

Trends in Behavioral Health

Webinar Series



How the Opioid Crisis and the SUPPORT Act Created a New Enforcement Reality

February 7, 2019
From 12 PM to 1 PM EST

presented by



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Presented by



Richard W. Westling

Epstein Becker Green

rwestling@ebglaw.com



Katherine Bowles, RN, JD

Nelson Hardiman LLP

kbowles@nelsonhardiman.com

Agenda

1. Reminder: SUPPORT Act
2. Laws Targeting Fraud, Waste and Abuse
3. Trends in Enforcement
4. Best Practices for Avoiding Scrutiny
5. When the Government Comes Knocking

I. Reminder: SUPPORT Act



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H.R. 6: The Substance Use Disorder Prevention that Promotes Opioid Recovery and Treatment [SUPPORT] for Patients and Communities Act (enacted October 24, 2018)



- Bipartisan opioid crisis-focused legislation



- Follow up to 2016 Comprehensive Addiction and Recovery Act (CARA)



- 58 separate bills, 250+ pages

Other highlights of H.R. 6's 58 bills in fighting the opioid crisis. . .

**Jessie's Law
(Reducing Privacy)**

**Partial Repeal of
IMD Exclusion**

**Expanded Access
to Medication
Assisted Treatment
(Buprenorphine)**

**Mandatory
E-Prescribing**

**Peer Support
Communities of
Recovery Act**

**Expanded
Telehealth**

II. Laws Targeting Fraud, Waste and Abuse



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Federal Anti-Kickback Statute (“AKS”)

- Enacted 1972
- 42 U.S.C. § 1320a-7b
- Prohibits knowing and willful conduct
- Prohibits giving or receiving payments or remuneration directly or indirectly, overtly or covertly, in cash or in kind
- Leading to claims on federal programs
- Safe harbors protect certain zones of accepted activity

A decade of federal enforcement (of old laws) . . .

Since the late 2000s, the FBI and U.S. Department of Justice have relied on older federal laws to prosecute patient-brokering outside federal programs such as in the area of urine drug screening fraud and abuse, using the Travel Act, 18 USC § 1952 and the Wire Fraud Act, 18 USC § 1343.



What is prohibited?

18 U.S.C. section 220

Makes it illegal, with respect to services covered by a **health care benefit program**, in or affecting interstate or foreign commerce, to knowingly and willfully solicit, receive, offer, or pay any “remuneration” in return for referring a patient to, inducing a referral of an individual to (or in exchange for an individual using the services of a):

- **Recovery home**
- **Clinical treatment facility, or**
- **Laboratory**



Who?

Anyone who gives, gets, or tries to give or get remuneration for referrals to:

- Clinical Treatment Facility: medical setting, other than a hospital, that provides detox, risk reduction, outpatient, residential treatment, or rehabilitation for SUD (licensed or certified)
- Recovery home: a shared living environment that is, or purports to be, free from alcohol and illicit drug use and centered on peer support and connection to services that promote sustained recovery from substance use disorders
- Lab: a facility for the examination of materials derived from the human body for the purpose providing information for the diagnosis, prevention, or treatment of any disease or impairment



Statutory Exceptions:

Certain . . .

1. Payments to bona fide employees and independent contractors (including services that meet the Federal AKS safe harbor for personal services and management contracts)
2. Disclosed discounts under a healthcare benefit program
3. Discounts on drugs furnished under the Medicare coverage gap discount program
4. Coinsurance and copayment waivers and discounts, if not routine and tied to documented patient financial hardship
5. FQHC arrangements that meet the Federal AKS exception

III. Trends in Enforcement



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National Drug Control Strategy

January 2019 Report by Office of National Drug Control Policy

- President Trump's strategy is intended to guide and focus Federal government efforts along three (3) complementary lines of effort.



1. We must **reduce the size of the drug-using population** by preventing initiates to illicit drug use through education and evidence-based prevention programs.



2. We must **reduce barriers** to treatment services so that access to long-term recovery is available for those suffering from substance use disorder.



3. We must **drastically reduce the availability** of these drugs in the United States through law enforcement and cooperation with international partners to lessen the negative effects of drug trafficking that impact the safety of our communities and the well-being of our citizens.

Increased Pressure from Federal, State & Local Prosecutors

1. Uptick in number of prosecutions
2. Examples of Government enforcement actions:
 - i. NIMBY-ism: Local governments suing Sober Living Homes under public nuisance laws
 - ii. Criminal complaints alleging illegal patient brokering, referral schemes and addiction treatment that lacks medical necessity and causes physical harm
 - iii. Civil insurance fraud complaints seeking penalty per claim billed plus treble damages for provision of addiction treatment without medical necessity through overuse of urinalysis testing, co-insurance waivers and other patient inducements and illegal referral relationships

Increased Scrutiny from Private Insurers



Insurance companies have been making **additional demands** as a precondition of payment, but will not increase the reimbursement to any more than already included in the bundled payment or per diem rate



Insurance companies have **been increasing pre-payment review audits** with increased scrutiny on documentation supporting medical necessity of addiction treatment, including urinalysis testing and therapy

Increased Scrutiny from Private Insurers (continued)



Insurance companies have **been filing impact litigation** addressing apparent schemes, such as billing urinalysis testing through community hospitals to increase reimbursement



Insurance companies have **“Special Investigation Units” or “SIUs”** that provide tips to Government enforcement agencies and may even produce claims data without telling the providers/patients

IV. Best Practices for Avoiding Scrutiny



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Marketing Arrangements

Compliance with Safe Harbor Exception for Personal Services



1. Written contract

2. Minimum 1 year term

3. If not full-time, specifying precise schedule of services

4. Detailing all services to be provided

5. Services do not involve promotion of illegal activity

6. Aggregate services are reasonably necessary to accomplish a **commercially reasonable** purpose

7. Aggregate compensation set in advance, consistent with **Fair Market Value** (FMV) and not taking into account the volume or value of any referrals

Patient Inducements

Waiving Co-Insurance and Paying for Patient Travel

- The new law makes it clear that it is a crime to offer patients a waiver or discount of deductibles, co-insurance and co-payments. The law provides exceptions if such waiver or discount is not routinely provided and the waiver or discount is provided in good faith. This means that addiction treatment and recovery programs may provide discounts to patients with a genuine, documented financial hardship.
- Additionally, the law prohibits offering anything of value to patients in exchange for using the services of the recovery home, clinical treatment facility, or laboratory. This means that it is a crime for programs or facilities to pay for a patient's travel to the facility.

Additional Best Practices

1. Text Messages and Emails
2. Offers to Guarantee or Warrantee Success of Treatment
3. Employee Background Checks
4. Staff Professionalism
5. Patient/Client Health and Safety
 - i. Physical/Chemical Restraint Laws
 - ii. Searches
 - iii. House Rules

V. When the Government Comes Knocking



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“Government agents are here.”

- Right to decline interview by Government agent
- Right to have counsel present before deciding to speak with investigator
- Required to comply with legally authorized search warrant

VI. Final Thoughts



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Questions?



Richard W. Westling

Epstein Becker Green

rwestling@ebglaw.com



Katherine Bowles, RN, JD

Nelson Hardiman LLP

kbowles@nelsonhardiman.com

Upcoming Webinars

Marketing Best Practices in Light of the SUPPORT for Patients and Communities Act: Trends in Behavioral Health Webinar Series

When: March 7, 2019 from 12:00 p.m. - 1:00 p.m. EST

For more information and to register, please visit www.ebglaw.com/events.



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