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What Healthcare Providers Need to Know About EKRA

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In October 2018, the President signed the SUPPORT for Patients and Communities Act, a portion of which is known as the “Eliminating Kickbacks in Recovery Act of 2018” or “EKRA.” EKRA, aimed at the ongoing opioid crisis, is meant to prevent patient brokering, referrals, and kickbacks related to drug recovery and substance abuse treatment centers. EKRA's language, however, is very broad and goes well beyond the opioid crisis to deal with “patient brokering,” which is when a substance abuse facility or provider pays a third party for referring or directing potential patients. EKRA violations carry significant penalties, including fines upwards of $200,000 per “occurrence,” as well as significant prison time.

While EKRA's purpose is to address kickbacks related to the broader issues surrounding opioids, it is not limited exclusively to treatment centers per se. Instead, EKRA precludes the solicitation or receipt of value for referrals to recovery homes, clinical treatment centers, or laboratories. EKRA applies to public and – importantly – private commercial health benefit programs. This is effectively an expansion of the Federal Anti-Kickback Statute's prohibition on kickbacks involving individuals covered by federal programs like Medicare, Medicaid, or TRICARE.

Recovery homes are defined by EKRA to include a “shared living environment that is, or purports to be, free from alcohol and illicit drug use and centered on peer support and connection to services that promote sustained recovery from substance abuse disorders.”

Clinical treatment facilities are defined as “a medical setting, other than a hospital, that provides detoxification, risk reduction, outpatient treatment and care, residential treatment, or rehabilitation for substance abuse, pursuant to licensure or certification under state law.”

Unlike recovery homes or clinical treatment facilities, EKRA's description of “laboratories” is very broad. The definition includes all laboratories, not just those that perform drug tests and toxicology screening: “a facility for the biological, microbiological, serological, chemical, immuno-hematological, hematological, biophysical, cytological, pathological, or other examination of materials derived from the human body for the purpose of providing information for the diagnosis, prevention, or treatment of any disease or impairment of, or the assessment of the health of, human beings.” Because the Act's definition of “laboratory” is so broad, any healthcare provider that maintains or utilizes a lab will need to take steps to ensure it is not in violation of EKRA.

Given EKRA's recent adoption by the government, courts and regulators

have yet to more fully define the reach of the statute. And while there are certain statutory exceptions and safe harbors, the statute nevertheless creates additional risk for all healthcare providers. Because of EKRA's broad sweep, all healthcare providers should scrutinize both existing and contemplated business relationships to avoid potential pitfalls, even if those relationships are outside the purview of Medicare and Medicaid. Holland & Hart recommends healthcare providers seek out legal counsel to evaluate compliance with this new statute and avoid unnecessary risk.

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