

## Part B Insider (Multispecialty) Coding Alert

### Enforcement: Master the 3 Big Fraud Laws to Avoid the OIG Spotlight

**Tip: With Stark, it doesn't matter if the violation was accidental.**

Referral abuse is a major factor in the relationship between providers and the laboratories they utilize. Both parties must always keep in mind the three federal regulations that mandate their relationships: the Anti-Kickback Statute (AKS), the False Claims Act (FCA) and the Physician Self-Referral or Stark Law. Take a look at these basics to keep your practice out of hot water.

#### 1. AKS: Steer Clear of Rewards for Referrals

Everyone appreciates referrals, but be extremely cautious about rewarding or incentivizing them, especially if you work in close quarters with different practitioners and labs who, naturally, refer to each other.

Under the AKS, "it is a felony to offer, provide, request, or accept any payment if one purpose is to influence payments under a federal healthcare program," reminds attorney **David Glaser** with Fredrikson & Byron, PA in Minneapolis. "Paying referral sources is a big problem."

Unlike the Stark Law, where your intent doesn't matter, an AKS violation would require improper intent. However, AKS is implicated with Medicare and Medicaid, and can garner both civil and criminal indictments. AKS "applies to any financial arrangements that impacts federal health care program beneficiaries, e.g., TriCare and other programs in addition to Medicare and Medicaid," says attorney **Linda Baumann**, Partner with Arent Fox in Washington, DC.

**Warning:** "In some industries, it is acceptable to reward those who refer business to you," OIG reminds. "However, in the federal healthcare programs, paying for referrals is a crime."

#### 2. FCA: Avoid the Sting of a Violation

The impacts of the FCA can be devastating for any practice, particularly since a gray area exists between what the feds term "deliberate ignorance" and "accidental oversight" under their explanation of what "knowing" means. And the penalties are incredibly high per violation both financially and personally.

**Nuts and bolts:** False claims encompass things as varied as upcoding to a code that pays more, double-billing, and unbundling codes to be paid for single codes at a higher rate. Other reasons that might land you in hot water under the FCA are billing Medicare for services that were never rendered, provided by unqualified staff, or administered by excluded providers. However, the number-one reason for most false claims relates to medical necessity or the lack thereof.

**Criminal record:** Though the FCA fines are a civil penalty, the mandate also includes a statute for criminal offenses, which carries with it substantial fines and possible imprisonment for individuals and entities found guilty.

**What to do:** "Prevention is the best cure," advises attorney **John E. Morrone**, a partner at Frier Levitt Attorneys at Law in New York. Because "if the medical record does not support the service(s) billed, CMS can certainly recoup the funds paid to the provider."

#### 3. Stark: Know These Things the Law Forbids

The physician self-referral law, more commonly referred to as the Stark Law, is a federal law that prohibits physicians from referring Medicare patients to an entity that provides designated health services (DHS) if the physician or an immediate family member has a financial relationship with that entity - unless an exception applies.

**Basics:** "Financial relationships can include ownership interest, investments as well as other compensation arrangement," says **Katherine Becker, JD, LLM, CHC, CHPC, CPC**, associate consultant at Acevedo Consulting, Inc. in Delray Beach, Florida "There are many ways in which the physician can achieve a financial benefit, whether it is through direct payment or an indirect benefit from the entity providing the designated health service."

**Important:** Stark, in Section 1877 of the Social Security Act, specifies that it:

- Prohibits a physician from making referrals for certain DHS payable by Medicare to an entity with which he or she (or an immediate family member) has a financial relationship unless an exception applies.
- Prohibits the entity from presenting or causing to be presented claims to Medicare (or billing another individual, entity, or third-party payer) for those referred services.
- Establishes a number of specific exceptions and grants the HHS Secretary the authority to create regulatory exceptions for financial relationships that do not pose a risk of program or patient abuse.

"Stark Law is a 'conflict of interest' statute," advises **Mary I. Falbo, MBA, CPC**, CEO of Millennium Healthcare Consulting, Inc. in Lansdale, Pennsylvania. "Stark Law is based almost entirely upon the AMA Code of Medical Ethics Opinion on 'Conflicts of Interest,' which is now Opinion 8.0321 - Physicians' Self-Referral."

**Not so fast:** But it's critical to remember that even the most innocent situations could be grounds for trouble. "The Stark Law is a strict liability statute so it doesn't matter whether any of the parties had improper intent," points out Baumann. So, if exemption terms are not defined and a physician refers his patients to a lab he has a financial stake in, that would be considered a Stark violation.