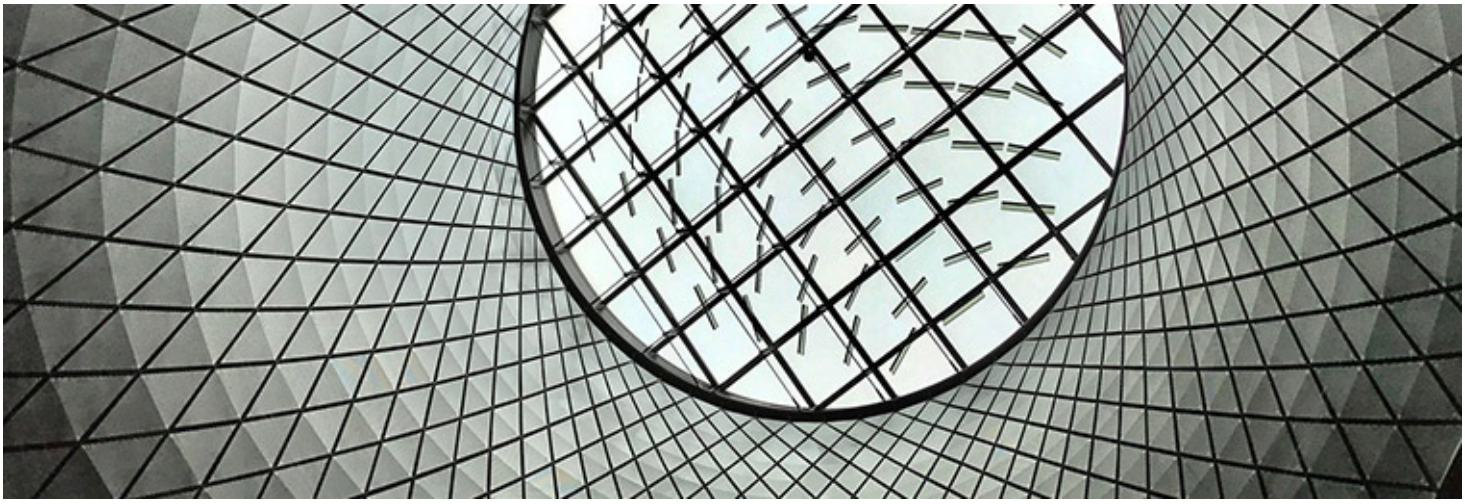

Healthcare providers beware! Amendment to Florida Patient Brokering Act may impact previously protected arrangements

Healthcare Alert

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In a significant development for healthcare providers and investors in Florida, House Bill 369 has amended the Florida Patient Brokering Act, Fla. Stat. § 817.505 in a manner that will bring a high level of uncertainty over the legality of many forms of existing and potential financial arrangements.

Previously, the Patient Brokering Act had exempted any arrangement "*not prohibited by*" the federal Anti-Kickback Statute (AKS). Going forward, however, the bill amends the Patient Brokering Act by only protecting payment practices "*expressly authorized by*" the AKS. While this change sought to *clarify* application of the Patient Brokering Act, it actually appears to create further uncertainty.

As a whole, the bill makes various changes to the Florida substance abuse service regime, aimed at combating the opioid crisis through increased oversight and transparency of marketing providers and recovery residences. While the bill may have been well intended, amending the Patient Brokering Act extends the bill's application well beyond the substance abuse space to essentially all Florida healthcare providers.

The Patient Brokering Act was originally enacted to combat patient brokering, defined as the offer, payment,

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solicitation or receipt of any payments or benefits, directly or indirectly, to induce or reward referrals to or from a healthcare provider or facility. Anyone who engages in patient brokering is guilty of a third-degree felony and must pay a $50,000 fine. There are enhanced penalties for higher volumes of patient brokering. By its terms, the Patient Brokering Act casts a very wide net and applies to virtually all healthcare providers.

The AKS, on the other hand, is an intent-based statute focused on federal healthcare programs (ie, Medicare, Medicaid, Tricare). Accordingly, financial arrangements implicating the AKS typically undergo a facts and circumstances analysis to determine if any one purpose is to pay for or induce federal health care program business. The Patient Brokering Act's prior verbiage, "not prohibited by" the AKS, offered providers a degree of comfort that a payment arrangement which did not violate the AKS would also be permissible under the Patient Brokering Act.

The Patient Brokering Act, as amended, appears to create a number of potential uncertainties. **First**, by changing the language in the Patient Brokering Act from "not prohibited by" to "expressly authorized by," the bill now brings into question whether an arrangement can be found to be in violation of the Patient Brokering Act where it is not otherwise found to be prohibited by the AKS.

Notably, the AKS includes various safe harbors that insulate the parties to an arrangement from prosecutorial discretion if all of the elements of a safe harbor are satisfied. Perhaps the legislative intent of the phrase "expressly authorized by" was intended to only permit arrangements that meet all of the elements of a safe harbor; however, that is not what the bill states.

Second, if compliance with the Patient Brokering Act now requires strict adherence to a safe harbor, it would seem to contradict the AKS. The AKS safe harbors are not intended to expressly authorize any type of arrangement. Rather, the AKS safe harbors are narrowly tailored to be applicable to only a handful of specific types of arrangements.

Failing to meet a safe harbor does not mean that an arrangement is per se illegal, but rather must be analyzed under the facts and circumstances analysis described above. Indeed, it is quite common for financial arrangements to fall outside of the narrowly construed AKS safe harbors, but still not be deemed to be in violation of the AKS. In fact, the Office of Inspector General (OIG) has an advisory opinion process for a party to request legal guidance on application of the AKS where an arrangement does not meet a safe harbor. Requiring an arrangement to be "expressly authorized by" the AKS in order to comply with the Patient Brokering Act seems to create a meaningful conflict between federal and state law.

Third, the amended Patient Brokering Act leaves open the question of whether it is intended to apply to business and payment practices involving private payors. A Florida appellate court recently construed the act to incorporate the AKS by reference, including its intent-based standard, but the AKS "only appl[ies] to federally funded programs," like Medicare and Medicaid. *State v. Kigar*, No. 16-CF-10364 (Fla. 15th Cir. Ct., Jan. 31, 2019). According to the bill's legislative analysis, the legislature felt this has "result[ed] in uncertainty on whether Florida's [Act] will apply to private insurance-related patient brokering if courts continue to use this interpretation." In other words, the legislature sought to clarify the scope of the act, and seemingly intended to expand its application to private as well as governmental payors. However, the plain language of the amended act does not reflect a broader scope or otherwise clarify the issue.

Fourth, the amended Patient Brokering Act does not address the application of the AKS safe harbors to private payor arrangements. Technically, business arrangements involving private payor reimbursement cannot be protected by the AKS safe harbors. If the Patient Brokering Act applies in the private payor space, then one must consider whether a business or payment arrangement structured to meet an AKS safe harbor would also be immune from prosecution under the Patient Brokering Act. The text of the amended Patient Brokering Act leaves this question unanswered. Thus, providers in Florida may face additional uncertainty after July 1 in their efforts to comply with both federal and state law.

Accordingly, the change to the Patient Brokering Act may actually create a greater conflict with the AKS than the verbiage it replaced. The Florida Supreme Court reviewed a similar issue in the conflict between the Florida Medicaid Anti-Kickback Statute (the FL Medicaid AKS) and the AKS, concluding that the AKS preempted the FL Medicaid AKS under the doctrine of implied conflict preemption. Specifically, the court determined that the FL

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Medicaid AKS was partially preempted, in that it criminalized conduct which the federal AKS specifically intended to be lawful and shielded from prosecution. *State v. Harden*, 938 So.2d 480 (Fla. 2006).

Unlike the amended Patient Brokering Act, the FL Medicaid AKS by its terms governs Medicaid, a joint federal/state program. To this end, *State v. Harden* addressed an apparent conflict between the FL Medicaid AKS and the federal AKS which applies to the same program. The preemption issue was direct and center stage. Here, however, preemption is less obvious.

Ultimately, the Patient Brokering Act, as amended, does not clarify the issues flagged in the legislative analysis for Florida providers. A Florida court may, in the future, need to assess whether the bill achieves its purpose, or whether it instead has made the Patient Brokering Act more ambiguous and created further compliance hurdles for providers seeking to comply with federal and state law.

As healthcare providers continue to navigate a myriad of federal and state healthcare laws, it is increasingly important to consider both federal and state law in structuring business and financial arrangements. While historically the Patient Brokering Act would have been evaluated in the same manner as the AKS, these changes undermine the continued viability of that analysis.

Find out more about the implications of the amended Florida Patient Brokering Act by contacting any of the authors or your regular DLA Piper lawyer.

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