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Opioid Law Creates New Kickback Penalties for Some Provider Types

By Nina Youngstrom

New penalties for kickbacks that were customized for the opioid crisis are part of the bipartisan legislation to address opioid abuse that passed Congress on Oct. 3 and was signed by President Trump on Oct. 24.

The SUPPORT for Patients and Communities Act (HR 6), which synthesized dozens of bills introduced by various members of Congress, is designed to increase access to prevention, treatment and recovery services. For example, the legislation broadens the use of telehealth in Medicare for treating opioid and other substance use disorders and requires Medicare coverage of certain services provided by opioid treatment programs. It also expands the Physician Payments Sunshine Act.

Breadth of Law Is Unclear

Section 8121 of the law, the Eliminating Kickbacks in Recovery Act of 2018, makes it a crime to solicit or receive “remuneration” (e.g., kickbacks, bribes) for patient referrals to a recovery home, clinical treatment facility or laboratory. The term “clinical treatment facility” specifically refers to a medical setting “other than a hospital that provides detoxification, risk reduction, outpatient treatment and care, residential treatment or rehabilitation for substance abuse pursuant to licensure or certification under State law.”

For those types of providers, the new anti-kickback law is broader than the existing Anti-Kickback Statute for federal health care programs, says Jonathan Diesenhaus, an attorney with Hogan Lovells US LLP in Washington, D.C. The new statute applies to referrals for “services covered by a health care benefit program.” The definition of benefit program encompasses government and private payers, he says, “adding a new layer of regulation for providers who already serve government program beneficiaries and already comply with the Medicare Anti-Kickback Statute and Stark Law.”

Another attorney believes the new law is targeted at private payers. Because the Anti-Kickback Statute is limited to federal health care programs and only some state kickback laws apply to private payers, there’s an enforcement gap, says Scott Memmott, with Morgan Lewis in Washington, D.C. The new law “is meant to address that gap,” he says.

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