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Fraud, Waste, and Abuse 101

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ROADMAP:

- Laws
- Enforcement
- Physician Resources

DISCLAIMER: This presentation does not constitute legal advice.

False Claims Act (31 U.S.C. § 3729):

- Regulates **accuracy** of claims for payment from government.
- Can violate by failing to return an overpayment.
- Examples:
 - Knowingly submit claim for service not rendered
 - Knowingly submit claim for medically unnecessary service
- Elements:
 - Claim OR failure to return
 - "Knowingly" = Actual knowledge **or** "**reckless disregard**" for truth
 - Materially false: "Having a natural tendency to influence, or be capable of influencing"

FCA Pitfalls:

Upcoding

Poor Documentation

Patient fees/Assignment

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

- Regulates remuneration for referrals, recommendations, and services for government programs.
- Examples:
 - Accept free trip for prescribing particular drug
 - Give patients taxi vouchers
- Elements:
 - Knowing and willful
 - Solicit or receive (*quid*)
 - Remuneration [something of value] in return (*pro quo*)
 - For referral, purchase, lease, etc.
 - [AND no safe harbor present such as equipment rental, personal services, practitioner recruitment, etc.]

AKS Pitfalls:

Conferences/travel

Patient perks

Rx company gifts

Consultancies

Physician Self-Referral Law (“Stark”) (42 U.S.C. § 1395nn)

- Regulates referrals for designated health services involving *financial conflicts of interest*.
- Examples:
 - Physician invests in a clinic and refers patients there.
 - Physician’s spouse works at a clinic and physician refers patients there.
- Elements:
 - [No mens rea]
 - Physician
 - Financial relationship (ownership, investment, or compensation)
 - Referral
 - Designated health service
 - [AND no exception present such as in-office ancillary services, group practice, ACO]

Stark Pitfalls:
Investments
Recruitment

Anti-Kickback Statute and Physician Self-Referral: What are Some Differences?

1. Physician Self-Referral Law is **narrower** in some ways:

- Applies only to referrals from physicians (AKS is referrals from anyone)
- Applies only to “designated health services” (AKS is any item or service)

2. Physician Self-Referral Law is **broader** in some ways:

- Has no *mens rea* requirement (AKS requires knowing and willful *quid pro quo*)

3. Physician Self-Referral Law’s exceptions are mandatory (failure to meet an exception means liability) whereas AKS safe harbors are voluntary (failure does not necessarily mean liability)

PA MA Provider Prohibited Acts (55 Pa. Code § 1101.75)

- List of independent state prohibitions analogous to federal False Claims Act and Anti-Kickback Statute
- Focused on Medical Assistance in Pennsylvania

Violation of the fraud, waste, and abuse laws can bring “treble damages” and exclusion from health care programs.

Enforcement Entities Include:

- HHS Office of Inspector General
- HHS CMS
- PA Attorney General Medicaid Fund Control Unit
- PA State Inspector General
- U.S. Department of Justice
- Whistleblowers (*qui tam*)

Resources:

- HHS OIG website **especially safe harbors, exceptions, and advisories**,
<https://oig.hhs.gov/compliance/physician-education/01laws.asp>
- HHS OIG, *Avoiding Medicare and Medicaid Fraud and Abuse*,
https://oig.hhs.gov/compliance/physician-education/roadmap_web_version.pdf
- HHS CMS, *Medicare Fraud & Abuse: Prevent, Detect, Report*,
<https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/Fraud-Abuse-MLN4649244-Print-Friendly.pdf>
- PA DHS, *Fraud and Abuse (information and fraud reporting)*,
<http://www.dhs.pa.gov/learnaboutdhs/fraudandabuse/index.htm>