



# Healthcare Enforcement Laws and Federal Healthcare Employment Laws

What would be prudent for physicians to learn?

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**F**ederal regulation policies and federal employment law strongly impact how physicians practice medicine. It would be prudent for physicians to understand how federal regulatory policies and federal employment laws influence the practice of medicine. Knowledge of these regulatory policies and employment laws will help physicians avoid costly penalties, fines, loss of medical license, imprisonment, and transgression of anti-discrimination laws.

Practices of every size must comply with an exponentially increasing, convoluted regulatory environment that directly impacts the medical practice of physicians. Physicians need to understand how fraud, waste, abuse, and federal employment laws introduce risk into their daily practice of medicine.

This article briefly introduces the reader to the complex topics of fraud, waste, abuse, and federal employment laws. These are extremely important topics for physicians to understand. Why? Because this un-

derstanding of mandatory federal regulations and employment law permits the development of compliance programs that help prevent physicians from engaging in fraud, waste, abuse and discrimination. This manuscript is an introduction to these complex topics and should not be considered legal advice or a comprehensive re-

such as CMS is the foundation of increasing federal regulation policies. Intentional or not, abusive practices such as submitting excess charges, billing for services not rendered, or ordering unwarranted tests increase financial strain on the federal programs that are a government safety net for the elderly, poor, and disabled.

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view of the regulatory policies that physicians live with today.

## **Federal Healthcare Enforcement**

Fraudulent, wasteful, and abusive practices create financial, regulatory, and reputational risks for physicians. Physicians must be aware, because enforcement agencies may impose fines, exclusions from federal programs, or even criminal charges resulting in imprisonment. Federal laws define what constitutes fraud, waste, and abuse, and the penalties imposed upon physicians for transgressing these laws. The misuse of federal healthcare programs

A simple example illuminates the extent of this financial strain. In 2014, \$600 billion of payment flowed into Medicare against \$613 billion in costs. Simple accounting reveals a \$13 billion deficit. Of the \$600 billion, how much was paid by payroll taxes? The answer is \$228 billion. Doing back-of-the-envelope simple math leaves Uncle Sam with a vast financial strain.

Let's investigate the critical concepts of fraud, waste, and abuse in medical practice.

Fraud is defined as an intentional act of deception, misrepresentation,

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or concealment to gain something of value. This implies a physician has knowingly made a false claim to obtain a federal healthcare payment. Examples of fraud include: billing for services not rendered, billing services at an inflated rate, soliciting a bribe or rebate, and violating physician self-referral laws.

Waste is defined as using or expanding resources carelessly, to no purpose. In the healthcare arena, waste is manifested when a physician uses resources without purpose, or fails to control costs, and then passes those fees on to CMS for payment. Waste is generally not considered intentional (but it can be).

Over-billing CMS carries consequences. Examples of waste that are prevalent in medical practice include providing medical services that are not medically necessary and performing tests and procedures that are not clinically congruent with the prevailing standard of care.

Abuse includes intentional or unintentional practices that directly or indirectly result in unnecessary costs to CMS. Examples of abuse include charging in excess for services or supplies, providing unnecessary services that do not comport with the prevailing standard of care, and miscoding on a claim.

### Federal Enforcement Agencies

There are five major federal fraud and abuse laws that would be prudent for practicing physicians to understand. Violating these laws may lead to loss of a medical license, exclusion from federal healthcare programs, civil fines, and criminal penalties. These laws include the Federal Anti-Kickback Statute (AKS), the Stark Law, the False Claims Act (FCA), the Exclusion Statute, and the Civil Monetary Penalties Law (CMPL).

The AKS (see 42 U.S.C. § 1320a-7b) prohibits physicians from intentionally offering, soliciting, or receiving anything of value to engender referrals for services payable by CMS. Succinctly stated, it is a crime to pay or get paid for referrals that are covered by CMS.

The AKS is a broad statute, and physicians encounter a range of pen-

alties for activities that may be considered a violation of the law. A physician receiving any cash inducement leading to an exchange for referrals may be found guilty of violating the statute and subject to civil or criminal penalties.

The Stark Law regulates self-referrals made by physicians. It is a strict liability statute. Proof of intent is not necessary to find a physician has violated the statute. A physician cannot refer a CMS patient for health services where there is a relationship with another physician, or a member of her immediate family. The law defines financial relationship by compensa-

prescription, or dispensing of controlled substances; felony conviction related to fraud, theft, embezzlement, and breach of fiduciary duty; or other financial misconduct connected to the delivery of healthcare services.

There are mandatory and permissive exclusions. The OIG is mandated to exclude physicians found guilty of felonies and criminal offenses for a minimum of five years. The OIG has discretion to decide whether to exclude physicians found guilty of losing a state license, failing to pay student loans, and conviction of misdemeanors.

The CMPL (42 U.S. Code § 1320a-7) authorizes the OIG to impose civil

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tion agreements and ownership/investment interests. (There are exceptions to the Stark law that should be considered by expert legal advice.)

Physicians who violate the law are subject to fines, repayment of claims, and exclusion from CMS programs. Whereas the Stark Law is only concerned with referrals from physicians, the Anti-Kickback Statute applies to referrals from anyone.

The FCA is designed to protect the government from being overcharged. It prevents physicians from knowingly making a false claim to CMS. Knowingly is defined as having actual knowledge that a claim is false, or acting with reckless disregard to the veracity of the claim. Penalties include civil and criminal fines.

The Exclusion Statute (42 U.S. Code § 1320a-7) is a section of the Social Security Act that explains why physicians can be excluded from participating in CMS programs. An excluded physician is forbidden from receiving payment from CMS for the duration of the exclusion period. The Office of Inspector General (OIG) must prevent physicians from participating in all healthcare programs if they have been convicted of CMS fraud; patient abuse or neglect; felony convictions of unlawful manufacture, distribution,

monetary penalties and program exclusions against any physician found guilty of fraudulent claims for CMS payment. Federal agencies impose penalties according to the federal sentencing guidelines. Certain mitigating factors (e.g., effective compliance program, self-reporting, cooperation with investigators, and acceptance of responsibility) can reduce these penalties.

Three federal enforcement agencies—the OIG, CMS, and the Department of Justice—collaborate to address fraudulent and abusive practice in federal healthcare programs.

The OIG recommends a seven-component compliance program that allows the following:

- Conducting internal monitoring and auditing;
- Developing compliance and practice standards;
- Appointing a compliance officer;
- Providing education and training for staff;
- Developing responses to detected offenses and corrective actions;
- Maintaining open lines of communication; and
- Establishing disciplinary standards.

It would be prudent for physicians to be aware of the compliance

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program, given the federal regulations' impact upon physicians.

### Federal Employment Law

Federal employment law bans employee discrimination in recruiting, hiring, job evaluation, promotion policies, compensation, and disciplinary actions. The law prohibits all employers from discriminating against employees or prospective employees who fall into the protective class categories, including age, gender, race, color, religion, sexual orientation, genetic profile, and disabilities. The majority of physicians today are employees. Again, physicians should be prudent about understanding federal anti-discrimination laws.

laws are required to have a workplace free of discrimination, harassment, and retaliation. Physicians need to be prudent about familiarizing themselves with the following important antidiscrimination laws:

- **Title VII of the Civil Rights Act:** Title VII applies to employers that have 15 or more employees. The protected classes include race, color, religion, national origin, and sex.

- **The Pregnancy Discrimination Act:** The Pregnancy Discrimination Act amended Title VII to expand the scope of the protected class of sex to include pregnant women. The act prohibits sex-based discrimination based on pregnancy, childbirth, and breast-feeding.

ment of Labor. To be eligible for FMLA, employees must have worked for the employer for at least 12 months, and worked at least 1250 hours over the last 12 months. The Act entitles the employee to 12 weeks of unpaid leave. The leave can be used for birth or adoption of a child, or due to a serious health condition of the employee or employee's family member.

### Conclusion

It is incumbent upon physicians to review and understand federal regulation policies and federal employment law as detailed in the body of this discussion. These regulatory policies and employment laws may have a huge impact on a physician's medical practice life, including loss of license to practice medicine, reputational damage, and civil and criminal penalties.

### Resources

Federal Healthcare Enforcement Comparison of the AKS and Stark Law <https://oig.hhs.gov/documents/provider-compliance-training/939/Starkand.AKSChartHandout508.pdf>

Laws Against Healthcare Fraud Fact Sheet <https://www.cms.gov/files/document/overviewfwalaws.againstfactsheet-072616pdf>

Medicare Fraud and Abuse: Prevent, Detect, Report <https://www.cms.gov/Outreach-and-Education/Medicare-Learning-Network-MLN/MLNProducts/Downloads/Fraud-Abuse-MLN4649244.pdf>

### Federal Employment Laws

Recordkeeping Requirements <https://www.eeoc.gov/employers/recordkeeping-requirements>

Age Discrimination <https://www.eeoc.gov/age-discrimination>

Equal Pay/Compensation Discrimination <https://www.eeoc.gov/equal-pay-compensation-discrimination>

Pregnancy Discrimination and Pregnancy-Related Disability Discrimination <https://www.eeoc.gov/pregnancy-discrimination>

Sex-Based Discrimination <https://www.eeoc.gov/sex-based-discrimination>

The Employer's Guide to the Family and Medical Leave Act <https://www.dol.gov/sites/dolgov/files/WHD/legacy/files/employerguide.pdf>

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Employees are protected from negative treatment in the terms, conditions, and privileges in all areas of employment. This includes hiring, firing, discipline, pay and benefits, promotions and demotions, work assignments and training, harassment, and retaliation. Direct discrimination is seen when an individual of a protected class is treated differently from another similarly situated employee. Indirect discrimination refers to a policy or action that appears to be neutral, but in fact has an adverse impact on a protected class.

There is strict liability if the discrimination was a tangible employment action carried out by a supervisor, such as firing, promotion, undesirable work assignment, or benefits and compensation decisions. An employer may be liable for discrimination even if there is no tangible employment action. An employer may be liable if she knew, or should have known, about harassment or retaliation and did not take prompt and appropriate action to correct the behavior (fact-specific).

Healthcare employers that are subject to federal antidiscrimination

- **The Age Discrimination in Employment Act (ADEA):** The ADEA applies to employers with a minimum of 20 employees. It bars discrimination against applicants and employees 40 years of age and older. This applies to employee benefits, pensions, and retirement benefits.

- **The Genetic Information Non-discrimination Act (GINA):** GINA applies to employers with a minimum of 15 employees and prohibits discrimination based upon genetic information. Employers cannot request, purchase, or consider genetic information about employees, applicants, or family members.

- **The Americans with Disabilities Act (ADA):** The ADA applies to employers with a minimum of 15 employees. It prohibits discrimination against individuals with a physical or mental disability, employees with a record of a disability, and those employees perceived as having a disability.

- **The Family Medical Leave Act (FMLA):** The FMLA applies to employers with a minimum of 50 employees. It is enforced by the Depart-