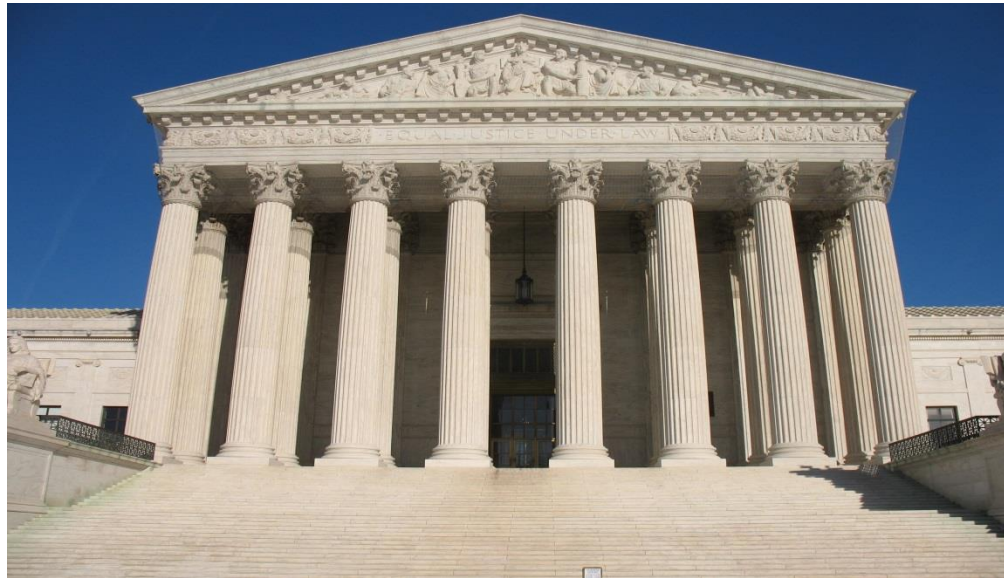
LAWS TO KNOW AND POTENTIAL PITFALLS TO AVOID

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What laws apply?



Overview of the Federal Physician Self-Referral Law (“Stark Law”)



When does the Stark Law apply?

Under the Stark Law, a physician (or his immediate family member) who has a financial relationship with an entity may not refer to such entity for designated health services for which payment otherwise may be made under Medicare unless an exception applies.

Key Points under the Stark Law:

- (1) Focused on physician referrals.
- (2) **Strict** liability.
- (3) Must meet every element of an applicable exception.
- (4) Civil liability.
- (5) Potential False Claims Act liability (... treble damages).

What exceptions are available?

Many, but for purposes of this discussion:

- (1) Personal Services.
- (2) Rental of Office Space.
- (3) Rental of Equipment.
- (4) *Bona fide* Employment.

What exceptions are available?

All of these exceptions generally share certain important elements in common:

- (1) Must be in writing (except for *bona fide* employment).
- (2) Must be for a term of at least 1 year.
- (3) Must specify services provided, space leased, or equipment used.
- (4) Amounts paid must be FMV, commercially reasonable, and set in advance (e.g., formula is set in advance).
- (5) Arrangement does not violate the AKS (more on this next).

Overview of the Federal Anti-Kickback Statute ("AKS")



When does the AKS apply?

Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind –

When does the AKS apply?

(1) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(2) 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 health care program,

When does the AKS apply?

[S]hall be guilty of a felony and upon conviction thereof, shall be fined not more than \$25,000 or imprisoned for not more than five years, or both

Key Points under the AKS:

- (1) Penalties are imposed on both parties.
- (2) AKS is a criminal statute.
 - Requisite *mens rea*, or intent, must be proved.

Key Points under the AKS:

- (1) A person does not need to know of the AKS to have the required intent to violate the AKS.
- (2) A violation of the AKS is a *per se*, or automatic, violation of the False Claims Act.
- (3) If even “one purpose” of the arrangement is to generate prohibited referrals, then you have violated the AKS.

What are the safe harbors under the AKS?

Many, but for purposes of this discussion:

- (1) Personal services and management contracts.
- (2) Office Space Leases.
- (3) Equipment Rental.
- (4) *Bona fide* Employment.

What are the safe harbors under the AKS?

- (1) Elements of each are similar to those under the Stark Law, but in some cases harder to satisfy.
- (2) For an arrangement to satisfy a safe harbor, it must meet every element of the applicable safe harbor, and if it does, it will not be subject to liability under the AKS.
- (3) However, even if an arrangement does not satisfy every element of a safe harbor, it may still be okay if it is (i) commercially reasonable and (ii) the remuneration paid is fair market value.

Example 1

Physician (P) enters into a 1 year office space lease with Hospital (H). As part of the lease, H agrees to provide receptionist coverage, office equipment, and medical supplies for P's office during normal business hours at no additional charge to P.

Example 2

P enters into contract with clinical laboratory services provider (L) to “supervise” a phlebotomist that will be on-site at P’s office. P generally refers patients for laboratory services to L. P is paid a flat rate fee of \$X per patient referred to L.

Example 2, continued

P is paid \$X per day for P's supervision services.

Example 3

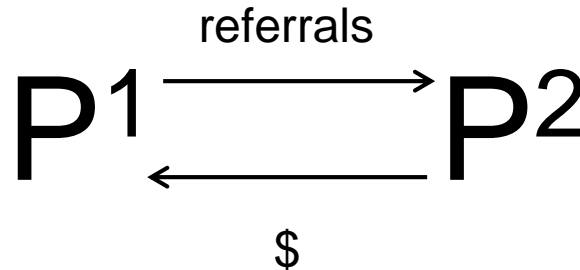
P employed by H. P to receive set annual base compensation plus a bonus equal to X% of P's personally performed services in excess of P's base compensation.

Example 3, continued

Bonus paid to P is instead based on P's personally performed services and any ancillary services (imaging, lab, etc.) referred to H.

Example 4

P¹ is a referral source for P². P¹ leases office space and imaging equipment to P² on a part time basis. The office space and equipment leased to P² is generally only used by P² to see patients referred by P¹. The lease provides that P² shall pay P¹ \$X each time the equipment is used by P² to see a patient.



Example 5

Physician Practice (PP) is a referral source for H. PP leases imaging equipment to H. The lease provides that H will pay X% of monthly revenue to PP.

How to avoid common pitfalls?

- Know whether you are referral source or whether you are entering into a contract with a referral source.
- Are you being paid or is someone paying you for each referral? If so, stop because you may be violating fraud and abuse laws.
- Whatever you do, get the arrangement in writing.
- Apply some level of effort to determine whether the remuneration being paid to you or paid by you is fair market value and, maintain that documentation in a file.
- Get a lawyer.

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