

First EKRA Enforcement Announced

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The first publicly disclosed prosecution under the Eliminating Kickbacks in Recovery Act (“EKRA”) occurred last month, a little over a year after EKRA became law. As we described in a [previous blog post](#), EKRA criminalizes certain health care payment arrangements related to referrals, regardless of payor.

In the [recent EKRA prosecution](#), an office manager of a Kentucky substance abuse treatment clinic pleaded guilty to soliciting kickbacks from a toxicology laboratory in exchange for urine drug testing referrals. Theresa Merced, the 80-year-old office manager, admitted that the CEO of the toxicology lab gave her a \$4,000 check as part of a larger bundle of promised inducements. When law enforcement questioned Merced about the check, she denied knowledge of it and said it was likely a loan from the CEO to her husband. After the questioning, Merced asked the CEO to alter the laboratory’s financial records to reflect her story. Last month, Merced plead guilty to one count of violating EKRA, one count of making false statements, and one count of attempted tampering with records. She is scheduled to be sentenced on May 1, 2020, and faces up

to twenty years in prison and a maximum fine of \$250,000.

EKRA was passed as part of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act of 2018 (the “SUPPORT Act”) in response to concerns that the federal Anti-Kickback Statute (“AKS”) was not broad enough to adequately address abusive payment arrangements related to addiction treatment centers. The

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laws are similar, yet are distinct in several ways. Like the AKS, EKRA makes it a crime to knowingly and willfully solicit, receive, pay or offer any remuneration in order to induce referrals. EKRA, however, only covers arrangements that induce referrals to specific entities: recovery homes, clinical treatment facilities (i.e., certain non-hospital settings that provide substance use treatment), and laboratories. Additionally, EKRA applies to payment arrangements involving all payors, not just those involving federal health care programs like Medicare and Medicaid.

Both the AKS and EKRA are criminal statutes with a maximum term of imprisonment of ten years. Both laws provide for several similar safe harbors, but the EKRA safe harbors are narrower in certain respects. For example, although the AKS provides a safe harbor for any payment that is part of any bona fide employment arrangement, EKRA's employment safe harbor only permits payment that does not vary based on the number of individuals referred, the number of tests or procedures performed, or the amount billed to or received from the health care benefit program from the individuals referred. Thus, EKRA does not protect employment compensation to the same extent that the AKS does. .

Although the DOJ has authority to clarify the law and its safe harbors by regulations, none have been proposed. Since EKRA passed in October 2018, many have raised concerns about whether Congress intended for the law to apply so broadly and whether it will be enforced for activity that was previously permissible under the AKS. The Merced prosecution did not involve employment compensation, so does not shed light on whether DOJ or HHS will pursue criminal enforcement for business practices previously permitted under the AKS. The prosecution also dispels hopes that the DOJ would refrain from prosecuting under the statute until clarifying the law through regulations or guidance.

The consequences of EKRA are potentially far-reaching and severe. Until clarifying regulations are promulgated, healthcare providers and other entities should evaluate whether their referral and compensation practices comply with the EKRA safe harbors in addition to the safe harbors of the Stark Law and AKS. Because EKRA applies to all payors, this evaluation should take into account practices related to all claims, not just government-reimbursed claims.

We will continue to closely monitor the state of EKRA for guidance, revisions to the law, and enforcement. If you have further questions or need advice on how to restructure payment arrangements to comply with EKRA, please contact the authors or your regular Dorsey attorney.