

Florida Health Care Providers Potentially in Peril When Seeking Patient Referrals

On July 1, Florida addiction recovery homes, and potentially health care providers in general, that thought they had legal referral arrangements may need to think again.

Why? Florida House Bill 369 (HB). The intent of HB 369 was to strengthen Florida laws on patient brokering and target bad actors fueling the opioid crisis and the so-called “sober homes.”

By Ron Herman | September 11, 2019 at 12:31 PM

On July 1, Florida addiction recovery homes, and potentially health care providers in general, that thought they had legal referral arrangements may need to think again.

Why? Florida House Bill 369 (HB). The intent of HB 369 was to strengthen Florida laws on patient brokering and target bad actors fueling the opioid crisis and the so-called “sober homes.” The bill covers a plethora of topics that range from substance abuse treatment, recovery, patient brokering/deceptive marketing practices and peer specialists. The revisions to the Patient Brokering Act may affect a lot of business relationships that were previously considered exceptions to the act and classified under a safe-harbor provision.

Patient Brokering Act and the Sober Homes Industry

The Florida Patient Brokering Act is a Florida statute that makes it a felony for any person to engage in patient brokering. Patient brokering is described as a recovery treatment center paying a third party for referring patients to the treatment center. Legislators and prosecutors want to crack down on sober homes that they claim often only operate as recovery residences to fraudulently bill insurance companies

for unnecessary treatments, lab tests and assessments. Those who violate the Patient Brokering Act can face serious fines up to \$500,000 and felony charges.

Which Business Arrangements Are in Legal Jeopardy?

Prior to HB 369, many businesses relied on the federal anti-kickback statute (AKS) to comply with the Florida Patient Brokering Act. The AKS, similar to the Patient Brokering Act, prohibits certain referral payments and other arrangements between healthcare providers and vendors. The AKS previously had more flexibility, making it easier for business relationships to participate in what would otherwise be considered an improper practice. As long as deals between providers and vendors fit into the AKS safe-harbor exception, they were not viewed as a violation of the Patient Brokering Act. Lawmakers and prosecutors saw this as a “loophole” on which many business relationships heavily relied. Prior to the bill, the patient-brokering statute did not “apply to any discount, payment, waiver of payment or payment practice not prohibited by the federal AKS.” Now, the word “prohibited” is changed to “expressly authorized.” While this is a minor change in words, what was not prohibited is not the equivalent of what is expressly authorized by the AKS. This means that while a deal may fall within the AKS guidelines, it does not necessarily mean that it will fall within the guidelines of the Patient Brokering Act.

Next Steps to Take

House Bill 369 has created an issue for all of these previously valid relationships, where providers and others in the industry now have to scramble to reevaluate whether their referral, marketing and business arrangements leave them exposed to violating the Patient Brokering Act. This may seem unfair because the arrangements that were viewed as practicing in good faith are now potentially in

jeopardy. There are many in the industry who are understandably upset about these changes because they are not sure whether their deals comply with the new Florida law. The initial goal of HB 369 was meant to provide clarity but it has instead caused a lot of confusion and stress for what the future holds for the numerous business relationships affected, and the courts have yet to review the new law.

Ron Herman owns *Herman Law in West Palm Beach*. He defends complex criminal law cases, representing companies and professionals fighting government investigations.

Reprinted with permission from the September 11, 2019 online edition of the Daily Business Review
© 2019 ALM Media Properties, LLC. All rights reserved. Further duplication without permission is prohibited, contact 877-257-3382 or reprints@alm.com.