The U.S. Department of Justice (DOJ) recently announced its first criminal prosecution under the Eliminating Kickbacks in Recovery Act (EKRA), codified at 18 U.S.C. § 220. The enforcement involves an office manager of a substance abuse treatment clinic in Jackson, Kentucky who pled guilty to soliciting kickbacks from the CEO of a toxicology laboratory in exchange for urine drug-testing referrals, lied to law enforcement agents about the kickback received, and attempted to cover up the kickback by requesting the alteration of certain financial records. The office manager faces up to 20 years in prison and a maximum fine of $250,000.

EKRA was signed into law on October 24, 2018 as part of the Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act (SUPPORT ACT). EKRA criminalizes knowingly and willfully soliciting, receiving, paying or offering any remuneration, including kickbacks, bribes or rebates, to induce a referral for, or in exchange for an individual using the services of, a recovery home, clinical treatment facility, or laboratory covered by a public or private health care program, unless an exception applies. Violators are subject to fines up to $200,000 and/or imprisonment of not more than 10 years.

This settlement is notable because it highlights the DOJ’s willingness to prosecute criminal conduct under EKRA despite uncertainty in the industry regarding the scope of the law, including whether EKRA was intended to apply to all laboratories and whether business practices that fit within a safe harbor to the federal Anti-Kickback
Statute will be treated as violative of EKRA. For example, while EKRA includes an exception that protects compensation to employees and independent contractors, it is limited to payments that are not determined by or do not vary by the number of individuals referred to a particular recovery home, clinical treatment facility or laboratory, the number of tests or procedures performed, or the amount billed to or received from a health care benefit programs.

EKRA also includes an exception for arrangements that satisfy the Personal Services and Managements Contracts safe harbor to the Anti-Kickback Statute, which similarly would prevent compensation based on the volume or value of referrals.

Recovery homes, clinical treatment facilities and laboratories should continue to monitor developments related to EKRA to ensure compliance with this law and avoid enforcement.

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