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Articles

A New Tool For Assessing Kickback Risks In Health Marketing

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A frequently recurring question under the federal Anti-Kickback Statute concerns when payments by healthcare providers to marketers or advertisers cross the line from legal marketing or advertising activities into unlawful referral payments — i.e., payments prohibited by the AKS because they are made to induce a person to refer an individual for items or services for which payment may be made under a federal healthcare program.

An April 14 decision by the U.S. Court of Appeals for the Seventh Circuit in U.S. v. Sorensen, reversing a conviction after trial of a durable medical equipment distributor, explores the outer boundaries of the AKS as applied to marketing and advertising by healthcare companies. The opinion distills the most important federal appellate decisions in this area into a useful pair of core considerations courts use to distinguish between legitimate marketing services and unlawful referral fees.

These basic elements are: (1) whether the marketers or advertisers have an existing or special relationship with the physician or other decision-maker such that the marketer is positioned to exert undue influence on the decision-maker; and (2) whether, in actuality, the physician or ultimate decision-maker exclusively, or nearly so, does in fact make the referrals.

Click here to read the full article.

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