

Legal Issues for ASCs: Fraud, Abuse and Employment



**Idaho Ambulatory Surgical
Center Ass'n**

Kim C. Stanger

(8.26)

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Overview

FRAUD AND ABUSE ISSUES

- False Claims Act
- Ethics in Patient Referrals Act (“Stark”)
- Anti-Kickback Statute
 - Standards
 - Safe Harbors
- Civil Monetary Penalties
- Idaho Anti-Kickback Statute
- Idaho Medical Practices Act
- Eliminating Kickbacks in Recovery Act

EMPLOYMENT ISSUES

- Idaho Medical Ethics Defense Act
 - Whistleblower statute
- Idaho Merit-Based Health Care Act
 - DEI program prohibitions
- Idaho Occupational Licensing Reform Act
 - Maximizes scope of practice
- Idaho non-competes

Caution

- This is a quick overview of some of the more relevant federal and state laws and regs applicable to ASCs.
 - Beware other laws, including state laws
- Application may depend on circumstances of your particular case, including payor type.
 - Be sure to confirm applicable laws and requirements when applying law to your facts.

False Claims Act ("FCA")

- Cannot knowingly submit a false claim for payment to the federal govt, e.g.,
 - Not provided as claimed
 - Substandard care
 - Failure to comply with applicable regulations
- Must report and repay an overpayment within the later of 60 days or date cost report is due.

(31 USC 3729; 42 USC 1320a-7a(a); 42 CFR 1003.200)

Penalties

- Repayment plus interest
- Civil penalty of \$14,308* to \$28,619* per claim
- Admin penalty \$24,947* per claim failed to return
- 3x damages
- Exclusion from Medicare/Medicaid
(42 USC 3729; 42 USC 1320a-7a(a); 42 CFR 1003.210; 45 CFR 102.3; 89 FR 9766)
- Potential *qui tam* lawsuits
 - ✓ *But see U.S. ex rel. Zafirov v. Florida Med. Associates LLC* (M. D. Fla. 9/30/24), holding *qui tam* lawsuits as unconstitutional

Ethics in Patient Referrals Act aka Patient Referrals Law or “Stark”



Stark

- If physician (or family member) has direct or indirect financial relationship with entity:
 - Physician may not refer patients to the entity for designated health services (“DHS”), and
 - Entity may not bill Medicare or Medicaid for such DHSunless arrangement fits within a regulatory exception (safe harbor).
(42 USC 1395nn; 42 CFR 411.353 and 1003.300)

Penalties

- No payment for services provided per improper referral
 - Repayment w/in 60 days
 - Civil penalties
 - \$31,670* per claim
 - \$211,146* per scheme
- (42 CFR 411.353, 1003.310; 45 CFR 102.3)
- Likely FCA violation

Stark

- If physician (or family member) has direct or indirect financial relationship with entity:

- Physician may not refer patients to the entity for designated health services (“DHS”), and

- Entity may not bill Medicare or Medicaid for such DHS

unless arrangement fits within a regulatory exception (safe harbor).

(42 USC 1395nn; 42 CFR 411.353 and 1003.300)

- “DHS do not include services that are paid by Medicare as part of a composite rate (for example, ... ASC services identified at § 416.164(a))...” (42 CFR 411.351)
- Consequently, Stark generally does not apply to a physician’s referrals to an ASC for services paid under the Medicare composite rate

Anti-Kickback Statute



Anti-Kickback Statute ("AKS")

- Cannot knowingly and willfully offer, pay, solicit or receive remuneration to induce referrals for items or services covered by govt program unless transaction fits within a regulatory safe harbor.

(42 USC 1320a-7b(b); 42 CFR 1003.300(d))

- "One purpose" test.
(*US v. Greber* (1985))

Penalties

- Felony
- 10 years in prison
- \$100,000 criminal fine
- \$124,732* civil penalty
- 3x damages
- Exclusion from Medicare/Medicaid
(42 USC 1320a-7b(b); 42 CFR 1003.310; 45 CFR 102.3)
- Automatic FCA violation
(42 USC 1320a-7b(g))
- Minimum \$100,000 settlement

AKS Red Flags

REFERRING PROVIDERS

- Investment opportunities
- Compensation or distributions based on referrals
- Free items or services
- Paying above or below FMV
- Paying for items or services that are not needed
- Professional courtesies
- Thank you gifts
- Anything else of value

OTHERS, INCLUDING PATIENTS

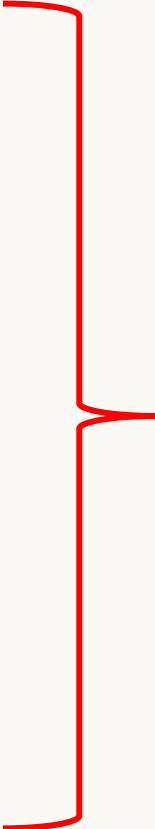
- Waiving copays or deductibles, i.e., insurance only billing
- Free or discounted items or services
- Referral incentives or rewards
- Anything else of value
- Thank you gifts

Anytime you give anything of value to incentivize or reward referrals for items or services payable by federal healthcare programs.

AKS Safe Harbors

- Bona fide employment
- **Personal services and management contracts**
- Space and/or equipment rental
- Investments in certain entities
- **Investments in ASCs**
- Waiver of beneficiary copays, coinsurance and deductibles
- Transportation programs
- Electronic health records
- Value-based care arrangements
- Patient engagement incentives
- Others...

(42 CFR 1001.952)

- 
- **Check the requirements of each safe harbor.**
 - **Must satisfy all elements to be safe, but...**
 - **The closer you come, the safer you are.**

AKS: Personal Services and Management Safe Harbor

- Agreement is set out in **writing and signed by the parties**.
- Agreement covers all of the services the contractor provides for the term of the agreement and specifies the services to be provided by the agent.
- The term of the agreement is not less than 1 year.
- Methodology for determining the compensation paid over the term of the agreement **is set in advance, is consistent with fair market value in arm's-length transactions, and is not determined in a manner that takes into account the volume or value of any referrals** or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare, Medicaid, or other Federal health care programs.
- Services performed under the agreement do not involve the counseling or promotion of a business arrangement or other activity that violates any State or Federal law.
- Aggregate services contracted for do not exceed those which are reasonably necessary to accomplish the **commercially reasonable** business purpose of the services.

(42 CFR 1001.952(d)(1))

AKS: Lease of Space or Equipment

Safe Harbors

- Lease is set out in writing **and signed by the parties**.
- Lease covers all of the premises or equipment leased between the parties for the term of the lease.
- If the lease is intended to provide the lessee with use for periodic intervals of time, rather than on a full-time basis for the term of the lease, the lease specifies exactly the schedule of such intervals, their precise length, and the exact rent for such intervals.
- Term of the lease is for not less than one year.
- Aggregate rental charge **is set in advance, is consistent with fair market value in arms-length transactions and is not determined in a manner that takes into account the volume or value of any referrals** or business otherwise generated between the parties for which payment may be made in whole or in part under Medicare, Medicaid or other Federal health care programs.
- Aggregate space or equipment rented does not exceed that which is reasonably necessary to accomplish the **commercially reasonable** business purpose of the rental.

(42 CFR 1001.952(b)-(c))

AKS: ASC Safe Harbor

Applies to:

1. Surgeon-owned ASCs
2. Single Specialty ASCs
3. Multi-Specialty ASCs
4. Hospital-Physician ASCs

Concept:

- *Allow investment in ASC if the ASC is an extension of the practitioner's practice.*
- *Not give practitioner an investment interest as way to incentivize provider's referrals to ASC.*

AKS: ASC Safe Harbor

- Return on investment in ASC does is protected if:
 - ASC operating and recovery room space is dedicated exclusively to the ASC.
 - Patients referred to the ASC by an investor are fully informed of the investor's investment interest.
 - Investors are either—
 - Not in a position to generate referrals, or
 - Are surgeons who satisfy the following requirements...

(42 CFR 1001.952(r))

- *ASC safe harbor does not protect investment by non-surgeon referral sources, e.g., primary care physicians.*
- *Small investor safe harbor might apply, but no more than 40% of investors can be in a position to refer to the ASC.*

AKS: Surgeon-Owned ASC Safe Harbor

All investors are either (i) general surgeons or surgeons engaged in same specialty, or (ii) not in a position to generate referrals for the ASC and:

- Terms on which an investment interest is offered to an investor must not be related to the previous or expected volume of referrals, services furnished, or business generated from that investor to the ASC.
- At least 1/3 of each physician investor's medical practice income from all sources for the previous year must be derived from the surgeon's performance of ASC procedures.
- Must not loan funds to or guarantee a loan for an investor if the investor uses any part of such loan to obtain the investment interest.
- Amount of payment to an investor in return for the investment must be directly proportional to the amount of the capital investment.
- All ancillary services for Federal health care program beneficiaries performed at the ASC must be directly and integrally related to primary procedures performed at the ASC, and none may be separately billed to Medicare or other Federal health care programs.
- The ASC and physician investors must treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

(42 CFR 1001.952(r)(1))

AKS: Single Specialty ASC Safe Harbor

All investors are either (i) physicians in same specialty or (ii) not in a position to generate referrals, and:

- Terms on which an investment interest is offered to an investor must not be related to the previous or expected volume of referrals, services furnished, or business generated from that investor to the ASC.
- At least 1/3 of each physician investor's medical practice income from all sources for the previous year must be derived from the surgeon's performance of ASC procedures.
- Must not loan funds to or guarantee a loan for an investor if the investor uses any part of such loan to obtain the investment interest.
- Amount of payment to an investor in return for the investment must be directly proportional to the amount of the capital investment.
- All ancillary services for Federal health care program beneficiaries performed at the ASC must be directly and integrally related to primary procedures performed at the ASC, and none may be separately billed to Medicare or other Federal health care programs.
- The ASC and physician investors must treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

(42 CFR 1001.952(r)(2))

AKS: Multi-Specialty ASC Safe Harbor

All investors are either (i) physicians who are in a position to refer patients, or (ii) are not in a position to generate referrals, and

- Terms on which an investment interest is offered to an investor must not be related to the previous or expected volume of referrals, services furnished, or business generated from that investor to the ASC.
- At least 1/3 of each physician investor's medical practice income from all sources for the previous year must be derived from the surgeon's performance of ASC procedures.
- Must not loan funds to or guarantee a loan for an investor if the investor uses any part of such loan to obtain the investment interest.
- Amount of payment to an investor in return for the investment must be directly proportional to the amount of the capital investment.
- All ancillary services for Federal health care program beneficiaries performed at the ASC must be directly and integrally related to primary procedures performed at the ASC, and none may be separately billed to Medicare or other Federal health care programs.
- The ASC and physician investors must treat patients receiving medical benefits or assistance under any Federal health care program in a nondiscriminatory manner.

(42 CFR 1001.952(r)(3))

AKS: Multi-Specialty ASC Safe Harbor (cont.)

All investors are either (i) physicians who are in a position to refer patients, or (ii) are not in a position to generate referrals, and

- **At least one-third of the ASC procedures performed by each physician investor for the previous year must be performed at the investment ASC.**

(42 CFR 1001.952(r)(3))

- *The is can be an important provision to ensure that the investors are bringing at least 1/3 of their ASC cases to the ASC.*
 - *Confirm in operating agreement.*
 - *Consider consequences for failing to comply.*
- *Consider the tension with the separate requirement that “Terms on which an investment interest is offered to an investor must not be related to the previous or expected volume of referrals, services furnished, or business generated from that investor to the ASC.”*

AKS: ASC Safe Harbor

If at least one investor is hospital and all the remaining investors are either (i) physicians who meet requirements in (r)(1)–(3) or (ii) not in a position to generate referrals:

- ASC may not use space (e.g., operating and recovery room space) or equipment located in or owned by any hospital investor unless such space or equipment is leased from the hospital in accordance with a lease that complies with the AKS safe harbor for leases of space or equipment.
- The hospital may not include on its cost report or any claim for payment from a Federal health care program any costs associated with the ASC unless such costs are required to be included by a Federal health care program.
- The hospital may not be in a position to make or influence referrals directly or indirectly to any investor or the entity.

(42 CFR 1001.952(r)(4))

- This condition is rarely satisfied.
- Hospital-owned ASCs may want to incorporate additional protections, e.g.,
 - Do not track or require referrals.
 - Do not compensate based on referrals.
 - Provide patient notification.
 - Others?

AKS: Group Practice Safe Harbor

Return on investment in group practice is protected if:

- The equity interests in the practice or group must be held by licensed health care professionals who practice in the practice or group.
- The equity interests must be in the practice or group itself, and not some subdivision of the practice or group.
- In the case of group practices, the practice must:
 - Meet the definition of “group practice” in Stark, 42 CFR 411.352;
 - Be a unified business with centralized decision-making, pooling of expenses and revenues, and a compensation/profit distribution system that is not based on satellite offices operating substantially as if they were separate enterprises or profit centers.
- Revenues from ancillary services, if any, must be derived from “in-office ancillary services” that meet the definition of such term in section 1877(b)(2) of the Act and implementing regulations.

(42 CFR 1001.952(p))

AKS: Common Issues

- Offering investment opportunity or terms based on existing or anticipated referrals.
- Compensating investors based on business they bring to the facility.
- Requiring certain level of referrals or ASC business to maintain ownership interest.
- Other?

Remember that ASC safe harbor requires:

- *Terms of investment not based on referrals.*
- *Amount of payment to investor must be proportional to capital investment.*

AKS: Safe harbors

Remember:

- Failure to comply with safe harbor does not necessarily mean that there is an AKS violation.
- If safe harbor does not apply, test is whether “one purpose” of the remuneration is to induce or reward referrals for federal healthcare programs.
- Historically, government has been willing to give ASCs some leeway because they are more efficient than hospitals, but there are no guarantees.

AKS: Additional Factors

Although they do not guarantee protection, the OIG has identified a number of factors that may mitigate the risk of an AKS violation, e.g.:

- Few or limited referrals
- Low risk of adverse impact on federal program
- Does not skew clinical decision making
- Fair market value
- Notice to patients
- Do not compensate based on referrals
- Do not track referrals
- Others?

✓ *Check OIG advisory opinions.*



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In accordance with section 1128(D)(b) of the Social Security Act (42 U.S.C. 1320a-7d(b)) and 42 CFR part 1008, OIG issues advisory opinions about the application of OIG's fraud and abuse authorities to the requesting party's existing arrangement. As required, the arrangement is being made available to the public.

One purpose of the meaningful advice and other OIG sanctions is to ensure that the arrangement is not being relied upon only for legal standards to which parties are bound by law. We have redacted information associated with the arrangement.

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- ❖ Preliminary
- ❖ Recommendation
- ❖ The full and current version of the Code of Federal Regulations Web site. 42 CFR part 1008.
- ❖  The OIG Final Rule (73 Fed. Reg. 40982) revising the procedural aspects for submitting payments for advisory opinion costs.
- ❖  The OIG Interim Final Rule (73 Fed. Reg. 15937) revising the procedural aspects for submitting

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ASC Best Practices: AKS Compliance



AKS:

Suggestions for Avoiding Concerns

1. Do not offer more or fewer shares, or a higher or lower price, based on the number, volume, or value of referrals a physician investor can generate.
2. Do not reallocate shares based on the volume or value of referrals.
3. Do not tie individual distributions to the number of patient referrals. Never make any indications that could lead a potential investor to believe that referrals or performance will determine an individual's "piece of the pie." Focus on overall distributions and profits.
4. Physicians should not be allowed to invest based upon the fact that they can generate referrals for another physician who may use the center.
5. Avoid providing physicians with estimates of the amount of revenue that will be generated from their referrals or from another physician's referrals, except as needed to, for example, prepare pro forma financial statements and to obtain certificates of need (if applicable).

(From AHLA, *Ambulatory Surgery Centers: Legal and Regulatory Issues* at p.45-46).

AKS: Suggestions for Avoiding Concerns (cont.)

6. Except with respect to compliance with the quantitative tests of the ASC safe harbor, do not develop eligibility determinations for investors based on the number of potential referrals. In evaluating physicians, examine compliance with all of the safeharbor criteria.
7. Do not create "target lists" of physicians based on their ability to generate large numbers of referrals.
8. When creating target lists, avoid making notations indicating the potential number of referrals, the growth potential of the physician's practice, that a certain physician is a good target (based on referrals), or similar attributes.
9. Avoid using age as an influencing factor when targeting physicians.
10. Subject to non-discrimination rules, consider excluding Medicare and Medicaid referrals from any internal revenue and investment analysis.

(From AHLA, *Ambulatory Surgery Centers: Legal and Regulatory Issues* at p.45-46).

AKS: Suggestions for Avoiding Concerns (cont.)

11. Do not offer remuneration or special treatment under various disguises, such as directorship contracts or discounted lease arrangements, in order to induce investors.
12. Do not pressure physician-investors to shift their current referral patterns.
13. Do not make any indications to investors that low-referring physicians will be pressured to withdraw.
14. Units should not be sold at a discount from then-fair-market value.
15. True joint ventures should be significantly preferred to contract or shell joint ventures.
16. Exit provisions should be defensible and intended to ensure that physician-investors are engaged in the operation and, if applicable, management of the ASC.
17. Physician-investors should not be prohibited from having privileges at other providers.

(From AHLA, *Ambulatory Surgery Centers: Legal and Regulatory Issues* at p.45-46).

Civil Monetary Penalties Law



Civil Monetary Penalties Law ("CMPL")

- Prohibits offering remuneration to a Medicare/Medicaid beneficiary if know or should know that it is likely to influence such beneficiary to order or receive services from a particular provider or supplier.

(42 USC 1320a-7a(5); 42 CFR 1003.1000(a))

Penalties

- \$25,595* per violation.
- Exclusion from Medicare and Medicaid
(42 CFR 1003.1010(a); 45 CFR 102.3)
- Likely also an AKS violation

CMPL and AKS Red Flags

- Free items or services to patients (e.g., gifts, services, supplies, drugs, equipment, etc.)
- Waive copays or deductibles, i.e., “insurance only” billing
- Discounted services
- “Refer a friend” incentive
- Free meals or lodging
- Free transportation
- Reward or incentive to comply with treatment
- Paying patient premiums
- Anything else of value that does not reflect FMV
- Other?

CMPL Safe Harbors

CMPL excepts from the definition of “remuneration” certain acts, e.g.,

- Items covered by AKS safe harbor.
- Item or service less than \$15/\$75.
- Demonstrated financial need, including waivers or discounts of copayments or deductibles.
- Certain preventive care items or services.
- Items or services that promote access to care.
- Value-based care and patient engagement.

(42 CFR 1003.110)

- *Ensure you comply with all relevant conditions and limitations in the regulations.*
- *Remember such inducements may still violate the AKS.*

Carving Out Federal Programs

- Beware carve-out programs
 - E.g., pay inducement to obtain private pay business, but carve out federal program business.
 - OIG: inducements for private pay business may also induce referrals for federal program business.

(OIG Adv. Ops. 23-06 and 21-10)

- Beware abusive practices with private payors.
 - Provider contracts.
 - State law fraud or unfair trade practices statutes.

Other Fraud and Abuse Laws



Idaho Anti-Kickback Statute

Service provider (including providers of healthcare services) cannot:

- Pay another person, or other person cannot accept payment, for a referral.
- Provide services knowing the claimant was referred in exchange for payment.
- Engage in regular practice of waiving, rebating, giving or paying claimant's deductible for health insurance.

(IC 41-348)

Penalties

- \$5000 fine by Department of Insurance
(IC 41-347)
- May be used to void contract.

Idaho Medical Practices Act

Prohibits:

- Dividing fees or gifts or agreeing to split or divide fees or gifts received for professional services with any person, institution or corporation in exchange for referral.
- Giving or receiving or aiding or abetting the giving or receiving of rebates, either directly or indirectly.

(IC 54-1814)

Penalties

- Adverse action against physician's license.

Eliminating Kickback in Recovery Act (“EKRA”)

- Cannot solicit, receive, pay or offer any remuneration in return for referring a patient to a laboratory, recovery home or clinical treatment facility unless arrangement fits within statutory or regulatory exception.

(18 USC 220(a))

Penalties

- \$200,000 criminal fine
- 10 years in prison

(18 USC 220(a))

- Applies to private or public payors.

Idaho Employment Law Issues



Idaho Medical Ethics Defense Act (Whistleblower Law)



Medical Ethics Defense Act: Prohibition

- Health care providers cannot be required to participate in or pay for a medical procedure, treatment, or service that violates such health care provider's conscience.

(IC 54-1304(1))

- “Health care provider” = any person, institution or payer who is authorized to participate in any way in any medical procedure, treatment, or service, *e.g.*, doctors, nurses, aides, APPs, MAs, techs, social workers, employees of hospital, clinic, nursing home or pharmacy, *etc.*
- “Conscience” = means the ethical, moral, or religious beliefs or principles held by any health care provider.

(IC 54-1303)

Medical Ethics Defense Act: Discrimination

- **Cannot discriminate against a health care provider for exercising right of conscience.**

(IC 54-1304(6))

- "Discriminate" = any adverse action taken against, or any threat of adverse action communicated to, any health care provider as a result of exercising conscience rights, including but not limited to any penalty or disciplinary or retaliatory action, whether executed or threatened.
- "Discriminate" ≠ negotiation or purchase of, or the refusal to use or purchase, insurance or medical procedures, treatments, or services by an individual or nongovernmental entity, nor does it include good faith efforts to reasonably accommodate conscientious objections of a health care provider.

(IC 54-1303)

Medical Ethics Defense Act: Exceptions

- EMTALA
- Protections under the Act don't apply if
 - an employee is unable to perform any essential function,
 - the employer cannot transfer the employee to a suitable alternative position for which the employee is qualified, and
 - the employer is otherwise unable to reasonably accommodate the employee without imposing an undue hardship on the employer.

(IC 54-1304(11)-(12))

Medical Ethics Defense Act: Disclosure to Employer

- A health care professional shall communicate to the health care professional's employer a conscience-based objection when it occurs or as soon as reasonably possible to allow an employer to make necessary staffing adjustments without delaying the provision of health care services.
- Employers may require an employee to disclose the employee's conscience-based objections at the time of hiring, but such disclosure shall not limit the rights protected by this chapter.
- Employer may require employee to provide conscience-based objections in writing.

(IC 54-1304(3))

Medical Ethics Defense Act: Whistleblowers

- **Cannot discriminate in any manner against a health care provider because the provider:**
 - Alleges or discloses a violation of the Act to the provider's employer, the Attorney General, a state agency, OCR, or other federal agency charged with protecting the right of conscience;
 - Testifies or assists in a proceeding concerning a violation of the Act;
 - **Discloses information the provider reasonably believes evidences:**
 - A violation of any law, rule, or regulation;
 - A violation of any ethical guidelines for care; or
 - Gross mismanagement, abuse of authority, practices that may put patients at risk, or endangers public health or safety.

**Broader than
"conscience"
objections**

(IC 54-1305)

Medical Ethics Defense Act: Immunity

- No health care provider shall be civilly, criminally, or administratively liable for exercising the right of conscience.
- No health care institution shall be civilly, criminally, or administratively liable for the exercise of the right of conscience by a health care professional employed, contracted, or granted admitting privileges by the health care institution.

(IC 54-1304(3))

Medical Ethics Defense Act: Cause of Action

- Provider may sue for a violation of the Act and recover:
 - Injunctive relief (e.g., reinstatement, board certification, licensure, etc.);
 - Actual damages for injuries suffered; and
 - Reasonable costs and attorneys' fees.

(IC 54-1307)

- **Beware potential whistleblower claims in addition to conscience claims.**

Other Conscience Objections

- A provider who for ethical or professional reasons is unwilling to conform to the desires of the patient or the patient's surrogate decision-maker may withdraw from rendering care if:
 - they first make a good faith effort to assist the patient in obtaining the services of another provider who is willing to provide the care requested by the patient; and
 - Must still provide life-sustaining or comfort care if requested by patient or patient's surrogate unless it would be nonbeneficial care.

(IC 39-4513(2) and -4514(3))

<https://www.hhs.gov/conscience/your-protections-against-discrimination-based-on-conscience-and-religion/index.html>



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- Remember other federal conscience objections, e.g.,
- 45 CFR part 88
 - Affordable Care Act § 1553
 - Church Amendments (abortion and sterilization)
 - Coates-Snowe Amendment (abortion training)
 - Others

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DEI Employment Programs



Merit-Based Health Care Act (No DEI Programs)

- Healthcare providers who receive Medicaid money may not engage in “prohibited DEI conduct,” including:
 - Discriminatory hiring or prohibited DEI conduct;
 - Adopt or implement internal policies that constitute prohibited DEI conduct; or
 - Use state funds, including Medicaid reimbursements, for any public-facing communication that promotes prohibited DEI conduct.
- Does not apply to:
 - Compliance with Title VI of the Civil Rights Act of 1964 or other applicable federal civil rights laws;
 - Collection of demographic data for certain legitimate clinical or quality reporting;
 - Patient-specific medical discussions related to biological, genetic, or epidemiological risk factors;
 - Non-ideological training required for clinical competency, licensure, accreditation, or compliance; or
 - Workforce training, quality improvement initiatives, or disparity-reduction programs required or encouraged by federal law, CMS guidance, or accreditation bodies.

(IC 45-2504)

Diversity, Equity and Inclusion (DEI)

“DEI” = policies or concepts that:

- One race or sex is inherently superior to another race or sex;
- The United States is fundamentally racist or sexist;
- An individual, by virtue of the individual's race or sex, is inherently racist, sexist, or oppressive;
- An individual should be discriminated against or receive adverse treatment because of the individual's race or sex;
- Members of one race or sex cannot and should not attempt to treat others without respect to race or sex;
- An individual's moral character is necessarily determined by the individual's race or sex;
- An individual, by virtue of the individual's race or sex, bears responsibility for actions committed in the past by other members of the same race or sex;
- An individual should feel discomfort, guilt, anguish, or distress on account of the individual's race or sex;
- Meritocracy or traits such as a hard work ethic are racist or sexist or were created by a particular race to oppress another race; or
- All people should be compelled to believe in and speak in a manner consistent with the concept that an individual can change the individual's sex or gender.

(IC 56-2503)

Prohibited DEI Conduct

“Prohibited DEI conduct” = any policy, practice, training, or requirement that includes:

- Consideration of DEI in hiring, promotion, compensation, discipline, termination, or contracting decisions;
- Race-based or sex-based preferences, targets, benchmarks, quotas, or equity goals;
- Mandatory bias, implicit bias, systemic bias, or similar training that assigns responsibility, disadvantage, or professional outcomes based on protected characteristics rather than individual merit or performance; or
- Required statements, pledges, attestations, or affirmations endorsing diversity, equity, and inclusion principles or related ideological frameworks as a condition of employment or contracting.

(IC 56-2503)

Penalties

Attorney General

- Attorney General investigations in response to a complaint.
- AG must provide notice and opportunity for corrective action before seeking civil penalties.
- AG may seek civil penalties:
 - Provider with ≥ 50 employees:
 - \$10,000 for first violation.
 - \$50,000 for second violation.
 - \$100,000 for third violation.
 - Provider with < 50 employees:
 - \$5000 for first violation.
 - \$25,000 for second violation.
 - \$50,000 for third violations.

(IC 56-2506)

Private Cause of Action

- Health care professional may sue solely for retaliation arising from refusing to participate in prohibited DEI conduct and recover:
 - Reinstatement
 - Injunctive relief
 - Compensatory damages.
 - Reasonable attorneys fees.

(IC 56-2507)

<https://publicdocuments.dhw.idaho.gov/WebLink/DocView.aspx?id=36653&dbid=0&repo=PUBLIC-DOCUMENTS&cr=1>

 IDAHO DEPARTMENT OF
HEALTH & WELFARE

PUBLIC DOCUMENTS > For Providers > Medicaid > Information Releases > 2026 > MA26-13 Update to Medicaid Provider Agreements

1 of 9 Automatic Zoom

 IDAHO DEPARTMENT OF
HEALTH & WELFARE

BRAD LITTLE - Governor
JULIE CHAFFRON - Director

SASHA O'CONNELL - Deputy Director
460 West State Street, 10th Floor
P.O. Box 63486
Boise, Idaho 83720-0036
PHONE: 208-334-5588
FAX: 208-334-6228

May 26, 2026

MEDICAID INFORMATION RELEASE MA26-13

To: All Managed Care, Medicaid, and ORP Providers

From: Sasha O'Connell, Deputy Director

Subject: Update to Medicaid Provider Agreements

Compliance with the Merit-Based Health Care Act is a material condition of all Medicaid provider agreements. (IC 56-2505)

Expansion of Scope of Practice



Occupational Licensing Reform Act

- An act is within the practice authority of a licensed professional in Idaho under the authority of the Division of Occupational and Professional licenses if:
 - The act is consistent with and not expressly prohibited by Idaho Code;
 - The act is consistent with the individual's education, training, and experience; and
 - Performance of the act is within the accepted standard of care for the licensed professional's profession or occupation that would be provided in the same or similar setting by a reasonable and prudent individual with the same or similar education, training, and experience(IC-67-9407)
- Maximizes scope of practice for licensed healthcare providers.

Non-Competition Clauses



Noncompetition Clauses

- FTC rule: effective 9/4/24
 - It is unfair method of competition to enter or enforce a post-termination non-compete against workers or senior executives.
 - Subject to limitations.
 - Employer must provide notice to workers otherwise covered by non-compete that it will not be enforced.

(16 CFR 910)

- On 8/20/24, federal court in Texas struck down the rule and enjoined the FTC from enforcing it. (*Ryan LLC v. FTC*, CV 3:24-CV-00986E (N.D. Tex. 2024))

FTC Warning Letter



FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

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For Release

FTC Chairman Ferguson Issues Noncompete Warning Letters to Healthcare Employers and Staffing Companies

September 10, 2025 | [f](#) [X](#) [in](#)

Tags: [Competition](#) | [Bureau of Competition](#) | [Nonmerger](#) | [Health Care](#) | [Noncompete](#)

[Warning Letters](#)

“The FTC is focusing resources on enforcing Section 5 of the FTC Act against unlawful noncompetes, particularly in the healthcare sector. Accordingly, I encourage you to conduct a comprehensive review of your employment agreements—including any noncompetes or other restrictive covenants—to ensure that they comply with applicable laws and are appropriately tailored to the circumstances. If your company is currently using noncompetes that are unfair or anticompetitive under the FTC Act, I strongly encourage you to discontinue them immediately and to notify relevant employees of the discontinuance.”

FTC Actions



The screenshot shows the Federal Trade Commission's website. At the top left is the FTC logo with the text "FEDERAL TRADE COMMISSION" and "PROTECTING AMERICA'S CONSUMERS". To the right is a navigation menu with links: "Enforcement", "Policy", "Advice and Guidance", "News and Events", and "About the FTC", each followed by a dropdown arrow. A search icon is on the far right. Below the navigation is a breadcrumb trail: "Home / News and Events / News / Press Releases", where "Press Releases" is highlighted with a blue box. Underneath the breadcrumb is a "For Release" label. The main heading of the press release is "FTC Takes Action Against Noncompete Agreements, Securing Protections for Workers". Below the heading is a summary: "FTC orders one of the nation's largest pest-control companies to stop enforcing noncompete agreements and sends warning letters to other industry employers". At the bottom left, the date "April 15, 2026" is displayed next to social media icons for Facebook, X, and LinkedIn.

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

Enforcement ▾ Policy ▾ Advice and Guidance ▾ News and Events ▾ About the FTC ▾

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For Release

FTC Takes Action Against Noncompete Agreements, Securing Protections for Workers

FTC orders one of the nation's largest pest-control companies to stop enforcing noncompete agreements and sends warning letters to other industry employers

April 15, 2026

Non-Competes in Idaho

- Non-competes for “key employees” or “key contractors” are enforceable if reasonable in duration, geographic area, and type of employment or line of business.
- Such a non-compete agreement is presumptively valid if it:
 - Is supported by consideration.
 - Only restricts competition in the line of business conducted by the key employee while working for the employer,
 - Has a post-employment term of 18 months or less, and
 - Is restricted to the geographic areas in which the key employee provided services or had a significant presence or influence.
- If court finds a non-compete to be unreasonable, court shall limit or modify the agreement.

(IC 44-2701 *et seq.*; see also *Blaskiewicz v. Spine Inst.*, 171 Idaho 201 (2022))

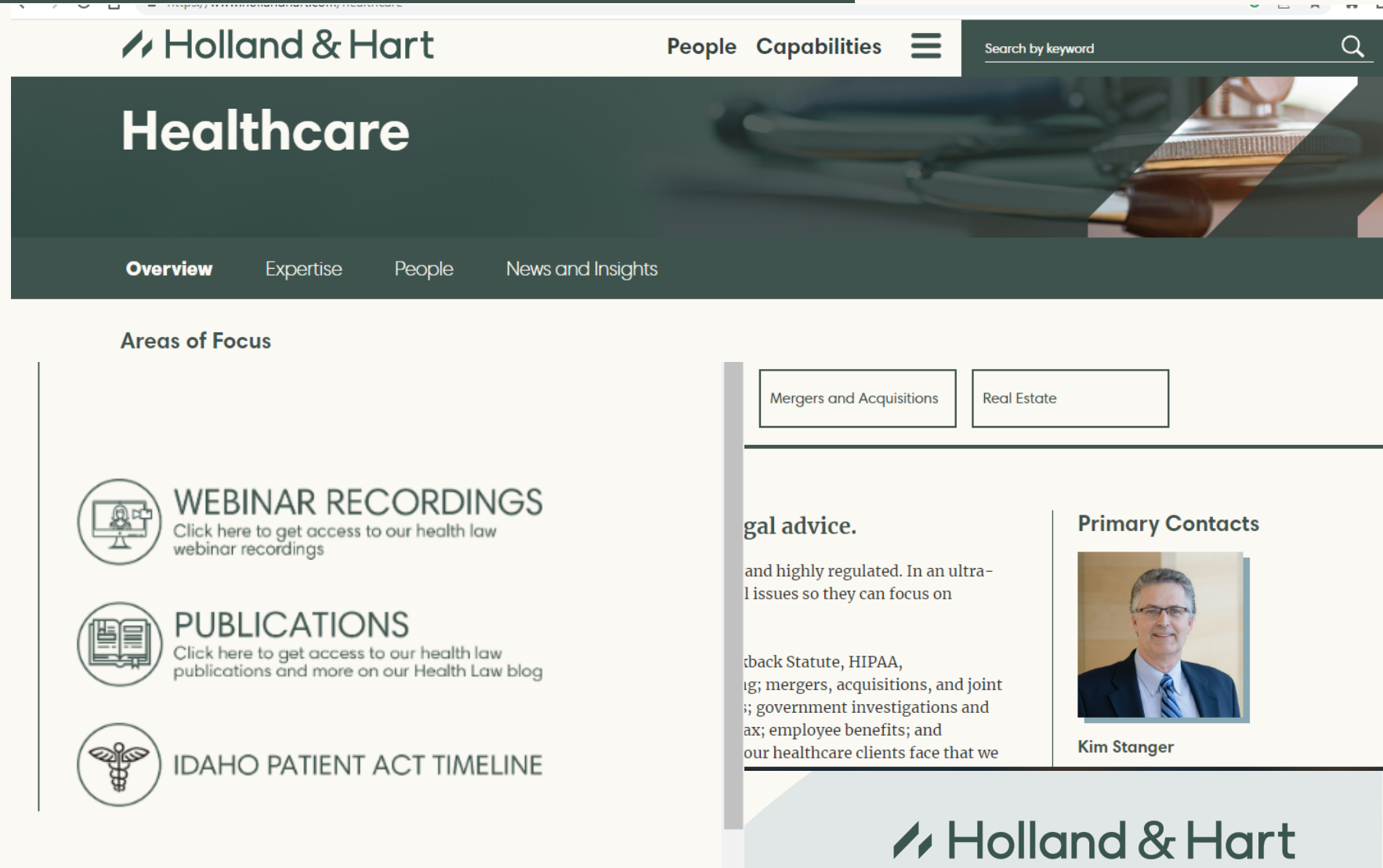
Additional Resources



HTTPS://WWW.HOLLAND HART.COM/HEALTHCARE

Free content:

- Recorded webinars
- Client alerts
- White papers
- Other



The screenshot displays the Holland & Hart website's Healthcare section. The header includes the firm's logo, navigation links for 'People' and 'Capabilities', and a search bar. The main banner features the word 'Healthcare' in large white text over a dark background with a stethoscope. Below the banner is a navigation bar with links for 'Overview', 'Expertise', 'People', and 'News and Insights'. The 'Areas of Focus' section contains three icons: a monitor for 'WEBINAR RECORDINGS', an open book for 'PUBLICATIONS', and a caduceus for 'IDAHO PATIENT ACT TIMELINE'. To the right, there are buttons for 'Mergers and Acquisitions' and 'Real Estate'. Further down, a 'Legal advice' section is partially visible, followed by a 'Primary Contacts' section featuring a photo of Kim Stanger.

Holland & Hart

People Capabilities

Search by keyword

Healthcare

Overview Expertise People News and Insights

Areas of Focus

Mergers and Acquisitions Real Estate

WEBINAR RECORDINGS
Click here to get access to our health law webinar recordings

PUBLICATIONS
Click here to get access to our health law publications and more on our Health Law blog

IDAHO PATIENT ACT TIMELINE

Legal advice.

and highly regulated. In an ultra-
l issues so they can focus on

back Statute, HIPAA,
g; mergers, acquisitions, and joint
; government investigations and
ax; employee benefits; and
our healthcare clients face that we

Primary Contacts



Kim Stanger

Holland & Hart

Questions?



Kim C. Stanger

Office: (208) 383-3913

Cell: (208) 409-7907

kcstanger@hollandhart.com