

PUBLICATION

U.S. District Court Finds EKRA Permits Commission Payments

Authors: Robert E. Mazer

December 14, 2021

A dispute between a clinical laboratory and a former employee who had managed the lab's client accounts has resulted in an unanticipated interpretation of the Eliminating Kickbacks in Recovery Act (EKRA).

Background

Similar to the longstanding Federal Antikickback Statute (AKS), effective October 24, 2018, EKRA generally prohibits kickbacks or any other form of remuneration for referrals. EKRA is, in one sense, a more narrow prohibition than the AKS. While the AKS is applicable potentially to referrals of any item or service paid under a federal health care program, EKRA applies only to referrals to a recovery home, clinical treatment facility, or laboratory (EKRA Providers). In another sense, EKRA is a broader prohibition than the AKS. While the AKS applies to items or services paid under a federal health care program only, such as Medicare and Medicaid, EKRA applies to services that are paid under any health care benefit program, including both governmental payers and commercial insurers.

The AKS and EKRA each include exceptions to their general prohibitions. AKS exceptions are either stated specifically in the statute or included in regulations published by the Office of Inspector General (OIG) specifying arrangements protected by safe harbors. EKRA has statutory exceptions only. While the AKS has separate exceptions for payments to bona fide employees and payments to independent contractors – the latter under a safe harbor for personal services and management contracts – EKRA includes a single exception that applies potentially to payments to employees and independent contractors. The exception requires that any such payments be unrelated to the number of individuals referred to an EKRA Provider, the number of tests or procedures performed, or the amount billed or received in connection with individuals referred to a particular EKRA Provider.

As a result of these provisions, EKRA has been viewed generally as prohibiting EKRA Providers from paying sales commissions to either employees or independent contractors. A U.S. District Court in Hawaii decided that's not the case, however, at least with respect to commissions related to clinical laboratory sales.

Case Facts

In this matter, *S&G Labs Hawaii v. Graves*, Civ. No. 19-00310, 2021 WL 4847430 (D. Haw. Oct. 18, 2021), the laboratory's accounts manager's employment contract provided for a base salary plus percentages of net profits from his own client accounts and from those of lab employees who he managed. After enactment of EKRA, the lab advised him that it needed to revise these contract arrangements. After the parties were unable to agree on a new contract, the lab terminated the accounts manager's employment. Litigation followed, with the lab and accounts manager each alleging legal violations by the other. The accounts manager claimed that the lab had breached their employment contract and that he was due unpaid wages. The lab replied that those payments would have violated EKRA, and that the statute made the contract provisions for commission-based payments illegal and unenforceable. The lab requested the court to award it summary judgment on this basis. The court, however, interpreted the law differently.

Court's Decision

The court determined that the lab's payments to the accounts manager under the employment contract were remuneration as that term was used in EKRA. However, these payments would *not* violate the EKRA prohibition against paying or offering remuneration "(A) to induce a referral of an *individual* to a ...laboratory; or (B) in exchange for the *individual* using the services of that ...laboratory...." 18 U.S.C. 220(a)(2)(A),(B) (emphasis added).

The court recognized that "individual," as referenced in section A of the EKRA prohibition (above), referred to the patient undergoing testing. However, according to the court, because sales efforts were directed towards physicians and other lab clients, the accounts manager was not paid to induce referrals of *individuals* to the lab as EKRA prohibited. The court stated:

Undoubtedly, [the accounts manager's] commission-based compensation structure induced him to try to bring more business to [the lab].... However, the "client" accounts ... serviced were not individuals whose samples were tested at [the lab]. ...[The lab] was not compensated by those "clients". ...Because [the accounts manager] was not working with individuals, the compensation that [the lab] paid him was not paid to induce him to refer individuals to [the lab].

In analyzing the Section B EKRA prohibition (above), the court appears to have determined that, in this matter, "individual" referred to the accounts manager. According to the court, the EKRA prohibition did not apply here "because the remuneration was not paid in exchange for [the accounts manager's] use of [the lab's]... services."

The court recognized that the commission-based payments provided for in the employment contract did *not* satisfy the potentially applicable EKRA exception for payments to employees and independent contractors because the employee's compensation was based on the number of tests that the lab performed. However, the court stated that, because payment of the compensation did not violate the EKRA prohibition, it was irrelevant whether the exception to the prohibition applied.

The court concluded that the employment agreement did not violate EKRA. Therefore, when the lab refused to pay the accounts manager amounts that were due under the agreement, it breached the parties' contract and became liable for damages.

Conclusion

The court's analysis will likely surprise the vast majority of attorneys and others who've attempted to apply EKRA to commission-based payments. The decision is unlikely to be the last word on the subject. Accordingly, clinical labs, clinical treatment facilities and recovery homes – the three providers subject to EKRA – may be appropriately wary of relying on the court's decision. EKRA is a relatively new law with little, if any, additional guidance regarding its meaning. This requires continuous attention to legal developments by EKRA Providers and a commitment to take whatever steps are necessary to maintain compliance with the law as it is interpreted and applied by government authorities, including federal courts.

If you have questions about the Eliminating Kickbacks in Recovery Act, please contact [Robert E. Mazer](#) or any member of Baker Donelson's [Health Law](#) team.