

Physician's Guide to Louisiana's Anti-Kickback Statutes and Stark Law

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In previous articles, we examined the federal Anti-Kickback Statute (the [Physician's Guide to the Anti-Kickback Statute – Part I](#) and [Part II](#)) and the federal Stark law (the [Physician's Guide to the Stark Law – Part I](#) and [Part II](#)). In this article, we will discuss the Louisiana analogues to these federal statutes, and explain the meaningful distinctions between these state and federal laws. This article is not intended to provide an exhaustive treatment of Louisiana's Anti-Kickback Statutes and Stark law but rather to serve as a general reference and educational guide. Physicians and medical practices are encouraged to seek advice from their own counsel to address specific legal issues that arise in their individual practices.

The Louisiana Anti-Kickback Statutes and Safe Harbors.

We first reiterate that the federal Anti-Kickback Statute (“AKS”) is a criminal statute that prohibits exchanging, or offering to exchange, anything of value in return for referring, or inducing another to refer, federal health care program business. More specifically, the federal AKS, as amended, prohibits anyone from knowingly and willfully soliciting or receiving, or offering or paying, any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring, or to induce a person to refer, an individual for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a federal health care program. 42 U.S.C. § 1320a-7b(b)(1) and (2). The federal AKS, as amended, also contains a similar prohibition forbidding the exchange of remuneration in return for the, or to induce a person to, purchase, lease, or order (or for arranging for or recommending the purchase, lease or order of) any good, facility, service or item for which payment may be made in whole or in part under a federal health care program. *Id.*

Conversely, Louisiana has three separate statutes that prohibit kickbacks in the health care setting: La. R.S. § 46:438.2, titled “[i]llegal remuneration,” La. R.S. § 14:70.5, titled “[f]raudulent remuneration,” and La. R.S. § 37:1745, titled “[p]rohibition on patient referrals.” The first of these statutes, La. R.S. § 46:438.2, is remarkably similar to its federal counterpart, and prohibits anyone from soliciting or receiving, or offering or paying, any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, in return for referring an individual to a health care provider (or for referring an individual to another person for the purpose of referring an individual to a health care provider) for the furnishing or arranging for the furnishing of any good, supply or service for which payment may be made in whole or in part under a medical assistance program. La. R.S. § 46:438.2(A)(1). This statute also contains a similar prohibition forbidding the exchange of remuneration in return for the purchasing, leasing, or ordering of (or for arranging for or recommending the purchasing, leasing, or ordering of) any good, supply, service or facility for which payment may be made in whole or in part under a medical assistance program. La. R.S. § 46:438.2(A)(2).¹

¹ In addition, La. R.S. § 46:438.2 prohibits anyone from offering or paying any remuneration, directly or indirectly, overtly or covertly, in cash or in kind (a) to a recipient of goods, services, or supplies, or his

The only obvious distinction between the federal AKS and La. R.S. § 46:438.2 is that the federal AKS is a criminal statute, which requires some degree of scienter, i.e., criminal intent, before a violation can be found, whereas La. R.S. § 46:438.2 is a civil statute that does not include an intent standard. However, this distinction is not particularly significant due to the subsequent enactment of La. R.S. § 14:70.5 (the second Louisiana statute that prohibits kickbacks in the health care setting), which “provides [for] criminal penalties for activities considered illegal remuneration under [La. R.S. § 46:438.2].” See House Summary of Senate Amendments to House Bill No. 846 adding La. R.S. § 14:70.5. Since the enactment of La. R.S. § 14:70.5, then, an individual can be held criminally liable (and imprisoned up to five years and/or fined up to \$20,000) to the extent the individual *intentionally* engages in any activity prohibited by La. R.S. § 46:438.2.² La. R.S. 14:70.5(A) and (C). To be clear, though, an individual who *unintentionally* engages in any of the activity prohibited by La. R.S. § 46:438.2 can still be held civilly liable for such activity and may be subject to various, and substantial, penalties, including, actual damages (equaling the difference between the amount that the medical assistance program paid and the amount that would have been paid had a violation not occurred), civil fines (not to exceed \$10,000 or an amount equal to three times the value of the illegal remuneration, whichever is greater), civil monetary penalties (in the amount of (i) not less than \$5,500 but not more than \$11,000 for each prohibited act; and (ii) payment of interest on the amount of the civil fine from the date the damage occurred to the date of repayment), and costs, expenses and fees (including attorney’s fees) related to the investigations and proceedings adjudicating the violations. See La. R.S. § 46:438.6. An action asserted under either of these statutes may be brought by the Secretary of the Louisiana Department of Health or the attorney general of Louisiana as provided in La. R.S. § 46:438.1(A), or by private persons—referred to as *qui tam* relators—as provided in La. R.S. § 46:439.2.³

The third and final Louisiana statute that prohibits kickbacks in the health care setting is La. R.S. § 37:1745. This statute, which prohibits health care providers, including physicians, from offering, making, soliciting, or receiving payment, directly or indirectly, overtly or covertly, in cash or in-kind, for referring or soliciting patients, adds another layer of complexity to Louisiana’s anti-kickback scheme. Specifically, this statute (1) only applies to health care providers (whereas La. R.S. § 46:438.2 and La. R.S. § 14:70.5, and the federal AKS, apply to health care providers and non-health care providers alike),

representative, for which payment may be made in whole or in part under the medical assistance programs or (b) to obtain a recipient list, number, name, or any other identifying information. La. R.S. 46:438.2(A)(3) and (4).

² In addition to the prohibited activities set forth in La. R.S. 46:438.2, La. R.S. 14:70.5 also prohibits anyone from intentionally offering or paying any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, to or from a third party for the recruitment of new patients for the purpose of providing any good, supply, service, or facility billed to the Louisiana medical assistance program. La. R.S. 14:70.5(A)(3). Further, in contrast to La. R.S. 46:438.2, La. R.S. 14:70.5 does not prohibit anyone from intentionally offering or paying any remuneration, directly or indirectly, overtly or covertly, in cash or in kind, to or from a third party to obtain a recipient list, number, name or other identifying information. See House Summary of Senate Amendments to House Bill No. 846 adding La. R.S. 14:70.5.

³ The rise of *qui tam* suits over the past ten (10) years is well-documented. Further, *qui tam* relators, referred to colloquially as whistleblowers, may come in many different forms, including employees, former employees, state and local governments, government employees, public interest groups, and even state medical societies (see, e.g., *U.S. et al. ex rel. Florida Society of Anesthesiologists v. Choudhry et al.*, 8:13-cv-02603 (M.D. Fla. Oct. 9, 2013)).

(2) can be implicated by activities paid for in whole or in part by governmental and private payers (whereas La. R.S. § 46:438.2 and La. R.S. § 14:70.5, and the federal AKS, are only implicated by activities paid for in whole or in part by governmental payers), and (3) may result in suspension or revocation of a health care provider’s license (whereas neither La. R.S. § 46:438.2 nor La. R.S. § 14:70.5, nor the federal AKS—which, among other remedies, only permits mandatory exclusion from participation in federal health care programs—authorize such a suspension or revocation although they set forth a host of other civil and criminal penalties). Further complicating matters, La. R.S. § 37:1745, although civil in nature, requires some degree of intent before a violation can be found. *See, e.g.*, La. Admin Code. Tit. 46, pt. XLV § 4205 (making clear that La. R.S. § 37:1745 applies to physicians who act “knowingly and willfully”). La. R.S. § 37:1745 is interpreted and enforced by various health care boards, including, with respect to physicians, the Louisiana State Board of Medical Examiners. *See* La. R.S. § 37:1745(A)(1).

Although the prohibitions codified in the Louisiana anti-kickback statutes are somewhat confusing, the applicable safe harbors, fortunately, are not. Simply stated, to the extent that any activity is protected by an exception or safe harbor recognized in connection with the federal AKS, that activity will likewise be excepted and/or exempted from the application of any of Louisiana’s anti-kickback statutes. *See, e.g.*, La. R.S. § 46:438.2(D)(4) (providing that “safe harbor” exceptions to the application of this statute include “[a]ny other ‘safe harbor’ exception created by federal ... law.”); La. R.S. § 14:70.5(B) (“[n]ormal business practices which fall within the ‘safe harbor’ exemptions of [La.] R.S. § 46:438.2 shall not be construed as an offense under the provisions of [La. R.S. § 14:70.5].”); and La. Admin Code. Tit. 46, pt. XLV § 4207(B) (“[a]ny payment, remuneration, practice or arrangement which is not prohibited by or unlawful under [the federal AKS], with respect to health care items or services for which payment may be made under Title XVIII or Title XIX of the [Social Security] Act, including ... [safe harbors promulgated in connection with the federal AKS], shall not be deemed a payment prohibited by [La.] R.S. § 37:1745.B or by § 4205 of these rules with respect to health care items or services for which payment may be made by any patient or private or governmental payer.”). Further, La. R.S. § 46:438.2 sets forth three additional “safe harbor exceptions” permitting certain (1) discounts or other reductions in price obtained by a health care provider under medical assistance programs, (2) amounts paid by an employer to a bona fide employee for the provision of certain goods, services and supplies, and (3) discounts paid by vendors to persons acting as purchasing agents for certain groups of health care providers. Finally, La. R.S. § 37:1745(B) explicitly indicates that “[p]ayments representing a return on investment based on a percentage of ownership are not considered a direct or indirect payment for the purposes of this Section.”

The bottom line: *Although the Louisiana anti-kickback paradigm is not a model of clarity, the primary takeaway from a review of the Louisiana anti-kickback statutes is that, in contrast to the federal AKS, the Louisiana anti-kickback statutes permit certain individuals to be held civilly liable regardless of whether the individual harbored any criminal intent (in addition to potentially being held criminally liable if the individual did harbor criminal intent) and can apply to payments made by private payers (in addition to payments made by governmental payers). Further, if an arrangement is protected pursuant to a federal AKS safe harbor (or exception), the arrangement will typically be exempted from the application of Louisiana’s anti-kickback statutes. Finally, we note that an individual can be found to have violated both the federal AKS as well as La. R.S. § 46:438.2 and/or La. R.S. § 14:70.5. See, e.g., La. R.S. § 46:438.5(D)(2) (“[i]n the case of a criminal conviction or plea in*

federal court, the action under this Section may be brought once the conviction or plea is final and no later than one year after written notification to the [Secretary of the Louisiana Department of Health] of the rendering of the conviction or final plea.”).

The Louisiana Stark Law and Exceptions.

As a starting point, we reiterate that the federal Stark law prohibits certain physician self-referrals. More specifically, the federal Stark law, as amended, prohibits a physician from referring his or her Medicare or Medicaid patients for the furnishing of certain designated health services (“DHS”) to an entity with which the physician (or an immediate family member of the physician) has a financial relationship, unless an exception applies. 42 U.S.C. § 1395nn(a)(1)(A). In addition, an entity may not present, or cause to be presented, a claim to the Medicare program or bill to any individual, third party payer or other entity for DHS furnished pursuant to a prohibited referral. 42 U.S.C. § 1395nn(a)(1)(B).

By way of comparison, Louisiana’s Stark law, which is titled “[d]isclosure of financial interest by referring health care providers” and is set forth in La. R.S. § 37:1744, provides that a health care provider may not “make referrals outside the same group practice as that of the referring health care provider to any other health care provider, licensed health care facility, or provider of health care goods and services ... when the referring health care provider has a financial interest served by such referral unless in advance of any such referral the referring health care provider discloses to the patient, in writing, the existence of such financial interest.”⁴ La. R.S. § 37:1744(B). This statute further defines a “financial interest” as “a significant ownership or investment interest established through debt, equity, or other means and held by a health care provider or a member of a health care provider’s immediate family, or any form of direct or indirect remuneration for referral.” La. R.S. § 37:1744(A)(3). With respect to physicians, an ownership or investment interest is “significant” if: (1) such interest, in dollar amount or value, represents five percent or more of the gross assets of the health care provider in which such interest is held; or (2) such interest represents five percent or more of the voting securities of the health care provider in which such interest is held. La. Admin Code tit. 46, pt. XLV, § 4211(B).

As revealed by its plain language, Louisiana’s Stark law differs from its federal counterpart in that its application is not limited to Medicare or Medicaid patients (but also includes private payer patients) or to services that constitute DHS (but also includes non-DHS). Further, if Louisiana’s Stark law is implicated, the disclosures required thereby are mandatory under any circumstance—that is, there are no exceptions to application of the statute. The required disclosures must be in writing, furnished to the patient (or the patient’s authorized representative), and include: (1) the physician’s name, address, and telephone number; (2) the name and address of the health care provider to whom the patient is being referred by the physician; (3) the nature of the items or services which the patient is to receive from the health care provider to which the patient is being referred; and (4) the existence and nature of the physician’s financial interest in the health care provider to which the patient is being referred. La. Admin

⁴ This statute also provides that it is a violation “for any licensee to enter into any arrangement or scheme, including cross-referral arrangements, if the licensee knows, or should know, that he or she has a principal purpose of ensuring referrals by the licensee to a particular entity, which referral, if made directly by the licensee, would be a violation of this Section.” La. R.S. § 37:1744(C)(1).

Code tit. 46, pt. XLV, § 4215(A). These disclosures may also, but are not required to, include a signed acknowledgement by the patient (or the patient's authorized representative) that the required disclosure has been given. *Id.* at (B). Significantly, applicable regulations include a sample form of disclosure (which is reproduced in full in the attached Appendix), which if used is presumptively deemed to satisfy the disclosure requirements of Louisiana's Stark law. *Id.* at (C).⁵

Finally, Louisiana's Stark law, like its federal counterpart, is a civil strict liability statute, i.e., proof of specific intent is not required for a violation to be found. To the extent that a violation is found, sanctions can include a refund of payments made to a physician who failed to make the required disclosures (together with legal interest) as well as suspension, revocation, refusal to issue, or imposition of probationary or other restrictions on any license or permit held or applied for by the physician who committed the violation. La. Admin Code. tit. 46, pt. XLV, § 4217.

The bottom line: To the extent that Louisiana's Stark law is implicated, a referring physician (or other health care provider) must appropriately disclose his or her financial interest in the entity to which the referral is made—without exception. Further, it is strongly recommended that this disclosure follow the format set forth in the sample form reproduced in the attached Appendix.

Disclaimer: The information provided herein (1) is for general information only; (2) does not create an attorney-client relationship between the author or the author's firm and the reader; (3) does not constitute the provision of legal advice, tax advice, or professional consulting of any kind; and (4) does not substitute for consultation with professional legal, tax or other competent advisors. Before making any decision or taking any action in connection with the matters discussed herein, you should consult with a professional legal, tax and/or other advisor who should be provided with all pertinent facts relevant to your particular situation. The information provided herein is provided "as is," with no assurance or guarantee of completeness, accuracy, or timeliness of the information.

⁵ The attached sample form is for use by physicians. Similar forms are available for use by other health care providers (for example, registered nurses and psychologists) and are set forth in the relevant Louisiana regulations.

**Appendix – Disclosure of Financial Interest Form
Set Forth in LAC 46:XLV.4219**

[Name of Physician/Group]
[Address]
[Telephone Number]

DISCLOSURE OF FINANCIAL INTEREST
As Required by La. R.S. § 37:1744 and
LAC 46:XLV.4211-4215

TO: _____ [referred patient or legal rep.]
FROM: _____ [referring provider]
NAME: _____ [of patient to be referred]
ADDRESS: _____ [referred patient address]

Louisiana law requires physicians and other health care providers to make certain disclosures to a patient when they refer a patient to another health care provider or facility in which the physician has a significant financial interest. [I am/we are] referring you, or the named patient for whom you are a legal representative, to:

_____ [name of referred to provider]
_____ [address of referred to provider]

to obtain the following health care services, products, or items:

_____. [purpose of the referral]

[I/we] have a financial interest in the health care provider to whom we are referring you, the nature and extent of which are as follows:

_____ [description of relationship between referring physician
and referred to provider]

PATIENT ACKNOWLEDGMENT

I, the above-named patient, or legal representative of such patient, hereby acknowledge receipt, on the date indicated and prior to the described referral, of a copy of the foregoing Disclosure of Financial Interest.

[signature of patient or patient's legal rep.]