

## **Client Alert: Eliminating Kickbacks in Recovery Act of 2018 (H.R. 6): Criminal Penalties for Patient Brokering and Inducement**

As readers of our client alerts know, on October 24, 2018, President Trump signed into law the SUPPORT for Patients and Communities Act, also known as H.R. 6. Providers of addiction treatment and recovery services should pay careful attention to Section 8122 of the Act entitled “Eliminating Kickbacks in Recovery Act of 2018,” which makes it illegal to pay for patient referrals and waive or discount fees to patients to induce them to receive addiction treatment services. The Act imposes prison sentences of up to 10 years and fines of up to \$200,000 for violation of this section.

### **What does the new anti-kickback law prohibit?**

Section 8122 of the Act makes it illegal to knowingly and willfully:

- solicit or receive anything of value in return for referring a patient to a recovery home, clinical treatment facility or laboratory,
- pay or offer anything of value to induce a referral of an individual to a recovery home, clinical treatment facility, or laboratory, or
- pay or offer anything of value in exchange for an individual using the services of that recovery home, clinical treatment facility, or laboratory.

The law is effective immediately and applies to both public and private (commercial) health benefit programs. A violation of this law is punishable by a fine of not more than \$200,000, imprisonment for not more than 10 years, or both, for each occurrence. Similar to the Medicare Anti-Kickback Statute’s (AKS) exceptions, the law sets forth a variety of exceptions, the most relevant of which we explain in detail below.

### **Is it illegal to pay employees and independent contractors for marketing services?**

Employers are prohibited from paying employees and independent contractors based on the following metrics: (i) the number of individuals referred, (ii) the number of tests or procedures performed, or (iii) the amount billed or received from, in part or in whole, the health care benefit program from the individuals referred. This means that employers may not pay employees or independent contractors a success bonus based on any of these factors.

The law does not totally prohibit all payments to employees and independent contractors for marketing services. Employers are permitted to pay employees and independent contractors for admission and marketing services based on the fair market value of the services provided to the facility at a commercially reasonable rate. If the employer is unsure as to what constitutes the fair market value for services at a commercially reasonable rate, the employer may find it prudent to hire an independent valuation expert to ensure that the employer is not running afoul of the new law.

### **Is it illegal to offer discounts to patients or pay for**

## patients' 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 patients' travel to the facility.

### Join Our Upcoming Webinar for More Details

For more information, please sign up for our webinar: **How the SUPPORT for Patients and Communities Act Will Impact Your SUD Treatment Business**

- **Date:** Thursday, December 13, 2018
- **Time:** 9:00 am – 10:00 am Pacific ([see when that is in your time zone](#))
- **Organization:** Behavioral Health Association of Providers
- **Contact:** [info@bhap.us](mailto:info@bhap.us) | 888-958-2282
- **Register:** [Click here to register](#)

If you have questions about the SUPPORT Act/H.R. 6, please contact Kathryn Edgerton ( [kedgerton@nelsonhardiman.com](mailto:kedgerton@nelsonhardiman.com)) or Harry Nelson ([hnelson@nelsonhardiman.com](mailto:hnelson@nelsonhardiman.com)) for additional information.

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