PG Alert
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Significant Changes to Florida's Patient Brokering Act: Uncertainty Lies Ahead

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A recent judicial development has the potential to significantly impact health care providers doing business in Florida. Providers and counsel need to use caution and carefully analyze arrangements that may implicate the state's Patient Brokering Act (PBA). Providers should expressly document their general intent both prior to and while engaging in such activities and maintain evidence of the interactions as proof of such intent. In addition, counsel may wish to encourage providers to seek a declaratory judgment or an advisory opinion from the state regulators before entering into or continuing such arrangements. This type of advisory opinion is expressly permitted under Florida law.

Historical Background

Florida has a broad statutory prohibition against patient brokering and splitting of fees in the health care context. The state's PBA, codified under Florida Statute § 817.505, criminalizes any "offer or pay[ment of] any commission, bonus, rebate, kickback, or bribe … to induce the referral of patients or patronage to or from a health care provider or health care facility." At first blush, the statue appears to track the federal Anti-Kickback Statute (albeit the state PBA applies to private payors, whereas the federal statute is limited solely to federal health care programs).

Even the exemptions in the PBA seem consistent with the federal Anti-Kickback Statute. For example, until earlier this summer, the PBA explicitly exempted "[a]ny discount, payment, waiver of payment, or payment practice not prohibited by 42 U.S.C. § 1320a-7b(b) [(i.e., the federal Anti-Kickback Statute)] or regulations promulgated thereunder." Although there was some confusion with this language, it was generally understood to indicate that conduct which fell under federal "safe harbors" of the federal Anti-Kickback Statute was not criminalized under the state statute.

Thus, many assumed that health care providers in Florida could simply follow and rely upon federal anti-kickback guidance to steer clear of additional regulatory scrutiny from the state under the PBA. A recent judicial opinion, however, has injected a note of caution into that common understanding, particularly with respect to the requisite intent and corresponding "advice of counsel" defense.

Recent *Kigar* Decision

Earlier this month, one of the state's five appellate courts rendered a significant decision that may impact health care providers and patient referral arrangements, *State of Florida v. James Francis Kigar,* No. 4D19-0600 (Fourth District Court of Appeals, August 7, 2019). In this opinion, the appellate court held that health care providers cannot rely on the "advice of counsel" defense as a bar to charges of violating the patient brokering laws.

In *Kigar,* a defendant was charged with over 100 counts of patient brokering. The state moved to exclude any evidence of an "advice of counsel" defense on the grounds that the patient brokering law was one of general intent, not specific intent, and thus the "advice of counsel" defense was inapplicable because "advice of counsel" is not a defense to a general intent crime. Defendant Kiger argued that the state should allow the same defenses advanced in cases where a violation of the federal Anti-Kickback Statute is asserted. *See e.g. United States v. Williams*, 218 F.Supp.3d 730, 743 (N.D. Ill., 2016).

The appellate court, in a matter of first impression, agreed with the state, holding that "'advice of counsel' is not a defense to the general intent crime of patient brokering as provided in section 817.505(1)(a), Florida Statutes (2016)." The court found that, in prosecuting a patient brokering act case, the government was not required to prove the defendant had a specific intent to violate the statute. Put another way, the court held that prosecutors need not prove a "heightened or particularized intent beyond the mere intent to commit the act itself" under Florida law. Given this finding—that the patient brokering act is a general intent statute in Florida—the court followed long-standing judicial principles to find the "advice of counsel" defense to be inapplicable. The provider was not able to rely on the legal opinion it had obtained prior to engaging in the conduct (a factual matter unchallenged by the state) as a defense to the charges against it. Until *Kigar,* a bedrock principle was that faithfully soliciting—and following—legal advice was a defense to any kickback prosecution. *Kigar* significantly casts that principle into doubt with respect to Florida law.

Health Care Practice in Florida Following *Kigar*

The *Kigar* holding may come as an unpleasant shock to providers, many of whom understood the "green light" from an attorney on a referral or payment model to more or less absolve all risk associated with kickback liability. However, this holding serves as a chilling reminder of the regulatory complexities and how there are no "black and white" answers in the world of health care compliance, which certainly holds true with respect to referral or payment models. Thus, sophisticated health care counsel provide counsel for such arrangements on a risk spectrum that contemplates both risk and business goals, rather than simply providing a "yes" or "no" answer. It is now clear (absent any legislative intervention) that advice of counsel is no defense under Florida law for patient brokering violations, and this is a new wrinkle—albeit, an unpleasant one—for

providers weighing the risk-reward analysis when considering various patient referral and payment models.

To that end, providers need to stay vigilant of compliance with their patient referral and payment models, and will need to re-evaluate their current models if implemented with the understanding that an advice of counsel document in itself ensured the practices are compliant with state law.

Moreover, a recent amendment to the PBA may reflect additional limitations to the scope of PBA exceptions. The amendment potentially narrows the exemption involved in *Kiger* by only exempting practices "*expressly authorized* by 42 U.S.C. § 1320a-7b(b) or regulations *adopted* thereunder," rather than the old language that exempted practices "*not prohibited* by 42 U.S.C. § 1320a-7b(b) or regulations *promulgated* thereunder" (emphasis added). The amendment was intended to bring clarity by only exempting those practices "expressly authorized" by the federal statute as opposed to those "not prohibited" by the language therein. However, this amendment hardly eliminates ambiguity, as the federal Anti-Kickback Statute does not "expressly authorize" certain practices or arrangements. Rather, the federal statute simply provides "safe harbors" defining conduct that is not prohibited by that law.

This recent amendment, coupled with the *Kigar* holding, leaves providers in a situation where any conduct not detailed as permissible in the law may run afoul of the statute, even if the conduct was run through legal counsel. Absent a safe harbor, federal enforcement authorities look to whether there is an "improper nexus" between a payment and referral of federal health care business. The key question becomes one of intent—that is, whether the arrangement is intended to reward or induce referrals. Although state prosecutors may not have adopted exactly the same "nexus analysis" rubric, the underlying question is not significantly different: what is the intent of the arrangement, and to that end, how does the record show such intent.

It is unclear whether the state legislature was aware of the potential impact of its amended language at the time of the amendment's passage. While the purpose of the amendment seems to have been to bring clarity to ambiguous language and bolster enforcement efforts by state prosecutors, the current interpretation may have a chilling effect on health care providers doing business in Florida that are good actors, and simply want to know what is expressly exempt from prosecution under the PBA to try to fit their models within an exception.

Sophisticated providers should avoid viewing the legislative developments as a drastic change. Prior to the recent amendment, the patient brokering act made it a felony to offer, pay, solicit, or receive remuneration to induce the referral of, or in return for referring, a patient or patronage to or from a health care provider or health care facility. After the amendment, the Act prohibits the same activities. Arrangements that did not violate the PBA prior to the amendment should be found consistent with current law as long as they are appropriately documented. As with any health care arrangement, caution and documentation are essential to mitigate compliance risk. The recent actions

by the Florida courts and legislature confirm the government's desire to prohibit arrangements that improperly benefit providers. Those advising providers should work to ensure that the uncertainty created by the enforcement actions does not adversely impact the provision of care.