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Lessons for Skilled Nursing and Assisted Living Facilities From the 'Largest Health Care Fraud Case'

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Phillip Esformes, the alleged mastermind of one of "the largest single criminal health care fraud cases ever brought against individuals by the Department of Justice,"[1] has finally reached a plea deal with the Department of Justice (DOJ), concluding the eight-year-long case. Esformes, the owner of multiple skilled nursing and assisted living facilities in Florida, along with a complicit physician assistant and hospital administrator, were originally charged with 28 criminal charges, including health care fraud, receipt of kickbacks in connection with a federal health care program, relevant conspiracy charges, and obstruction of justice in 2016.

The DOJ originally alleged that Esformes bribed the physician assistant to improperly refer patients to his skilled nursing facilities (SNF) and then keep patients there for 100 days — the maximum number of days Medicare will pay for a skilled nursing stay. Then, after the 100-day period, the DOJ alleged the physician assistant would transfer the patient to one of Esformes' assisted living facilities (ALF).

Although SNFs and ALFs are unlikely to intentionally engage in fraud of such magnitude, Esformes' case nonetheless provides a cautionary tale of the potential fraud risks facing these facilities, and offers important lessons on mitigating government enforcement risks.

Lessons Learned From the *Esformes* Case

1. Be Cautious When Referring Between Facilities With Shared Ownership.

To accommodate the ever-changing needs of residents, long term care (LTC) businesses may wish to operate a network of affiliated facilities and services that are eligible for reimbursement from federal health care programs, including SNFs, ALFs, home health agencies, and hospice services. However, when referring residents to another affiliated facility or service — particularly when the facility stay or service is covered by Medicare or other government health care programs — it is imperative to comply with the Anti-Kickback Statute (AKS), the Stark Law, and other fraud and abuse laws.

In particular, the AKS prohibits any person or entity from knowingly offering, receiving, or exchanging anything of value to induce or reward the referral of items or services that are payable by a federal health care program. Similarly, the Stark Law prohibits physicians from making referrals to entities for the furnishing of designated health services payable by Medicare if the physician (or an immediate family member) has a financial relationship

with the entity. Although numerous exceptions and safe harbors may be available — such as for ownership and investment interests in an entity like a SNF or ALF — these exceptions and safe harbors sometimes place limitations on the volume of referrals or type of compensation or financial relationship.

2. Combat Patient Steering by Offering Patient Choice

During the discharge process, it is important to consider the potential influence of the SNF on the resident's choice of facility or service provider post-discharge. "Patient steering" refers to the practice of directing or "steering" patients toward certain providers, often allegedly in exchange for financial incentives, which can be characterized as kickbacks. In a nursing home context, it is not uncommon for a patient to desire the additional support of an ALF after they are discharged. These ALF facilities do not always require a physician order for admission, and SNF personnel and medical providers can have significant influence over a resident's choice of facility and care. To mitigate the risk of improper patient steering during the discharge process, patients should be given multiple ALF options, rather than a single option to go to an affiliated ALF.

In addition, SNF and ALF residents often require access to supplemental medical services, including but not limited to, physician services, therapy services, hospice, and home care. Depending on the circumstances, this care could be provided by any number of provider types. To the extent the ALF or SNF has contracted with or is affiliated with a provider to render these or other medical services to residents, it should consider the possible implications of creating a captive referral base. Any financial relationship or exchange of remuneration between the provider and the ALF/SNF will surely be scrutinized heavily by regulators looking for potential kickbacks.

3. Do Not Forget About Stark Law

The Stark Law, also known as the physician self-referral law,[2] restricts a physician from making a referral of certain "designated health services" to any entity with which the physician, or a physician's immediate family member, has a financial relationship. "Financial relationship" is broadly defined, and includes any direct or indirect ownership, investment, or compensation arrangement.

The *Esformes* case is unique because the main co-conspirator was a physician's assistant, not a physician. The current Stark law does not directly apply to nonphysician practitioners (NPP), such as physician assistants. Nonetheless, any LTC business should be aware of any financial relationship it might have with a physician that refers designated health services reimbursable by Medicare or Medicaid to the business — which can include physical therapy, occupational therapy, and home health care services. Any financial relationship with a referring physician in such circumstances is strictly prohibited, unless a statutory exception applies.

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[1] Department of Justice, *Three Individuals Charged in $1 Billion Medicare Fraud and Money Laundering Scheme*

[2] Section 1877 of the Social Security Act (the Act) (42 U.S.C. 1395nn)

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