Federal Court Interprets EKRA Narrowly – Allows Commission Payments

Insights

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In *S&G Labs Hawaii, LLC v. Graves*, a federal court in Hawaii recently held that EKRA allows a laboratory to pay commissions to its employed sales force. The Eliminating Kickbacks in Recovery Act ("EKRA"), is a federal anti-kickback statute that, among other things, prohibits knowingly and willfully soliciting, receiving, paying or offering any remuneration, directly or indirectly, overtly or covertly, in cash or in kind (1) in return for "referring a patient or patronage" to a recovery home, treatment facility or laboratory, or (2) in "exchange for an individual using the services" of a recovery home, treatment facility or laboratory. EKRA is an ***all-payor*** kickback statute, meaning that it applies to federal health care programs, commercial insurance and self-cash pay patients. A violation of EKRA can result in a fine of up to $200,000, imprisonment for 10 years, or both, for each occurrence. The full text of EKRA is codified at 18 U.S.C. § 220.

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EKRA has an exception that permits certain types of compensation arrangements for some *bona fide* employment and independent contractor arrangements. This exception, however, prohibits compensation determined by or varying with (1) referrals to the laboratory, (2) the number of tests or procedures performed, or (3) the amount billed or received from payors. Accordingly, many observers had concluded that the common practice of paying sales commissions to laboratory sales agents could violate EKRA.

A narrower reading of EKRA, however, could conclude that laboratory sales agents are not typically paid for "referring a patient or patronage" to a laboratory, because they do not typically solicit or refer individual patients for testing. Instead, they generally are paid to convince those who do make referrals to a laboratory, *e.g.*, physicians, clinics, *etc*., that ***they*** should be sending ***their*** referrals and patronage to the laboratory for whom the sales agent is working. The federal court in Hawaii essentially adopted this reasoning:

Undoubtedly, Graves's commission-based compensation structure induced him to try to bring more business to S&G, either directly through the accounts he serviced himself, or through the accounts of the personnel under his management. However, the 'client' accounts they serviced were not individuals whose samples were tested at S&G. Their 'clients' were 'the physicians, substance abuse counseling centers, or other organizations in need of having persons tested.' … Because Graves was not working with individuals, the compensation that S&G paid him was not paid to induce him to refer individuals to S&G.

S&G Labs Hawaii, LLC v. Graves, D. Haw., 19-00310 LEK-WRP (Oct. 18, 2021).

For now, this case is binding only in Hawaii, although other federal courts might find the reasoning here to be persuasive, and rule similarly, if presented with a similar situation. The analysis, however, very well could be different if a commission-based sales agent were soliciting or directing individual patients to a recovery home, treatment facility or laboratory, as opposed to engaging in sales efforts aimed at physicians, clinics, and other referral sources.

Ultimately, the precise scope of EKRA awaits further developments, and it should not be assumed that other federal courts will reach the same conclusion reached in this case. As the *Graves* court indicates in its analysis, the legality of these arrangements is highly dependent on the specific facts and circumstances.

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If you have questions about EKRA or its application to specific arrangements, please contact Charles Oppenheim, Robert Miller or Stephanie Gross in Los Angeles, or any other member of our Hooper, Lundy & Bookman team.

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