

Anti-Kickback Laws Possible Effects on Insurance Exchanges

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By [Richard E. Haskin, Esq.](#)

An interesting question evolved several months ago upon creation of the Federal and State run insurance exchanges. Would payments stemming from private insurance companies participating in the public exchanges and accepting public subsidies now become subject to the Federal Anti-Kickback law, prohibiting the remuneration of consideration in exchange for services, referrals and the like?

Providers felt sheltered from the Anti-Kickback law as long as the payment came from either a cash or private payor because the Federal law only extended to payments from Federal health programs. However, this assumption was now somewhat in flux with the creation of the public exchange in which private insurance companies participated. If the private payor, insurance company, accepted a Federal subsidy, would that subsidy then make payments subject to the Federal Anti-Kickback law? Given the broad definition employed by HHS, this certainly seemed plausible. The past century's application of the Constitution's Commerce Clause also would lend towards expansion of the Federal Anti-Kickback law.

However, HHS, in likely a political move to satisfy insurance companies and providers, recently opined that private insurance companies, participating in the public exchanges and accepting subsidies would not qualify as a Federal health program subject to the Anti-Kickback law.

California providers, however, should still be mindful that under California's anti-kickback law (Business and Profession Code, Section 650), consideration for referrals is prohibited regardless of the type of payor (e.g. cash, private insurance, Medicare or Medicaid). California's anti-kickback law provides as follows:

“...the offer, delivery, receipt, or acceptance by any person licensed under this division or the Chiropractic Initiative Act of any rebate, refund, commission, preference, patronage dividend, discount, or other consideration, whether in the form of money or otherwise, as

compensation or inducement for referring patients, clients, or customers to any person, irrespective of any membership, proprietary interest, or coownership in or with any person to whom these patients, clients, or customers are referred is unlawful.”

The California law is intentionally broad and all-encompassing.

For more information about this topic please contact:

[Richard E. Haskin, Esq.](#)

Gibbs Giden Locher Turner Senet & Wittbrodt LLP

1880 Century Park East, 12th Floor

Los Angeles, California 90067

Phone: (310) 552-3400

email: rhaskin@ggltsw.com

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