

# CHAPTER 6

## FLORIDA PATIENT BROKERING ACT

### **A. Summary of the Florida Patient Brokering Act**

The Patient Brokering Act is a criminal statute which specifically prohibits any health care provider or health care facility from giving or receiving any form of remuneration in exchange for referrals, regardless of the source of payment for the applicable service or product.

The Florida Legislature passed the Patient Brokering Act after learning that various mental health and substance abuse hospitals were making payments to individuals for the referral of patients identified in Alcoholics Anonymous meetings, homeless shelters, and other similar environments. In these situations, the hospitals had an agreement with “patient brokers,” who would “screen” patients at AA meetings and other events to determine if they had insurance coverage. Individuals with coverage would be referred to a facility, and in turn, the facility would pay the patient broker a fee. Sometimes these facilities leased hospital rooms, and the hospital would receive a rent payment and the entrepreneurial treatment entity would keep significant profits.

**Florida Patient Brokering Statute: Florida Statutes Section 817.505**

(1) It is unlawful for any person, including any health care provider or health care facility, to:

(a) Offer or pay any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, to induce the referral of patients or patronage to or from a health care provider or health care facility;

(b) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for referring patients or patronage to or from a health care provider or health care facility;

(c) Solicit or receive any commission, bonus, rebate, kickback, or bribe, directly or indirectly, in cash or in kind, or engage in any split-fee arrangement, in any form whatsoever, in return for the acceptance or acknowledgement of treatment from a health care provider or health care facility; or

(d) Aid, abet, advise, or otherwise participate in the conduct prohibited under paragraph (a), paragraph (b), or paragraph (c).

The law is very broad and can apply to almost any form of remuneration. Giving or receiving items such as sports tickets, restaurant gift certificates, or concert tickets for referrals will be considered a kickback in violation of both federal and state law. Even taking someone to an event or meal can be considered an illegal kickback if it is intended to induce referrals. Of course, there is a difference between receiving a small holiday basket and receiving sports tickets in exchange for referring patients. However, to be safe, it is recommended that physicians do not offer or accept any gift items.

To understand the Patient Brokering Act, it is important to distinguish between referrals within a practice group and referrals from a practice group, because both can be illegal. The law is very clear regarding *referrals from outside the practice group*. Physician groups cannot pay or receive compensation from another entity that is a direct or indirect result of a referral, unless one of the explicit exceptions described below applies.

The law is less clear with regards to *referrals from within the practice group*. The Florida law governing fee splitting prohibits a physician group practice from paying an employee to induce him or her to refer patients to the group for ancillary or other services. Within a group practice, an employee or independent contractor can be compensated for services that the employee or contractor actually performs or provides, but cannot be paid or rewarded for services they order, such as an x-ray or a referral. For example, a physician could not receive any direct or indirect payment for ordering blood labs, unless the physician personally performed the services. In developing these relationships with employees and independent contractors, physicians should note that the law treats employees differently than independent contractors. For example, if a patient is scheduled to see an independent contractor rather than an employee, that would be considered a referral.

It is best to assure that employees are paid a reasonable salary, notwithstanding patient marketing or productivity compensation, and that bonuses be appropriately structured with the above issues in mind. The Florida Patient Self-Referral Act described in Chapter II of this book should also be carefully reviewed before structuring physician group arrangements.

Additionally, physicians should beware of compensation arrangements where a doctor is hired to provide consulting, speaking, or other similar services by a company to which the physician directly or indirectly refers.

The Florida Patient Brokering Act provides a list of exceptions for certain practices that the Act will not apply to, including:

- 1) Any discount, payment, waiver of payment, or payment practice not prohibited by the federal Medicare Anti-Kickback Statute (42 U.S.C. 1320a-7b) or regulations promulgated thereunder;
- 2) Any payment, compensation, or financial arrangement within a group practice as defined in the Florida Patient Self-Referral Act, so long as such payment, compensation, or arrangement is not to or from persons who are not members of the group practice.
- 3) Payments to a health care provider or health care facility for professional consultation services.
- 4) Commissions, fees, or other remuneration lawfully paid to insurance agents as provided under the insurance code.
- 5) Payments by a health insurer who reimburses, provides, offers to provide, or administers health, mental health, or substance abuse goods or services under a health benefit plan.
- 6) Payments to or by a health care provider or health care facility, or a health care provider network entity, that has contracted with a health insurer, a health care purchasing group, or the Medicare or Medicaid program to provide health, mental health, or substance abuse goods or services under a health benefit plan when such payments are for goods or services under the plan.
- 7) Lawful insurance advertising gifts.
- 8) Commissions or fees paid to a licensed nurse registry referring persons providing health care services to clients of the nurse registry.
- 9) Payments by a health care provider or health care facility to a health, mental health, or substance abuse information service that provides information upon request and without charge to consumers about providers of health care goods or services to enable consumers to select appropriate providers or facilities, provided that such information service:

- i. Does not attempt through its standard questions for solicitation of consumer criteria or through any other means to steer or lead a consumer to select or consider selection of a particular health care provider or health care facility;
- ii. Does not provide or represent itself as providing diagnostic or counseling services or assessments of illness or injury and does not make any promises of cure or guarantees of treatment;
- iii. Does not provide or arrange for transportation of a consumer to or from the location of a health care provider or health care facility; and
- iv. Charges and collects fees from a health care provider or health care facility participating in its services that are set in advance, are consistent with the fair market value for those information services, and are not based on the potential value of a patient or patients to a health care provider or health care facility or of the goods or services provided by the health care provider or health care facility.

Physicians must comply with the provisions in the Patient Brokering Act, or risk potentially facing criminal penalties. The Patient Brokering Act makes it a third-degree felony to participate in patient brokering or to aid another in patient brokering, which is punishable by up to 5 years of imprisonment and a \$5,000 fine. The Attorney General and state attorney are authorized to enforce The Patient Brokering Act and seek appropriate relief and remedies, including injunctive relief.<sup>72</sup>

Florida Patient Brokering Statute: Florida Statutes Section 817.505(4)

(4) Any person, including an officer, partner, agent, attorney, or other representative of a firm, joint venture, partnership, business trust, syndicate, corporation, or other business entity, who violates any provision of this section commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

## **B. Case Law Discussion**

There have been a few lower court decisions interpreting the Patient Brokering Act in the context of civil litigation in which insurance companies have sought to avoid paying claims by alleging that the services were rendered pursuant to alleged violations of the

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72 Fla. Stat. § 817.505(5).

statute, but *State v. Rubio*<sup>73</sup> is the only reported case in which individuals or entities have been prosecuted under the Patient Brokering Act.<sup>74</sup>

Case Summary: *State v. Rubio* (2005).

In this case, five defendants were charged with multiple counts of patient brokering by engaging in a split-fee arrangement in violation of the Patient Brokering Act. Defendants Guzman and Mendez were recruited by Rubio and Fernandez, owners of a dental practice management company, to provide dental services to Medicaid eligible children. It was Rubio's responsibility to solicit children from the public housing areas and transport them to and from the clinic. The dentists billed Medicaid for the services they provided to the children and split the fees with Rubio. Rubio's company assisted the dentists in marketing as well as handling the business aspect of the dental practice. The standard payment for the company's services was a percentage of the remuneration received by the dentists for their services. The defendants filed a motion to dismiss the counts related to the Patient Brokering Act on the grounds that the statute is unconstitutional because it is: (1) void for vagueness; (2) lacks any form of mens rea; (3) lacks a "willfulness requirement;" and (4) violates the First Amendment.

The appellate court upheld the constitutionality of the statute and concluded that: (1) the statute is not vague because the type of arrangements that induce, or are in return for, the referral of patients are distinguishable from lawful arrangements, and the statute provides sufficient notice of the type of arrangement that would be in violation; (2) the defendants intentionally referred patients to one another in order to receive a share of the fee; (3) "willfulness" is not required because the Patient Brokering statute has a safe harbor provision, which specifically provides that the statute is not applicable to any payment practice allowed by federal law; and (4) the Patient Brokering statute does not inhibit a person's right generally to solicit business, but merely prohibits the solicitation and referral of patients in exchange for payment. The case was reversed and remanded in accordance with the court's findings, and the Florida Supreme Court later upheld the

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73 917 So. 2d 383 (Fla. 5th DCA 2005).

74 There are a number of cases that have cited to the statute, but the defendants involved were not prosecuted for violating the statute. For instance, in *Gold, Vann & White v. Friedenstab*, a medical practice group appealed from a grant of summary judgment in a suit for breach of contract and enforcement of a contract not to compete. The court determined that the "agreement, itself, impermissibly provided for payment of a percentage of the revenue the management services and practice enhancement would generate and, thus, constituted an indirect method of fees for patient referral in violation of ... section 817.505, Florida Statutes (2001)." The agreement provided for severability if any portion was held "invalid, illegal or unenforceable for any reason." The trial court determined, as a matter of law, that the provisions that violated the patient brokering act were not severable. However, whether the illegal provision goes to the essential purpose of the contract is a factual question. Therefore, the case was reversed and remanded for an evidentiary hearing concerning this issue. 831 So. 2d 692 (Fla. 4th DCA 2002).

constitutionality of the Patient Brokering Act.<sup>75</sup>

Case Summary: *NuWave Diagnostics, Inc. v. State Farm Mutual Automobile Insurance Co. (1999)*.<sup>76</sup>

This was the first case of its type in which an imaging company sued an automobile insurance personal injury carrier, State Farm, to collect unpaid claims. The insurance company defended the suit by stating that NuWave Diagnostics, Inc. (“NuWave”) violated the Patient Brokering Act through its business practices. NuWave did not actually operate an imaging center, but leased time from various imaging centers. Physicians would refer patients to NuWave, which would then select an imaging center and arrange for the patient to be treated. NuWave would pay the imaging center a fee for each scan that the imaging center performed on NuWave’s behalf.

State Farm alleged that the difference between what NuWave paid to the imaging center and what it was able to bill the insurance company amounted to a kickback from the imaging center to NuWave. The County Court, finding for State Farm in an unpublished opinion, agreed and found that the relationship violate the Patient Brokering Act.

Case Summary: *Medical Management Group of Orlando, Inc. v. State Farm Mutual Automobile Insurance Co. (2002)*.<sup>77</sup>

An individual (“Insured”) had automobile insurance through State Farm. The Insured’s physician recommended that the Insured receive an MRI. The physician referred the insured to Medical Management Group of Orlando (“MMGO”), which “leased” space, equipment, and services from an imaging center that performed the MRI. Subsequently, the imaging center billed MMGO \$350 for the procedure and MMGO billed State Farm \$1,400.

MMGO maintained that the arrangement involved the Insured’s assignment of benefits under their insurance policy to MMGO. The appellate court agreed with the trial court that this arrangement was “nothing more than a fee-splitting scheme to compensate for MRI referrals prohibited by [the Patient Brokering Act].” In affirming the trial court’s decision to grant summary judgment to State Farm, the appellate court stated that “[t]here is simply nothing medically necessary about a billing which compensates for the referral to a particular MRI provider and/or the cost of billing for the provider’s services.”

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75 State v. Rubio, 967 So. 2d 768, 776 (Fla. 2007).

76 6 Fla. L. Weekly Supp. 522a (May 7, 1999) (Docket No.: 97-09175(53), Broward Co., Fla.).

77 811 So. 2d 705 (Fla. 5th DCA 2002).

Following an automobile accident, Allstate's insured was referred to Prosper Diagnostic Centers ("Prosper") for an MRI. Prosper had a "lease agreement" with a separate facility called the MRI Scan Center. Under the agreement, Prosper paid a monthly fee to the MRI Scan Center for twenty hours of use of the MRI equipment, whether or not it actually used the full twenty hours in a month. The MRI Scan Center administered the insured's MRI, and a physician provided would interpret the MRI.

When Allstate denied payment for the MRI on the grounds that the amount Prosper sought for the insured's MRI was not compensable, Prosper brought suit. The county court granted final summary judgment in favor of Allstate concluding that the "lease agreement" violated the prohibition against patient brokering. On appeal to the circuit court, Prosper added a challenge to the constitutionality of the Patient Brokering Act on grounds of vagueness and over breadth. The circuit court affirmed, and upheld the constitutionality of the Patient Brokering Act, finding the facts of this case indistinguishable from those in *Med. Mgmt. Group of Orlando, Inc. v. State Farm Mut. Auto. Ins. Co.*

### **C. Referrals by Employees**

As discussed above, the Florida Patient Brokering Act prevents direct or indirect payment for referrals. The Act, however, may allow employers to pay employees a reasonable bonus for referring patients to the practice, so long as the referring employee actually performs the service. If the employee only refers patients and does not actually perform the service, the employee might be permitted to receive a compensation based on these referrals, but this is not without risk.

The Florida Patient Brokering Act provides that any exception to the federal Medicare Anti-Kickback Statute will also apply under the Act. The federal Anti-Kickback statute provides an exception for arrangements between an employer and employee. The federal law specifically states that this section does "not apply to . . . any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services."<sup>79</sup> A bona fide employee is an employee that is not considered to be an independent contractor under the federal income tax law.

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78 964 So. 2d 763 (Fla. 4th DCA 2007).

79 42 U.S.C. Section 1320a-7b.

The IRS uses a “control” test to determine whether a worker is an employee or an independent contractor. The more control a company exercises over how, when, where, and by whom work is performed, the more likely that the worker will be considered an employee rather than an independent contractor. The IRS considers many factors in making this determination, including the term of employment, method of payment, provision of tools and materials, investment in facilities, and control over discharge.<sup>80</sup> Thus, if the employing entity employs the worker on a full time and exclusive basis; provides the worker with a place to work; provides furnishings and general office amenities; and pays the worker upon an hourly or fixed salary basis, the worker will likely be considered an employee. In sum, the worker should be integrally involved in the medical practice to be considered an employee.

Based on the above, an employer may be permitted to provide an employee with a reasonable bonus each time that such employee signs up a patient for a service or procedure, so long as that employee is actually providing the service or procedure. For example, a physician in a medical practice may be permitted to receive compensation based on the number of patients that he or she refers for a particular service or procedure offered by the practice, as long as the referring physician actually performs these services or procedures.

An employee who makes referrals without performing the services might be allowed to receive compensation based on these referrals. For example, if a marketing representative, who is an employee, generates referrals for the practice, a commission might be acceptable under the Florida Patient Brokering Act. However, it is possible that an employee only performing sales or marketing functions may not be considered integrally involved in the practice as required by the exception. The Office of Investigator General (OIG) has left this door open.

Notwithstanding the above, any employer should be cautious in compensating employees for generating patient volume. Most of the compensation received by the employee should not be conditioned upon patient sign-ups. Further, employees receiving compensation or bonuses for referrals should sign a Certification of Non-Payment to ensure that the employee is not using such compensation to pay others to induce referrals.

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<sup>80</sup> Joint Committee on Taxation, Present Law and Background Relating to Worker Classification for Federal Tax Purposes (JCX-26-07) (May 7, 2007) (available at <http://www.irs.gov/pub/irs-utl/x-26-07.pdf>).



Florida Patient Brokering Statute: Florida Statutes Section 817.505

(3) This section shall not apply to:

(a) Any discount, payment, waiver of payment, or payment practice not prohibited by 42 U.S.C. s. 1320a-7b(b) or regulations promulgated thereunder.

Federal Patient Brokering Statute: 42 U.S.C. Section 1320a-7b

(3) Paragraphs (1) and (2) shall not apply to—

(B) any amount paid by an employer to an employee (who has a bona fide employment relationship with such employer) for employment in the provision of covered items or services;