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Hospitals and Other Entities Given Protection to Provide Mental Health Wellness Programs to Clinicians

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April 25, 2023

Hospitals and other health care providers struggle to attract and maintain clinical staff due to staffing shortages. While several factors contribute to the staffing shortage including an aging patient population and longer life expectancy due to scientific advances, the stressful nature of the work and the adverse impact it has on clinicians is certainly an important component of the problem.

Congress recently gave health care entities access to a tool that may be helpful in addressing the ongoing staffing crisis and improving the mental health and wellness of individual practitioners. Nestled in the 2023 Consolidated Appropriations Act's more than 1,000 pages are changes to the federal Anti-Kickback Statute (AKS) and Physician Self-Referral Law (commonly known as the Stark Law) intended to enhance the mental well-being of health care professionals by protecting arrangements in which hospitals and other entities provide bona fide mental health or behavioral health improvement or maintenance programs to physicians and other clinicians, in compliance with certain conditions.

In the absence of these statutory protections, health care entities would be subject to risks under the AKS and Stark Law because the provision of such benefits to individual providers may not fit within an exception or safe harbor and could constitute improper remuneration in connection with referrals of federal health care programs to the providing entity. The new law requires that programs meet certain criteria in order to qualify for statutory protection under AKS, the Stark Law, or both, including:

- The program consists of counseling, mental health services, a suicide prevention program, or a substance use disorder prevention and treatment program.
- The program is made available to physicians or other clinicians for the primary purpose of preventing suicide, improving mental health and resiliency, or providing training in appropriate strategies to promote the mental health and resiliency of such physicians or other clinicians.
- The program is set out in a written policy that is approved in advance of becoming operational by the governing body of the entity providing any such program and includes: (i) a description of the content and duration of the program; (ii) a description of the evidence-based support for the design of the program; (iii) the estimated cost of the program; (iv) the names of personnel implementing the program; and (v) the method by which the entity will evaluate the use and success of the program.
- The program, if offered by an entity with a formal medical staff, must be offered to all physicians and other clinicians who practice in the geographic area served by the entity, including clinicians with privileges at such entity.
- The program is offered to all such physicians or other clinicians on the same terms and conditions and without regard to the volume or value of referrals or other business generated by a physician or clinician for the entity offering the program.

- The program is evidence-based and conducted by a qualified health professional.
- Neither the provision of the program nor the value of the program is contingent upon the number or value of referrals made by a physician or other clinician to the entity providing the program or the amount or value of other business generated by such physician or other clinician for the entity.

A broad range of health care entities can offer these protected mental health wellness programs, including:

- hospitals
- ambulatory surgery centers
- community health centers
- rural emergency hospitals
- rural health clinics (Stark Law only; AKS exception does not include rural health clinics)
- skilled nursing facilities
- any other similar entity as determined by the Secretary of Health and Human Services

The health care provider community should find these new protections as welcome news, given the documented mental health struggles of health care workers. The National Institute for Occupational Safety and Health (NIOSH) has reported that more than 20 million U.S. health care workers are at risk for mental health problems, and 76 percent of physicians reported suffering from burnout.¹

The mental health concerns of individual providers undoubtedly can adversely affect the quality of care received by patients and the overall costs of health care delivery. The Association of American Medical Colleges asserts that the U.S. will be facing a shortage of up to 124,000 physicians by 2034, and nursing staff workforce shortages are causing health care systems to limit access to care by staffing fewer beds, while also incurring significant labor costs to recruit and retain staff (including increased utilization of costly contract agency labor).

While congressional protection of mental wellness programs gives a degree of helpful flexibility for health care entities to address these concerns, the industry will continue to need additional innovative solutions concerning workforce wellness to protect the health care delivery system.

If you have any questions about this alert or topic, feel free to reach out to [Robert A. Wells](#), [Michaela D. Poizner](#), or any Baker Donelson [Health Law](#) Group member with whom you regularly work.

¹ National Institute for Health Care Management, Physician Burnout & Moral Injury: The Hidden Health Care Crisis (March 22, 2021).