California Statutory Amendment Provides Anti-Kickback Carve Out for Healthcare Provider Directory and Marketing Services

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The California legislature amended California Business and Professions Code Section 650 ("Section 650"), effective January 1, 2022, so that internet-based services advertising clinicians, booking appointments with clinicians, and providing other information about clinicians to prospective patients are carved out from anti-kickback enforcement, as long as the service provider does not recommend or endorse a specific provider to the patient. This amendment departs from prior California Attorney General opinions holding that paid provider listings would result in anti-kickback violations because they generated unlawful referrals. This amendment also removes some uncertainty surrounding whether online services that connect patients and providers in California face anti-kickback risk.

Until now, neither of California's anti-referral statutory provisions [1] directly addressed healthcare provider directory and marketing services. However, the issue has been addressed in California Attorney General opinions, the most recent of which was issued in 2001. [2] These opinions reviewed online provider listings available to prospective patients, for which providers paid to be included, and found that those specific listing arrangements would constitute unlawful payments for referrals under California law. [3] In practice, these opinions have had a chilling effect on online healthcare provider directory and marketing services.

The California Attorney General opinions were more restrictive than guidance on the federal anti-kickback statute (Social Security Act Section 1128B(b)). The Office of the Inspector General of the Department of Health and Human Services has recently issued two favorable advisory opinions concerning online platforms that allow users to search for health care providers, and that charge health care providers to be listed on the platform (Advisory Opinion No. 19-04 (September 5, 2019) and 21-20 (December 13, 2021)).

The amendment to Section 650 appears to align California law with the federal guidance. Specifically, Section 650 now includes the following provision:

(h) To the extent consistent with federal law, regulations, or guidance, the payment or receipt of consideration for internet-based advertising, appointment booking, or any service that provides information and resources to prospective patients of licensees shall not constitute a referral of a patient if the internet-

based service provider does not recommend or endorse a specific licensee to a prospective patient.

While the amendment to Section 650 does not address California's other anti-referral statute, Health and Safety Code Section 445, the amendment suggests that a business may provide a platform for a provider directory that does not recommend or endorse a particular provider without violating California law, as long as the platform operates in a way that is consistent with the federal guidance.

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[1] Section 650 is California's general anti-kickback statute. In relevant part, Section 650 provides as follows:

[T]he offer, delivery, receipt, or acceptance by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest or co-ownership in or with any person to whom these patients, clients, or customers are referred is unlawful.

California Health and Safety Code Section 445 ("Section 445") prohibits any person from profiting from the referral of a person to a health-related facility. It provides:

No person, firm, partnership, association or corporation, or agent or employee thereof, shall for profit refer or recommend a person to a physician, hospital, health-related facility, or dispensary for any form of medical care or treatment of any ailment or physician condition. The imposition of a fee or charge for any such referral or recommendation creates a presumption that the referral or recommendation is for profit.

[2] *See* 65 Ops. Cal. Atty Gen. 252 (1982); 77 Ops. Cal. Atty Gen. 143 (1994); 82 Ops. Cal. Atty Gen. 1 (1999); 84 Ops. Cal. Atty Gen. 113 (2001).

[3] Three of these opinions referenced Section 650 and one referenced the other California anti-referral provision, Section 445.

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