

Anti-Kickback Statute [42 U.S.C. § 1320a-7b (b)]

The AKS is a criminal law that prohibits the knowing and willful payment of "remuneration" to induce or reward patient referrals or the generation of business involving any item or service payable by the Federal health care programs (e.g., drugs, supplies, or health care services for Medicare or Medicaid patients). Remuneration includes anything of value and can take many forms besides cash, such as free rent, expensive hotel stays and meals, and excessive compensation for medical directorships or consultancies. **In some industries, it is acceptable to reward those who refer business to you. However, in the Federal health care programs, paying for referrals is a crime.** The statute covers the payers of kickbacks-those who offer or pay remuneration- as well as the recipients of kickbacks-those who solicit or receive remuneration. Each party's intent is a key element of their liability under the AKS.

Criminal penalties and administrative sanctions for violating the AKS include fines, jail terms, and exclusion from participation in the Federal health care programs. Under the CMPL, physicians who pay or accept kickbacks also face penalties of up to \$50,000 per kickback plus three times the amount of the remuneration.

Safe harbors protect certain payment and business practices that could otherwise implicate the AKS from criminal and civil prosecution. To be protected by a safe harbor, an arrangement must fit squarely in the safe harbor and satisfy all of its requirements. Some safe harbors address personal services and rental agreements, investments in ambulatory surgical centers, and payments to bona fide employees.

As a physician, you are an attractive target for kickback schemes because you can be a source of referrals for fellow physicians or other health care providers and suppliers. You decide what drugs your patient's use, which specialists they see, and what health care services and supplies they receive.

Many people and companies want your patients' business and would pay you to send that business their way. Just as it is illegal for you to take money from providers and suppliers in return for the referral of your Medicare and Medicaid patients, it is illegal for you to pay others to refer their Medicare and Medicaid patients to you.

Kickbacks in health care can lead to:

- Overutilization
- Increased program costs
- Corruption of medical decision making
- Patient steering
- Unfair competition

The kickback prohibition applies to all sources of referrals, even patients. For example, where the Medicare and Medicaid programs require patients to pay copays for services, you are generally required to collect that money from your patients. Routinely waiving these copays could implicate the AKS and you may not advertise that you will forgive copayments. However, you are free to waive a copayment if you make an individual determination that the patient cannot afford to pay or if your reasonable collection efforts fail. **It is also legal to provide free or discounted services to uninsured people.**

Besides the AKS, the beneficiary inducement statute (42 U.S.C. § 1320a-7a (a) (5)) also imposes civil monetary penalties on physicians who offer remuneration to Medicare and Medicaid beneficiaries to influence them to use their services.

The Government does not need to prove patient harm or financial loss to the programs to show that a physician violated the AKS. A physician can be guilty of violating the AKS even if the physician actually rendered the service and the service was medically necessary. **Taking money or gifts from a drug or device company or a durable medical equipment (DME) supplier is not justified by the argument that you would have prescribed that drug or ordered that wheelchair even without a kickback.**

Case Examples Involving kickbacks for Referrals and Self-Referrals

- Nine cardiologists paid the Government over \$3.2 million for allegedly engaging in a kickback scheme. The cardiologists received salaries under clinical faculty services agreements with a hospital under which, the Government alleged, they did not provide some or any of the services. In exchange, the cardiologists referred their patients to the hospital for cardiology services. Two of the physicians also pled guilty to criminal embezzlement charges involving the same conduct.
- A physician paid the Government \$203,000 to settle allegations that he violated the physician self-referral prohibition in the Stark law for routinely referring Medicare patients to an oxygen supply company he owned.