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Client Alert: Florida Health Law Quirks: Guidance for Health Care Businesses Entering Florida

SERVICE LINE

Health Care

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If you are entering into the Florida health care industry for the first time or starting up a health care business in Florida, you should make yourself aware of Florida's robust health care laws. Most importantly, Florida health care laws tend to be broader than federal regulations and apply to all payors instead of only federal payors. Florida's regulatory framework can create opportunities or barriers for your business depending upon your business plan. For example, Florida stands out in its state regulation of physician self referrals, its criminal patient brokering prohibition, and its regulation of health care businesses not owned by health care licensees. Some of the notable Florida "quirks" of these laws will be discussed below.

The Florida Patient Brokering Act

The Florida Patient Brokering Act ("FPBA"), set forth at Section 817.505, Florida Statutes, is a criminal statute, similar to the federal Anti-Kickback Statute ("AKS"), which prohibits persons, including any health care provider or health care facility, from giving or receiving any form of remuneration in exchange for referrals, regardless of the source of payment for the applicable service or product. Violation of the FPBA is a third-degree felony. The FPBA contains a prohibition that is similar to the AKS. Specifically, the FPBA makes it unlawful for any person, including a health care provider or health care facility, to "offer or pay" or "solicit or receive" directly or indirectly any commission, bonus, rebate, kickback, or bribe, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for or to induce the referral of patients or patronage to or from health care providers or health care facilities. The FPBA provides that any arrangement that does not violate the AKS or meets one of the AKS safe harbors does not violate the FPBA.

Unsuspecting business owners may think they can market freely in creative ways that pay for patient referrals or patronage if there is no federally paid business involved (i.e., Medicare, Medicaid, or Tricare). However, this is not the case in Florida. For example, a cash-only cosmetic practice could arguably be criminally liable for paying for patient referrals. Therefore, such businesses in Florida need to review all of their marketing and payment arrangements to make sure they are compliant and do not violate the FPBA.

The Florida Patient Self-Referral Act

The Florida Patient Self-Referral Act ("PSRA") is a civil penalty statute, found at Section 456.053, Florida Statutes, which applies to all physician referrals to entities in which they have an investment interest. Pursuant to the PSRA, if a physician refers to an entity in which the physician (or an immediate family member) has a direct or indirect ownership or investment interest, the physician violates this law unless an exception is met. The PSRA restricts only physician ownership and investment interests, not compensation arrangements, and applies to all health care items or services regardless of the source of payment.

The PSRA is implicated when a physician refers a patient to an entity in which the physician is an investor. "Physician" as referenced in the PSRA, includes: medical doctors, doctors of osteopathic medicine, chiropractors, and podiatrists. A "referral" includes the forwarding of a patient by a health care provider to an entity that provides or supplies health care items or services. An "investor" means a person or entity owning a legal or beneficial ownership or investment interest, directly or indirectly, including, without limitation, through an immediate family member, trust, or another entity related to the investor within the meaning of 42 C.F.R. § 413.17.

Practically speaking, the PSRA applies to a physician's referral to the physician's own medical practice. Thankfully, an exception exists for such referrals. However, the exception has restrictions that are more stringent than the similar federal Stark law exception. Under the PSRA, a physician can refer the physician's own patients to the physician's practice. However, those health care items or services must be provided under the direct supervision of the health care provider or group practice. This practically means that in Florida every time a physician refers a patient to their practice for laboratory work, diagnostic imaging, or physical therapy, or other ancillary services, all of those services must be provided under direct physician supervision even if scope of practice or billing rules would not require that level of supervision. This means that a physician must be onsite and immediately available during the time that any of these services is being performed. This became such an issue for sleep laboratories that physicians in this area lobbied and got an exception to this law for sleep laboratory referrals. The direct supervision requirement is more stringent than the federal Stark law for the same services, to the extent covered.

Furthermore, this law also may restrict a physician's ability to invest in an entity separate from the physician's practice, such as a pharmacy, a medical spa, or other entity. An exception exists for an investment in an ambulatory surgery center and certain other health care ventures as long as certain investment requirements are met. Therefore, physicians and businesses entering into Florida may have to make certain practice modifications in Florida to comply with this law.

The Florida Health Care Clinic Act

Many people do not realize that in Florida, unlicensed individuals may own a health care practice and even one that provides medical services. Nonetheless, unless an exception is met, the business must be licensed pursuant to the Florida Health Care Clinic Act (the "Act") which is located in Part X of Florida Statutes Chapter 400. If the Act is triggered, a license is required for each physical location that receives reimbursement other than on a cash-only basis. Owners and providers must undergo criminal background checks, financial projections are required by a certified public accountant, a medical or clinical director must be under a special contract to supervise the services and billing, the clinic must enact specified policies and procedures and it is subject to inspection by the Florida Agency for Healthcare Administration ("AHCA"). Any clinic that operates without the required licensure under the Act is committing a felony, is subject to substantial penalties, and all charges and reimbursements for services provided by that clinic are non-compensable and unenforceable as a matter of law. See Fla. Stat. §§ 400.993 and 400.995. Therefore, before considering opening a health care business in Florida with unlicensed owners, this Act must be considered

and, possibly, a license must be obtained before the business can legally operate.

Conclusion

Accordingly, a number of "quirks" exist in Florida for those providers new to the state and for those business owners in Florida new to the health care industry. Importantly, businesses new to Florida, or to its health care industry, must be aware that even if their business is correctly structured to comply with federal law, it may still run afoul of Florida civil and criminal statutes. It is important to seek out legal advice from a lawyer trained in this area. The easiest way to accomplish this is to run your business plan by a Florida board certified health lawyer before it is implemented. Florida is the first and one of only two states in the United States to board certify health lawyers. The Florida Bar provides peer review and examination for lawyers who seek to become and remain board certified in health law. Therefore, while the regulatory framework in Florida is robust, health law experts are available in the state to help providers navigate it.