I. INTRODUCTION

Prior to 2008, health care attorneys representing physicians or home health agencies in Florida had to understand the limitations imposed by the federal and Florida prohibitions against physician self-referrals and kickbacks in exchange for referrals. For the most part—owing largely to the lack of Florida jurisprudence in this area—health care attorneys focused on the requirements of the Stark Law and the federal antikickback statute when trying to determine what financial arrangements between physicians and home health agencies were permissible. In 2008, however, the Florida Legislature changed the game significantly when it amended Florida’s Home Health Services Act to include sweeping prohibitions against giving remuneration to physicians in a position to refer patients to home health agencies. In a nutshell, the laws enacted in 2008 allowed each home health agency to have a financial relationship directly or indirectly with (i.e., give remuneration to) only one medical director and no other physician. Although many in the industry complained that these new amendments were too strict, there was one undeniable benefit of such broad prohibitions: they made the law very clear, and everyone involved knew what was not permitted. Home health agencies that violated the 2008 law were subject to $5,000 fines per instance and possible licensure revocation (and the physicians involved could face professional license disciplinary proceedings).

In 2009, the Florida Legislature passed Senate Bill 1986, which was designed specifically to prevent health care fraud, and again amended the Home Health Services Act. In one brief, seemingly minor subsection of that bill, however, the Legislature created a significant amount of confusion in the Florida home health industry by including language which essentially provides that certain financial relationships between home health agencies and physicians that are permitted under the Stark Law or the federal antikickback statute (or those laws’ corresponding implementing regulations) do not violate Florida’s Home Health Services Act. After the 2009 changes became law, Florida’s Agency for Health Care Administration (AHCA) issued “Frequently Asked Questions” on its website in an effort to give the industry some guidance regarding how AHCA likely would implement the changes. This outline addresses these issues. Attorneys representing physicians should keep in mind that if AHCA determines that a home health agency has violated an anti-remuneration provision by giving unlawful remuneration to a physician, AHCA could refer the matter to the Department of Health to commence licensure disciplinary proceedings against the physician.
II. 2009 AMENDMENTS TO FLORIDA’S HOME HEALTH SERVICES ACT

A. Senate Bill 1986

Section 6 of Senate Bill 1986 amended (with language changes highlighted herein by underscoring) subsection (6) of section 400.474, Florida Statutes, as follows:

400.474 Administrative penalties.—

(6) The agency may deny, revoke, or suspend the license of a home health agency and shall impose a fine of $5,000 against a home health agency that …

(e) Gives remuneration to a case manager, discharge planner, facility-based staff member, or third-party vendor who is involved in the discharge planning process of a facility licensed under chapter 395, chapter 429, or this chapter from whom the home health agency receives referrals.

(h) Has more than one medical director contract in effect at one time or more than one medical director contract and one contract with a physician-specialist whose services are mandated for the home health agency in order to qualify to participate in a federal or state health care program at one time.

(i) Gives remuneration to a physician without a medical director contract being in effect. The contract must:

1. Be in writing and signed by both parties;

2. Provide for remuneration that is at fair market value for an hourly rate, which must be supported by invoices submitted by the medical director describing the work performed, the dates on which that work was performed, and the duration of work; and

3. Be for a term of at least 1 year.

The hourly rate specified in the contract may not be increased during the term of the contract. The home health agency may not execute a subsequent contract with that physician which has an increased hourly rate and covers any portion of the term that was in the original contract.

(j) Gives remuneration to:

1. A physician, and the home health agency is in violation of paragraph (h) or paragraph (i);
2. A member of the physician's office staff; or

3. An immediate family member of the physician,
   if the home health agency has received a patient referral in
   the preceding 12 months from that physician or physician's
   office staff.

Nothing in paragraph (e) or paragraph (j) shall be interpreted as applying
to or precluding any discount, compensation, waiver of payment, or
payment practice permitted by 42 U.S.C. s. 1320a7(b) or regulations
adopted thereunder, including 42 C.F.R. s. 1001.952, [Federal Anti-
kickback Statute] or 42 U.S.C. s. 1395nn or regulations adopted
thereunder [the Stark Law]. Emphasis added.

For purposes of this outline, that last paragraph of Section 400.474(6), which the Florida
Legislature added in 2009, shall be referred to as the “Federal Exemption.”

B. AHCA’s Interpretation

AHCA, which is the Florida agency responsible for regulating home health agencies, has
posted a series of “Frequently Asked Questions” (FAQs) on its website to communicate its
interpretation of how Senate Bill 1986 changed the Home Health Services Act. Although the
rules promulgated by administrative agencies are entitled to some deference in Florida and
typically will not be held invalid unless they are arbitrary or capricious, the FAQs were not
adopted pursuant to formal rulemaking. Further, AHCA has expressly stated in the FAQs that
the FAQs are provided for general informational purposes only:

These Frequently Asked Questions and Answers are provided for general
informational purposes only. They do not constitute, and should not be substituted
for, professional legal advice. These Frequently Asked Questions and Answers
are not an interpretation of law nor are they statements of AHCA policy. Each
situation is different and each situation deserves individual attention. Due to the
complex nature of the state and federal laws that govern health facilities and fraud,
home health agencies and other readers should consult with a health care attorney
for their particular issue.

AHCA Introductory Statement to FAQ § 14.1.

The following AHCA FAQs relate to home health agencies’ financial relationships with
physicians or physician practices and their staffs:

14.2.1 Is my home health agency required to have a medical director?

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1 The AHCA FAQs included in this outline were current as of November 30, 2009. See
http://www.fdhc.state.fl.us/MCHQ/Health_Facility_Regulation/Home_Care/docs/hha_faq.html#section14 (last
accessed 11/30/09).
Answer: No. Home health agency state licensure law does not require a medical director.

14.2.2 Is our home health agency required to have a physician?

Answer: No. Only Medicare and Medicaid home health agencies are required to have a physician on the group of professional personnel that advises the HHA. The group is to meet a minimum of once per year. (Federal HHA regulation 42 CFR 484.16).

14.2.3 Can my home health agency have more than one medical director?

Answer: No. Under Subsection 400.474(6) (h), Florida Statutes, it is illegal for a home health agency to have more than one medical director contract in effect at one time or more than one medical director contract and one contract with a physician-specialist whose services are mandated for the home health agency in order to qualify to participate in a federal or state health care program at one time.

14.2.4 Can our home health agency accept referrals from our one medical director?

Answer: Yes. This state law does not prohibit it.

14.2.5 Can our home health agency accept referrals from physicians other than our medical director?

Answer: Yes.

14.2.5.5 What is “remuneration” and what does it include?

Answer: As defined in Subsection 400.462(27), Florida Statutes, “remuneration” means “any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind.” The Agency has filed administrative complaints against home health agencies for giving physicians and other individual items such as meals, gifts, event tickets, flowers, and other similar items. There is no dollar allowance under this statutory definition.

14.2.6 May a HHA give remuneration to a Florida licensed physician?

Answer: No, unless the physician is the medical director for the home health agency. A home health agency may give remuneration to a physician only if the physician has a medical director contract which meets all contractual requirements in 400.474(6)(i), Florida Statutes.

14.2.7 May a HHA give remuneration to a physician’s immediate family member or a member of his office staff?
Answer: Depends. Under Subsection 400.474(6)(j), Florida Statutes, home health agencies are prohibited from giving remuneration to a member of the physician’s office staff or an immediate family member of the physician if the home health agency has received a patient referral in the preceding 12 months from that physician or that physician’s office staff. As defined by section 400.462(19), Florida Statutes, "immediate family member" means a “husband or wife; a birth or adoptive parent, child, or sibling; a stepparent, stepchild, stepbrother, or stepsister; a father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; a grandparent or grandchild; or a spouse of a grandparent or grandchild.” Home health agencies should carefully review and document their referrals and monitor referral sources to determine whether a referral has been made to the home health agency by the physician or physician’s staff. As for the effect of the 2009 amendment, please see FAQ 14.2.12.

14.2.8 I would like to hire a registered nurse who is married to a physician. The physician refers some patients to our home health agency. Can I hire the nurse?

Answer: No. By hiring the nurse, the HHA is providing remuneration to immediate family member of the physician. Because the home health agency accepts patient referrals from this physician, the remuneration is prohibited. Please see FAQ 14.2.7 above. As for the effect of the 2009 amendment, please see FAQ 14.2.12.

14.2.9 Can our home health agency provide remuneration to a physician that has not referred any patients to us? Then, once a referral is made by a physician, no longer offer remuneration?

Answer: No, unless the physician is the medical director of the home health agency. There was no change to Subsection 400.474(6)(i), Florida Statutes.

14.2.10 Can our home health agency lease space from a referring physician or a physician group?

Answer: No, unless the physician is the medical director of the home health agency. There was no change to Subsection 400.474(6)(i), Florida Statutes.

14.2.11 What about when there are multiple physicians in a practice, with one being the medical director -- Can we market to these other physicians that are in the same practice by providing lunches, cookies, coffee, or other gifts?

Answer: No. Please refer to FAQ 14.2.6.

14.2.12 What effect does the 2009 amendment have?
In 2009, the Legislature enacted a provision which states: “Nothing in paragraph (e) or paragraph (j) shall be interpreted as applying to or precluding any discount, compensation, waiver of payment, or payment practice permitted by 42 U.S.C. s. 1320a-7(b) or regulations adopted thereunder, including 42 C.F.R. s. 1001.952, or 42 U.S.C. s. 1395nn or regulations adopted thereunder.” This 2009 amendment references the Federal Anti-Kickback Law and the Stark Law and their regulations. The 2009 amendment did not modify any other paragraph under Section 400.474(6) and thus the 2009 amendment is limited to paragraphs (e) and (j). The prohibitions under paragraph (i), i.e., giving remuneration to physicians, are unaffected by the 2009 amendment.

As for Subsections 400.474(6)(e) and (j), if a home health agency can establish that a federal safe harbor applies to its situation, the giving of some forms of remuneration “may” be permitted by the 2009 amendment. However, remuneration still does not include meals, food, beverages, gifts, event tickets, flowers, and other similar items. A “safe harbor” is a provision in the federal regulations that permits certain arrangements and would serve as a defense in enforcement actions. These two federal laws are complex. A home health agency should determine (a) whether one of these two federal laws applies to it, (b) whether a safe harbor applies to it, and (c) whether it has satisfied the burdens of satisfying the safe harbor. The burden of establishing that a safe harbor rests upon the home health agency. Because of the complexity of these two federal laws, home health agencies are encouraged to consult with a health care attorney.

14.2.13 Is it permissible for any entity (such as a hospital) to provide remuneration to physicians if that entity shares any common ownership or controlling interest with a home health agency to which that physician refers patients?

Answer: Pursuant to section 400.474, Florida Statutes, a home health agency is prohibited from giving remuneration, as defined by statute, to certain individuals or entities under specified circumstances as set forth within the statute. In that same light, a home health agency may not cause, condone or acquiesce in the giving of such prohibited remuneration through the actions of a related entity (such as a hospital), which may share a common ownership or controlling interest with the home health agency. The related entity may be viewed as a conduit for the giving of prohibited remuneration and thus its actions may be imputed to the home health agency. Each case will be reviewed on a case-by-case basis with a focus of whether the remuneration was given with the intent to induce referrals to the home health agency. Generally, however, a hospital or other entity may provide admitting privileges, common areas and common equipment to physicians who refer patients to home health agencies that share an ownership or controlling interest without violating section 400.474, Florida Statutes. In addition, section 400.474, Florida Statutes, does not prohibit a hospital or other entity from referring a patient to any particular home health agency, even one that is related to the hospital or other entity. However, the federal regulations require that the
hospital include in the discharge plan a list of Medicare home health agencies that are available to the patient and that serve the geographic area in which the patient resides. Home health agencies must request to be listed by the hospital as available. 42 CFR 482.43(c)(6). The key is that the choice of which home health agency to employ rests with the patient and that the patient’s choice should be made freely after proper consultation and in accordance with the laws concerning patient referrals.

Note that in FAQ 14.2.12 – which is the FAQ that attempts to interpret the impact of the new Federal Exemption in Florida law – AHCA expressly states that “if a home health agency can establish that a federal safe harbor applies to its situation, the giving of some forms of remuneration ‘may’ be permitted by the 2009 amendment.” It therefore is necessary to examine the Stark Law and the federal antikickback statute to determine whether a federal exception or safe harbor arguably could apply and make a home health agency’s financial relationship with a physician immune from a licensure sanction pursuant to section 400.474(6), Florida Statutes.

III. FEDERAL ANTIKICKBACK STATUTE AND STARK LAW -- OVERVIEW

A. Federal Antikickback Statute

The federal antikickback statute, 42 U.S.C. Section 1370a-7(b), makes it a crime for any person to solicit, receive, offer or pay any remuneration in return for referring, arranging for or recommending the referral of, an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made, in whole or in part, by a federal health care program. The federal antikickback statute also makes it a crime for any person to solicit, receive, offer or pay any remuneration to induce a person to purchase, lease, order or arrange for or recommend purchasing or leasing any good, facility or service for which payment may be made, in whole or in part, under a federal health care program.

In order for the federal antikickback statute to be violated, the illegal remuneration must be made “knowingly and willfully . . . to induce” a person to make or arrange for a referral or recommend purchasing a service. A payment for actual services rendered with no intent to induce the payee to make, arrange for, or recommend referrals, would not, therefore, be a violation of the federal antikickback statute. The United States Court of Appeals for the Eleventh Circuit has held that “knowingly and willfully” means that the person has knowledge that his or her conduct was unlawful and does require that the person knew that the conduct specifically violated the federal antikickback statute. To violate the federal antikickback statute, one therefore must offer or pay remuneration with the criminal intent to induce referrals. Merely because an individual “hoped or expected or believed that referrals may ensue from remuneration” is not sufficient intent. United States v. McClatchey, 217 F. 3d 823 (10th Cir. 2000). Providing remuneration that “merely encourages” rather than “induces” the referrals of patients is not prohibited by the federal antikickback statute. The Hanlester Network, et al., v. Shalala, 51.F. 3d 1930 (9th Cir. 1995). If one purpose of the offer or payment of remuneration is to induce patient referrals, that could be a violation of the federal antikickback statute. See United States v. Greber, 760 F.2d 68 (3d Cir.), cert. denied, 474 U.S. 988 (1985).
The Office of the Inspector General of the Department of Health and Human Services has published regulations (commonly referred to as “safe harbors”) that define relationships that are immune from administrative sanction and criminal prosecution under the federal antikickback statute. See 42 C.F.R. § 1001.952. The failure to comply with a safe harbor does not mean that the arrangement is per se illegal. Such an arrangement will be analyzed by the federal enforcement agencies on a case-by-case basis, looking at the totality of circumstances surrounding the arrangement for evidence that the parties’ intent was to pay or receive remuneration as an inducement for referrals.

B. The Federal Stark Law

The federal statute governing physician self-referrals, commonly known as the “Stark Law,” provides that if a physician has a financial relationship with an entity, then the physician may not make a referral to the entity for the furnishing of certain designated health services for which payment otherwise may be made by the Medicare or Medicaid programs. 42 U.S.C. § 1395nn. Moreover, the entity may not present or cause to be presented a claim or bill to the Medicare or Medicaid programs, or to any other individual, third-party payor, or other entity for the designated health services performed pursuant to the prohibited referral. There are numerous exceptions in the Stark Law and implementing regulations for specific financial relationships, such as leases and services agreements. See 42.C.F.R. § 411 Subpart J.

“Financial relationship” under the Stark Law includes any direct or indirect compensation arrangement between the physician and the entity. The Stark Law defines “remuneration” to include any discount, forgiveness of debt, or other benefit made directly or indirectly, overtly or covertly, in cash or in kind. “Designated health services” include, among others, home health services.

Note that the failure to meet a federal antikickback statute safe harbor does not mean that a financial arrangement is per se illegal. However, failure to meet the Stark Law requirements strictly prohibits a physician from referring patients for Medicare services and prohibits the home health agency from billing Medicare for services furnished following an unlawful referral.

IV. REMUNERATION TO PHYSICIANS

A. Remuneration for the Physician’s Professional Services

Prior to July 1, 2008, many home health agencies retained a physician (and in some cases, more than one physician) under medical director or consultant contracts to provide certain professional consulting services (e.g., chart reviews, policy and program development, and training for staff in specialty clinical areas). Section 400.474(6)(j) – originally effective on July 1, 2008 – authorized AHCA for the first time to impose administrative penalties on a home health agency if that home health agency “gives remuneration to a physician, and the home health agency is in violation of paragraph (h) [having more than one Medical Director contract in effect] or paragraph (i) [giving remuneration to a physician without a compliant Medical Director contract in effect].” This was a significant change for home health agencies in Florida.
An argument could be made that the new Federal Exemption under Florida law allows home health agencies to pay more than one physician for professional consulting services, provided that those consulting arrangements comply with a Stark Law and do not violate the federal antikickback statute. There are a number of federal exceptions/safe harbors that could apply if certain conditions are met.

1. **Employment Relationships.** Although the provisions are similar, the Stark Law employment exception (42.C.F.R. § 411.357(c)) is slightly more specific than the federal antikickback statute’s safe harbor (42.C.F.R. § 1001.952(i)) criteria. The federal antikickback Statute permits any compensation paid to a bona fide employee for “covered services,” which is not defined. The Stark Law exception requires that amounts paid by an employer to employee-physician in a bona fide employment relationship meet the following criteria:

   a. Employment is for identifiable services.

   b. The amount of remuneration under the employment is – (i) consistent with the fair market value of the services; and (ii) except in the case of certain permissible incentive arrangements, is not determined in any manner that takes into account the volume or value of any referrals by the referring physician.

   c. The remuneration is provided under an agreement that would be commercially reasonable even if no referrals were made by the employee.

   There is no requirement under the Stark Law or the federal antikickback statute that the employment arrangement is on a full-time basis, but the relationship must be a “bona fide” employment relationship.

2. **Independent Contractor Relationships.** Prior to July 1, 2008, medical director and other physician consulting service arrangements between a home health agency and a physician commonly were on an independent contractor basis. The federal antikickback statute safe harbor for personal services and management contracts (42.C.F.R. § 1001.952(d)) and the Stark Law’s personal services arrangements exception (42.C.F.R. § 411.357(d)) set forth the criteria that must be met for the safe harbor or exception to apply. Generally, these relationships are considered compliant with these federal laws so long as:

   a. The arrangement is set out in writing, signed by the parties and specifies the services covered by the arrangement.

   b. The arrangement covers all of services to be provided by the physician to the HHA.

   c. The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purpose of the arrangement.

   d. The term of the agreement is at least one year.

   e. The compensation to be paid over the term of each arrangement is set in advance, does not exceed fair market value and (except in the case of certain physician
incentive plans) is not determined in any manner that takes into account the volume or value of any referral or other business generated between the parties.

f. The services furnished under each arrangement do not involve the counseling or promotion of a business arrangement that violates state or federal law.

The federal antikickback statute safe harbor for personal services arrangements adds an additional standard for periodic or part-time arrangements that requires a fixed schedule of intervals of service with a fixed payment amount per interval to be set out in the contract. The safe harbor requires a fixed compensation amount over the term of the arrangement rather than payment for services on an as-needed basis.

3. One Medical Director Limitation. As mentioned, section 400.474(6)(h) provides that a home health agency can have only one medical director; however, there is no such restriction in either the Stark Law or the federal antikickback statute. An argument could be made that the Federal Exemption now in Florida law permits home health agencies to contract with more than one medical director, although this argument would appear to contradict other sections in the statute. Another argument is that the Federal Exemption permits home health agencies to contract with (and pay remuneration to) more than one physician “consultant”, even though the home health agency is limited to only one paid medical director. To date, however, AHCA has expressed its view that the only physician that can be under contract with the home health agency is its medical director.

B. Space Leases

1. Federal Law. Prior to the 2008 revision to the Home Health Services Act, some home health agencies leased space from referring physicians (or companies owned by physicians), resulting in remuneration flowing directly or indirectly from the home health agency to the physician in the form of lease payments. Under the Stark Law and federal antikickback statute, these relationships are permissible as long as a Stark Law exception is met, federal antikickback statute safe harbor, is met or the relationship does not violate the federal antikickback statute. The criteria for space leases are very similar for both the Stark Law and the federal antikickback statute. See 42.C.F.R. 411.357(a) and 42. C.F.R. 1001.(b). Generally, the criteria are as follows:

   a. The lease is set out in writing, signed by the party and specifies the premises it covers.
   b. The lease is for at least one year.
   c. The space does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease and is used exclusively by the lessee.
   d. The rental charges over the term of the lease is set in advance and consistent with fair market value.
e. The rental charges over the term of the lease are not determined in any manner that takes into account the volume or value of any referrals generated between the parties.

f. The lease would be commercially reasonable even if no referrals were made between the parties.

g. A hold-over rental for up to six months in the year following expiration of a one-year agreement is acceptable.

The federal antikickback statute safe harbor for space rentals contains an additional requirement to the above-listed criteria for the Stark Law space lease exception. If the lease is intended to be a part-time arrangement, a fixed schedule of time intervals with the exact rent for the intervals must be set out in advance in order for the arrangement to also meet the federal antikickback statute safe harbor for space leases.

There is an argument based on the Federal Exemption that home health agencies should be permitted to give remuneration to referring physicians in the form of lease payments for space rentals, provided that the rental arrangements comply with either the Stark Law or the federal antikickback statute. It is unclear, however, whether AHCA would agree with that interpretation.

C. Promotional Items, Meals Accompanied By An Educational Or Marketing Presentation, And Entertainment

The 2008 law (CS/HB 7083) imposed a strict prohibition on the provision of any remuneration in any form to referring physicians. AHCA interpreted this to mean that home health agencies could not give physicians promotional items of any value (e.g., pens or lunches) to physicians. Based on the passage of Senate Bill 1986 during the 2009 legislative session, an argument could be made that the Federal Exemption eliminates this prohibition if the promotional items or meals are permitted by the Stark Law or the federal antikickback statute. Remuneration to physicians in the form of marketing gifts, meals and entertainment and could implicate the federal antikickback statute. The federal antikickback statute does not contain a specific provision that specifies how much a home health agency can provide to a physician in terms of the value of marketing gifts, meals or entertainment without risk of liability. The offering of anything of value with the specific intent to induce patient referrals implicates the federal antikickback statute. Also, there is no safe harbor regulation under the federal antikickback statute that protects the giving of gifts, meals or entertainment items to referring physicians. The lack of a safe harbor does not mean that a home health agency providing that type of remuneration to a physician is, per se, illegal.

Giving remuneration to physicians in the form of gifts, entertainment and marketing materials has been specifically addressed in detail by the Stark Law’s Non-Monetary Compensation up to $300 Exception (“$300+ Exception”). 42 C.F.R. 411.357(k). That exception provides:
Sec. 411.357 Exceptions to the referral prohibition related to compensation arrangements.

For purposes of Sec. 411.353, the following compensation arrangements do not constitute a financial relationship:

* * *

(k) Nonmonetary compensation.

(1) Compensation from an entity in the form of items or services (not including cash or cash equivalents) that does not exceed an aggregate of $300 per calendar year, as adjusted for inflation in accordance with paragraph (k)(2) of this section, if all of the following conditions are satisfied:

   (i) The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician.
   
   (ii) The compensation may not be solicited by the physician or the physician's practice (including employees and staff members).
   
   (iii) The compensation arrangement does not violate the antikickback statute (section 1128B(b) of the Act) or any Federal or State law or regulation governing billing or claims submission.

(2) The annual aggregate nonmonetary compensation limit in this paragraph (k) is adjusted each calendar year to the nearest whole dollar by the increase in the Consumer Price Index--Urban All Items (CPI-U) for the 12-month period ending the preceding September 30. CMS displays after September 30 each year both the increase in the CPI-U for the 12-month period and the new nonmonetary compensation limit on the physician self-referral Web site: [http://www.cms.hhs.gov/PhysicianSelfReferral/10--CPI-U--Updates.asp](http://www.cms.hhs.gov/PhysicianSelfReferral/10--CPI-U--Updates.asp).

(3) Where an entity has inadvertently provided nonmonetary compensation to a physician in excess of the limit (as set forth in paragraph (k)(1) of this section), such compensation is deemed to be within the limit if--

   (i) The value of the excess nonmonetary compensation is no more than 50 percent of the limit; and
   
   (ii) The physician returns to the entity the excess nonmonetary compensation (or an amount equal to the value of the excess nonmonetary compensation) by the end of the calendar year in which the excess nonmonetary compensation was received or within 180 consecutive calendar days following the date the excess nonmonetary compensation was received by the physician, whichever is earlier.

   (iii) Paragraph (k)(3) may be used by an entity only once every 3 years with respect to the same referring physician.

Under this Stark Law exception, a physician will not be prohibited from referring to a home health agency so long as the remuneration provided to the physician from the home health agency is in the form of non-cash items that do not exceed an annual amount of $300 (adjusted annually). Cash or cash-equivalents such as gift certificates are not protected by the exception.
The annual amount increases each year and the amount for 2009 is $355. If the home health agency exceeds the annual limit to any physician, the Stark Law prohibits the home health agency from accepting referrals from such physician and from billing Medicare for services furnished to patients referred by the physician.

V. REMUNERATION TO PHYSICIANS’ FAMILY MEMBERS & OFFICE STAFF

A. Background

The 2008 amendments to Florida’s Home Health Services Act in subsections 400.474(j)(2) and (3) prohibited home health agencies from providing any remuneration to either the physician’s office staff or the physician’s immediate family member. There is an argument that the Federal Exemption adopted in 2009 allows home health agencies to provide some forms of remuneration to a physician’s office staff and immediate family member.

B. Federal Law

Family Members. Under the Stark Law, remuneration given to a physician’s immediate family member is viewed the same as if the remuneration were given directly to the physician. The same standards discussed above for the Stark Law exception for employment and personal services arrangements would be applied to the physician’s family member. See 42 C.F.R. 411.353. The federal antikickback statute does not address remuneration specifically provided to a physician’s family member; instead, it prohibits remuneration intended to induce referrals to any person for referring or recommending or arranging for referrals of federal health care program business. Unless the family member is in a position to recommend or arrange for referrals, the federal antikickback statute would not be implicated by remuneration provided to a physician’s family member. In other words, the Stark Law has a stricter standard. Home health agencies must satisfy a Stark Law exception when accepting Medicare referrals from physicians if the home health agency has a financial relationship with the physician’s immediate family member. If those requirements are met, then there is an argument that the arrangements should be permissible in Florida under the Federal Exemption.

Office Staff. Neither the Stark Law nor the federal antikickback statute (or their corresponding regulations) specifically addresses remuneration to a physician’s office staff member. Prior to July 1, 2008, one common type of remuneration from a Florida home health agency to a physician’s office staff member involved the home health agency conducting an educational session at the office for the physician and/or his office staff during mealtime and to furnish a modest meal. Such lunches gave the home health agency an opportunity to introduce their services to the physician’s office staff or educate them on the home health agency’s specialized programs or criteria for meeting Medicare’s home health benefit. Such a practice was intended to promote better communication with the physician’s office and better patient care.

If a home health agency provides remuneration to a physician’s office staff member in the form of a modest meal accompanied by an educational presentation, the Stark Law would not prohibit the physician from referring Medicare patients to the home health agency. The answer is less clear under the federal antikickback statute. The federal antikickback statute prohibits remuneration intended to induce referrals to any person for
referring or recommending or arranging for referrals of federal health care program business. Many physician’s office staff members arguably are in a position to arrange for referrals or recommend referrals for home health care. Consequently, any remuneration provided to a physician’s office staff that is intended to, and is of sufficient value to, “induce” the referral of home health referrals rather than “merely encourage” might result in liability under the federal antikickback statute.

For practical purposes, potential liability under the federal antikickback statute often depends on prosecutorial discretion. Some industry sectors (through their industry associations) have voluntarily adopted compliance codes that disallow marketing representatives from distributing free gifts to potential referral sources but allow the marketing representatives to provide physicians and their staff members an occasional, modest meal accompanied by an educational or marketing presentation actually attended by those receiving the meal, so long as the presentations provide scientific or educational value and the meals (a) are modest as judged by local standards; (b) are not part of an entertainment or recreational event; and (c) are provided in a manner conducive to information communication. There is an argument that the Federal Exemption should permit home health agencies to engage in this type of marketing activities, but it is unclear whether AHCA would agree.

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For purposes of Sec. 411.353, the following compensation arrangements do not constitute a financial relationship:

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(d) Personal service arrangements. (1) General--Remuneration from an entity under an arrangement or multiple arrangements to a physician or his or her immediate family member, or to a group practice, including remuneration for specific physician services furnished to a nonprofit blood center, if the following conditions are met:

   (i) Each arrangement is set out in writing, is signed by the parties, and specifies the services covered by the arrangement.

   (ii) The arrangement(s) covers all of the services to be furnished by the physician (or an immediate family member of the physician) to the entity. This requirement is met if all separate arrangements between the entity and the physician and the entity and any family members incorporate each other by reference or if they cross-reference a master list of contracts that is maintained and updated centrally and is available for review by the Secretary upon request. The master list must be maintained in a manner that preserves the historical record of contracts. A physician or family member can `furnish' services through employees whom they have hired for the purpose of performing the services; through a wholly-owned entity; or through locum tenens physicians (as defined at Sec. 411.351, except that the regular physician need not be a member of a group practice).

   (iii) The aggregate services contracted for do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement(s).

   (iv) The term of each arrangement is for at least 1 year. To meet this requirement, if an arrangement is terminated during the term with
or without cause, the parties may not enter into the same or substantially the same arrangement during the first year of the original term of the arrangement.

(v) The compensation to be paid over the term of each arrangement is set in advance, does not exceed fair market value, and, except in the case of a physician incentive plan (as defined at Sec. 411.351 of this subpart), is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.

(vi) The services to be furnished under each arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates any Federal or State law.

(vii) A holdover personal service arrangement for up to 6 months following the expiration of an agreement of at least 1 year that met the conditions of paragraph (d) of this section satisfies the requirements of paragraph (d) of this section, provided that the holdover personal service arrangement is on the same terms and conditions as the immediately preceding agreement.

* * *

FEDERAL ANTI-KICKBACK STATUTE REGULATORY PROFESSIONAL SERVICES SAFE HARBOR

[Code of Federal Regulations]
[Title 42, Volume 4]
[Revised as of October 1, 2008]
From the U.S. Government Printing Office via GPO Access
[CITE: 42CFR1001.952]

[Page 1188-1215]

TITLE 42--PUBLIC HEALTH

CHAPTER V--OFFICE OF INSPECTOR GENERAL--HEALTH CARE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 1001_PROGRAM INTEGRITY_MEDICARE AND STATE HEALTH CARE PROGRAMS--Table of Contents

Subpart C_Permissive Exclusions

Sec. 1001.952 Exceptions.

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

* * *

(d) Personal services and management contracts. As used in section 1128B of the Act, "remuneration" does not include any payment made by a principal to an agent as compensation for the services of the agent, as long as all of the following seven standards are met--

(1) The agency agreement is set out in writing and signed by the parties.

(2) The agency agreement covers all of the services the agent
provides to the principal for the term of the agreement and specifies
the services to be provided by the agent.

(3) If the agency agreement is intended to provide for the services
of the agent on a periodic, sporadic or part-time basis, rather than on
a full-time basis for the term of the agreement, the agreement specifies
exactly the schedule of such intervals, their precise length, and the
exact charge for such intervals.

(4) The term of the agreement is for not less than one year.

(5) The aggregate compensation paid to the agent over the term of
the agreement is set in advance, is consistent with fair market value in
arms-

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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.

(6) The services performed under the agreement do not involve the
counselling or promotion of a business arrangement or other activity
that violates any State or Federal law.

(7) The aggregate services contracted for do not exceed those which
are reasonably necessary to accomplish the commercially reasonable
business purpose of the services.

For purposes of paragraph (d) of this section, an agent of a
principal is any person, other than a bona fide employee of the
principal, who has an agreement to perform services for, or on behalf
of, the principal.
STARK LAW REGULATORY LEASE EXCEPTION

Title 42--Public Health
Chapter IV--Centers for Medicare & Medicaid Services, Department of Health and Human Services
Part 411_Exclusions from Medicare and Limitations on Medicare Payment--Table
Subpart J_Financial Relationships Between Physicians and Entities

Sec. 411.357 Exceptions to the referral prohibition related to compensation arrangements.

For purposes of Sec. 411.353, the following compensation arrangements do not constitute a financial relationship:

(a) Rental of office space. Payments for the use of office space made by a lessee to a lessor if there is a rental or lease agreement that meets the following requirements:
   (1) The agreement is set out in writing, is signed by the parties, and specifies the premises it covers.
   (2) The term of the agreement is at least 1 year. To meet this requirement, if the agreement is terminated during the term with or without cause, the parties may not enter into a new agreement during the first year of the original term of the agreement.
   (3) The space rented or leased does not exceed that which is reasonable and necessary for the legitimate business purposes of the lease or rental and is used exclusively by the lessee when being used by the lessee (and is not shared with or used by the lessor or any person or entity related to the lessor), except that the lessee may make payments for the use of space consisting of common areas if the payments do not exceed the lessee's pro rata share of expenses for the space based upon the ratio of the space used exclusively by the lessee to the total amount of space (other than common areas) occupied by all persons using the common areas.
   (4) The rental charges over the term of the agreement are set in advance and are consistent with fair market value.
   (5) The rental charges over the term of the agreement are not determined--

   (i) In a manner that takes into account the volume or value of any referrals or other business generated between the parties; or
   (ii) [Reserved]
(6) The agreement would be commercially reasonable even if no referrals were made between the lessee and the lessor.

(7) A holdover month-to-month rental for up to 6 months immediately following the expiration of an agreement of at least 1 year that met the conditions of paragraphs (a)(1) through (a)(6) of this section satisfies the requirements of paragraph (a) of this section, provided that the holdover rental is on the same terms and conditions as the immediately preceding agreement.

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FEDERAL ANTI-KICKBACK STATUTE REGULATORY SPACE LEASE SAFE HARBOR

[Code of Federal Regulations]
[Title 42, Volume 4]
[Revised as of October 1, 2008]
From the U.S. Government Printing Office via GPO Access
[CITE: 42CFR1001.952]

[Page 1188-1215]

TITLE 42--PUBLIC HEALTH

CHAPTER V--OFFICE OF INSPECTOR GENERAL--HEALTH CARE, DEPARTMENT OF HEALTH AND HUMAN SERVICES

PART 1001_PROGRAM INTEGRITY_MEDICARE AND STATE HEALTH CARE PROGRAMS--Table of Contents

Subpart C_Permissive Exclusions

Sec. 1001.952 Exception.

The following payment practices shall not be treated as a criminal offense under section 1128B of the Act and shall not serve as the basis for an exclusion:

* * *

(b) Space rental. As used in section 1128B of the Act, "remuneration" does not include any payment made by a lessee to a lessor for the use of premises, as long as all of the following six standards are met--

(1) The lease agreement is set out in writing and signed by the parties.

(2) The lease covers all of the premises leased between the parties for the term of the lease and specifies the premises covered by the lease.

(3) If the lease is intended to provide the lessee with access to the premises 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.

[[Page 1191]]
(4) The term of the lease is for not less than one year.

(5) The 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.

(6) The aggregate space rented does not exceed that which is reasonably necessary to accomplish the commercially reasonable business purpose of the rental. Note that for purposes of paragraph (b) of this section, the term fair market value means the value of the rental property for general commercial purposes, but shall not be adjusted to reflect the additional value that one party (either the prospective lessee or lessor) would attribute to the property as a result of its proximity or convenience to sources of referrals or business otherwise generated for which payment may be made in whole or in part under Medicare, Medicaid and all other Federal health care programs.
STARK LAW REGULATORY EMPLOYMENT EXCEPTION

[Code of Federal Regulations]
[Title 42, Volume 2]
[Revised as of October 1, 2008]
From the U.S. Government Printing Office via GPO Access
[CITE: 42CFR411.357]

[Page 484-498]

TITLE 42--PUBLIC HEALTH

CHAPTER IV--CENTERS FOR MEDICARE & MEDICAID SERVICES, DEPARTMENT OF
HEALTH AND HUMAN SERVICES

PART 411_EXCLUSIONS FROM MEDICARE AND LIMITATIONS ON MEDICARE PAYMENT--Table
Subpart J_Financial Relationships Between Physicians and Entities
Sec. 411.357 Exceptions to the referral prohibition related to compensation arrangements.

For purposes of Sec. 411.353, the following compensation arrangements do not constitute a financial relationship:

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(c) Bona fide employment relationships. Any amount paid by an employer to a physician (or immediate family member) who has a bona fide employment relationship with the employer for the provision of services if the following conditions are met:

1. The employment is for identifiable services.
2. The amount of the remuneration under the employment is--
   i. Consistent with the fair market value of the services; and
   ii. Except as provided in paragraph (c)(4) of this section, is not determined in a manner that takes into account (directly or indirectly) the volume or value of any referrals by the referring physician.
3. The remuneration is provided under an agreement that would be commercially reasonable even if no referrals were made to the employer.
4. Paragraph (c)(2)(ii) of this section does not prohibit payment of remuneration in the form of a productivity bonus based on services performed personally by the physician (or immediate family member of the physician).

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Federal Antikickback Statute Exception for Bona Fide Employment Relationships

From the U.S. Code Online via GPO Access
[www.gpoaccess.gov]
[Laws in effect as of January 3, 2006]
[CITE: 42USC1320a-7b]

[Page 1827-1833]

TITLE 42--THE PUBLIC HEALTH AND WELFARE

CHAPTER 7--SOCIAL SECURITY

SUBCHAPTER XI--GENERAL PROVISIONS, PEER REVIEW, AND ADMINISTRATIVE SIMPLIFICATION

Part A--General Provisions

Sec. 1320a-7b. Criminal penalties for acts involving Federal health care programs

* * *

(b) Illegal remunerations

(1) Whoever knowingly and willfully solicits or receives any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind--

(A) in return for referring an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) in return for purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined not more than $25,000 or imprisoned for not more than five years, or both.

(2) Whoever knowingly and willfully offers or pays any remuneration (including any kickback, bribe, or rebate) directly or indirectly, overtly or covertly, in cash or in kind to any person to induce such person--

(A) to refer an individual to a person for the furnishing or arranging for the furnishing of any item or service for which payment may be made in whole or in part under a Federal health care program, or

(B) to purchase, lease, order, or arrange for or recommend purchasing, leasing, or ordering any good, facility, service, or item for which payment may be made in whole or in part under a Federal health care program,

shall be guilty of a felony and upon conviction thereof, shall be fined
not more than $25,000 or imprisoned for not more than five years, or both.

(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;

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**STARK LAW REGULATORY NONMONETARY COMPENSATION EXCEPTION**

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For purposes of Sec. 411.353, the following compensation arrangements do not constitute a financial relationship:

(k) Nonmonetary compensation. (1) Compensation from an entity in the form of items or services (not including cash or cash equivalents) that does not exceed an aggregate of $300 per calendar year, as adjusted for inflation in accordance with paragraph (k)(2) of this section, if all of the following conditions are satisfied:

(i) The compensation is not determined in any manner that takes into account the volume or value of referrals or other business generated by the referring physician.

(ii) The compensation may not be solicited by the physician or the physician's practice (including employees and staff members).

(iii) The compensation arrangement does not violate the anti-kickback statute (section 1128B(b) of the Act) or any Federal or State law or regulation governing billing or claims submission.

(2) The annual aggregate nonmonetary compensation limit in this paragraph (k) is adjusted each calendar year to the nearest whole dollar by the increase in the Consumer Price Index--Urban All Items (CPI-U) for
the 12-

([[Page 490]])

month period ending the preceding September 30. CMS displays after September 30 each year both the increase in the CPI-U for the 12-month period and the new nonmonetary compensation limit on the physician self-referral Web site: http://www.cms.hhs.gov/PhysicianSelfReferral/10--CPI-U--Updates.asp.

(3) Where an entity has inadvertently provided nonmonetary compensation to a physician in excess of the limit (as set forth in paragraph (k)(1) of this section), such compensation is deemed to be within the limit if--

(i) The value of the excess nonmonetary compensation is no more than 50 percent of the limit; and

(ii) The physician returns to the entity the excess nonmonetary compensation (or an amount equal to the value of the excess nonmonetary compensation) by the end of the calendar year in which the excess nonmonetary compensation was received or within 180 consecutive calendar days following the date the excess nonmonetary compensation was received by the physician, whichever is earlier.

(iii) Paragraph (k)(3) may be used by an entity only once every 3 years with respect to the same referring physician.
ATTACHMENT

B
Agency for Health Care Administration

Frequently Asked Questions

(http://www.fdhc.state.fl.us/MCHQ/Health_Facility_Regulation/Home_Care/Home_Health_Agency.shtml)

Section 14:

14.1 Marketing & Administrative Penalties 400.474, F.S.

These Frequently Asked Questions and Answers are provided for general informational purposes only. They do not constitute, and should not be substituted for, professional legal advice. These Frequently Asked Questions and Answers are not an interpretation of law nor are they statements of AHCA policy. Each situation is different and each situation deserves individual attention. Due to the complex nature of the state and federal laws that govern health facilities and fraud, home health agencies and other readers should consult with a health care attorney for their particular issue.

14.1 Marketing & Administrative Penalties 400.474, F.S.

14.1.1 Does this law change prohibit my home health agency from advertising?

Answer: No. There are no state laws that prohibit home health agencies from advertising in newspapers or other print media, television, radio or internet.

14.1.2 May a HHA have a booth at a Health Fair at shopping mall or senior center and give out small items, such as pens, pads, and other items with the HHA’s name on it?

Answer: Yes. However, the HHA cannot give out cash, or its equivalent, to a Medicare or Medicaid beneficiary. In addition, a home health agency cannot give remuneration to certain persons or referral sources as specified in 400.474(6), F.S.

14.1.3 In two places in the law [400.474(6) (d) and (k)], it refers to providing copies of contracts which were executed within 5 years of the request by AHCA. Since the bill takes effect July 1, 2008, does this mean 5 years back from request if made this fall, for example? This would be prior to the effective date of the bill. Or, does the 5 years count forward from July 1, 2008?

Answer: Copies of contracts executed on July 1, 2008, and thereafter must be provided to the Agency upon request pursuant to this law. However, the Agency may request any document pursuant to 408.811, F.S.

14.1.4 Does this law change affect existing contracts, i.e. third party vendors paid for referrals and medical director contractors (400.474(6), F.S.)?

Answer: Yes, subject to the limitations of the contracts clause, it affects existing contracts.
14.1.5 How do I make a complaint about a home health agency that I know is violating the new laws?

Answer: Call the AHCA complaint call center (888) 419-3456.

If you have the following or similar questions, your home health agency will need to contact your attorney for legal advice:

1. May a HHA sponsor events such as a hospital golf tournament, an Alzheimer’s Disease Association, or a Heart Association Walk/Run?

2. Is it a violation of state law for our home health agency to serve as sponsor of the National Association for Continuing Education conference that has about 100 physicians in attendance? We pay to sponsor and put up an information board on their agency and its services.

**14.2 Medical Directors & Physicians - Questions about 400.474(6) (h) (i) (j), F.S.**

“The agency may deny, revoke, or suspend the license….and shall impose a fine of $5,000 against a home health agency that:”

(h) Has more than one medical director contract in effect at one time or more than one medical director contract and one contract with a physician-specialist whose services are mandated for the home health agency in order to qualify to participate in a federal or state health care program at one time.

(i) Gives remuneration to a physician without a medical director contract being in effect. The contract must:

1. Be in writing and signed by both parties;

2. Provide for remuneration that is at fair market value for an hourly rate, which must be supported by invoices submitted by the medical director describing the work performed, the dates on which that work was performed, and the duration of that work; and

3. Be for a term of at least 1 year.

The hourly rate specified in the contract may not be increased during the term of the contract. The home health agency may not execute a subsequent contract with that physician which has an increased hourly rate and covers any portion of the term that was in the original contract.”

(j) Gives remuneration to:

1. A physician, and the home health agency is in violation of paragraph (h) or paragraph (i);
2. A member of the physician's office staff; or

3. An immediate family member of the physician, if the home health agency has received a patient referral in the preceding 12 months from that physician or physician's office staff.

“Nothing in.... paragraph (j) shall be interpreted as applying to or precluding any discount, compensation, waiver of payment, or payment practice permitted by 42 U.S.C. s.1320a-7(b) or regulations adopted thereunder, including 42 C.F.R. s.1001.952, or 42 U.S.C. s. 1395nn or regulations adopted thereunder.”

14.2.1 Is my home health agency required to have a medical director?

Answer: No. Home health agency state licensure law does not require a medical director.

14.2.2 Is our home health agency required to have a physician?

Answer: No. Only Medicare and Medicaid home health agencies are required to have a physician on the group of professional personnel that advises the HHA. The group is to meet a minimum of once per year. (Federal HHA regulation 42 CFR 484.16).

14.2.3 Can my home health agency have more than one medical director?

Answer: No. Under Subsection 400.474(6) (h), Florida Statutes, it is illegal for a home health agency to have more than one medical director contract in effect at one time or more than one medical director contract and one contract with a physician-specialist whose services are mandated for the home health agency in order to qualify to participate in a federal or state health care program at one time.

14.2.4 Can our home health agency accept referrals from our one medical director?

Answer: Yes. This state law does not prohibit it.

14.2.5 Can our home health agency accept referrals from physicians other than our medical director?

Answer: Yes.

14.2.5.5 What is “remuneration” and what does it include?

Answer: As defined in Subsection 400.462(27), Florida Statutes, "remuneration" means “any payment or other benefit made directly or indirectly, overtly or covertly, in cash or in kind.” The Agency has filed administrative complaints against home health agencies for giving physicians and other individual items such as meals, gifts, event tickets, flowers, and other similar items. There is no dollar allowance under this statutory definition.

14.2.6 May a HHA give remuneration to a Florida licensed physician?
Answer: No, unless the physician is the medical director for the home health agency. A home health agency may give remuneration to a physician only if the physician has a medical director contract which meets all contractual requirements in 400.474(6)(i), Florida Statutes.

14.2.7 May a HHA give remuneration to a physician’s immediate family member or a member of his office staff?

Answer: Depends. Under Subsection 400.474(6)(j), Florida Statutes, home health agencies are prohibited from giving remuneration to a member of the physician’s office staff or an immediate family member of the physician if the home health agency has received a patient referral in the preceding 12 months from that physician or that physician’s office staff. As defined by section 400.462(19), Florida Statutes, "immediate family member" means a “husband or wife; a birth or adoptive parent, child, or sibling; a stepparent, stepchild, stepbrother, or stepsister; a father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, or sister-in-law; a grandparent or grandchild; or a spouse of a grandparent or grandchild.” Home health agencies should carefully review and document their referrals and monitor referral sources to determine whether a referral has been made to the home health agency by the physician or physician’s staff. As for the effect of the 2009 amendment, please see FAQ 14.2.12.

14.2.8 I would like to hire a registered nurse who is married to a physician. The physician refers some patients to our home health agency. Can I hire the nurse?

Answer: No. By hiring the nurse, the HHA is providing remuneration to immediate family member of the physician. Because the home health agency accepts patient referrals from this physician, the remuneration is prohibited. Please see FAQ 14.2.7 above. As for the effect of the 2009 amendment, please see FAQ 14.2.12.

14.2.9 Can our home health agency provide remuneration to a physician that has not referred any patients to us? Then, once a referral is made by a physician, no longer offer remuneration?

Answer: No, unless the physician is the medical director of the home health agency. There was no change to Subsection 400.474(6)(i), Florida Statutes.

14.2.10 Can our home health agency lease space from a referring physician or a physician group?

Answer: No, unless the physician is the medical director of the home health agency. There was no change to Subsection 400.474(6)(i), Florida Statutes.

14.2.11 What about when there are multiple physicians in a practice, with one being the medical director -- Can we market to these other physicians that are in the same practice by providing lunches, cookies, coffee, or other gifts?

Answer: No. Please refer to FAQ 14.2.6.
14.2.12 What effect does the 2009 amendment have?

In 2009, the Legislature enacted a provision which states: “Nothing in paragraph (e) or paragraph (j) shall be interpreted as applying to or precluding any discount, compensation, waiver of payment, or payment practice permitted by 42 U.S.C. s. 1320a-7(b) or regulations adopted thereunder, including 42 C.F.R. s. 1001.952, or 42 U.S.C. s. 1395nn or regulations adopted thereunder.” This 2009 amendment references the Federal Anti-Kickback Law and the Stark Law and their regulations. The 2009 amendment did not modify any other paragraph under Section 400.474(6) and thus the 2009 amendment is limited to paragraphs (e) and (j). The prohibitions under paragraph (i), i.e., giving remuneration to physicians, are unaffected by the 2009 amendment.

As for Subsections 400.474(6)(e) and (j), if a home health agency can establish that a federal safe harbor applies to its situation, the giving of some forms of remuneration “may” be permitted by the 2009 amendment. However, remuneration still does not include meals, food, beverages, gifts, event tickets, flowers, and other similar items. A “safe harbor” is a provision in the federal regulations that permits certain arrangements and would serve as a defense in enforcement actions. These two federal laws are complex. A home health agency should determine (a) whether one of these two federal laws applies to it, (b) whether a safe harbor applies to it, and (c) whether it has satisfied the burdens of satisfying the safe harbor. The burden of establishing that a safe harbor rests upon the home health agency. Because of the complexity of these two federal laws, home health agencies are encouraged to consult with a health care attorney.

14.2.13 Is it permissible for any entity (such as a hospital) to provide remuneration to physicians if that entity shares any common ownership or controlling interest with a home health agency to which that physician refers patients?

Answer: Pursuant to section 400.474, Florida Statutes, a home health agency is prohibited from giving remuneration, as defined by statute, to certain individuals or entities under specified circumstances as set forth within the statute. In that same light, a home health agency may not cause, condone or acquiesce in the giving of such prohibited remuneration through the actions of a related entity (such as a hospital), which may share a common ownership or controlling interest with the home health agency. The related entity may be viewed as a conduit for the giving of prohibited remuneration and thus its actions may be imputed to the home health agency. Each case will be reviewed on a case-by-case basis with a focus of whether the remuneration was given with the intent to induce referrals to the home health agency. Generally, however, a hospital or other entity may provide admitting privileges, common areas and common equipment to physicians who refer patients to home health agencies that share an ownership or controlling interest without violating section 400.474, Florida Statutes. In addition, section 400.474, Florida Statutes, does not prohibit a hospital or other entity from referring a patient to any particular home health agency, even one that is related to the hospital or other entity. However, the federal regulations require that the hospital include in the discharge plan a list of Medicare home health agencies that are available to the patient and that serve the geographic area in which the patient resides. Home health agencies must request to be listed by the hospital as available. 42 CFR 482.43(c)(6). The key is that the choice of which home health agency to employ rests with the
patient and that the patient’s choice should be made freely after proper consultation and in accordance with the laws concerning patient referrals.

14.3 Assisted Living Facilities (ALFs)

400.474(6), F.S. “The agency may deny, revoke, or suspend the license of a home health agency and shall impose a fine of $5,000 against a home health agency that:

(b) Provides services to residents in an assisted living facility for which the home health agency does not receive fair market value remuneration.

(c) Provides staffing to an assisted living facility for which the home health agency does not receive fair market value remuneration.

(d) Fails to provide the agency, upon request, with copies of all contracts with assisted living facilities which were executed within 5 years before the request.”

400.518(4), F.S. “The agency shall impose an administrative fine of $15,000 if a home health agency provides nurses, certified nursing assistants, home health aides, or other staff without charge to a facility licensed under chapter 429 in return for patient referrals from the facility.”

14.3.1 Re 400.474(6) (b), F.S., our home health agency does monthly blood pressure clinics in ALFs. Can we continue to do these if we charge a nominal fee?

Answer: No.

14.3.2 Can a HHA provide monthly educational programs for residents in an ALF and give pens, pads, and items with our name on it away?

Answer: Yes. However, the HHA cannot give out anything of value to a Medicare or Medicaid beneficiary. If your home health agency is Medicare or Medicaid certified, see also the U.S. Department of Health and Human Services Office of Inspector General Advisory Bulletin on the Social Security Act Sec. 1128A(a)(5) (gifts to beneficiaries) dated 8/30/2002, shown as 9/2/2002 (see page 55856) at: http://www.oig.hhs.gov/authorities/frnotices.html .

14.3.3 Our home health agency operates a satellite office in an ALF. The residents may stop in this office if they have a health care problem and our nurse will check them to see if a referral needs to be made to their physician. Is this allowable?

Answer: No.
14.3.4 There are some home health agencies (HHAs) in our part of the state that employ physicians who see nearly all of their patients as home visit doctors and their patients are in ALFs mostly. These physicians become the patients’ primary care physicians and refer directly to the HHA that they work for. This is a big problem for our home health agency since we cannot get patients referred to us from these ALFs. We hear that the patient do not get a choice either. Since the HHA employs the physician, can they accept patient referrals from him?

Answer: No.

If you have the following or similar questions, your home health agency will need to contact your attorney for legal advice:

1. May our home health agency have a satellite office or drop-off site at an ALF? We would be renting space from the ALF.

2. Is it a violation of state law if an occupational/physical therapy group paying rent in an ALF calls a home health agency with a referral for a patient residing in the ALF, and then provides the therapy under a subcontract with the home health agency?

14.4 Giving cash or its equivalent to Medicare or Medicaid Beneficiaries

14.4.1 Can I give free services, gifts, or cash to new patients as an incentive to sign up for services with my agency? To current patients I am serving?

Answer: No.

If you have the following or similar questions, your home health agency will need to contact your attorney for legal advice:

We recently printed coupon cards offering "8 hours of free services" with the purchase of 2 weeks (at least 40 hours per week) of home care services. There are other exclusions and limitations on the bottom of the card. These cards have no cash value, but we haven't yet distributed any since we are scrutinizing our marketing practices to ensure that we are not violating any of the new laws. These cards would potentially be given to clients who live in at home or in facilities, including assisted living facilities. Some discharge planners and case managers from facilities with whom we have relationships may also choose to distribute these cards to potential clients. Even though virtually all first-time clients would be eligible for this offer, I want to be sure that no one will accuse us of offering special deals to those clients who reside in facilities.
14.4.2 Can I our home health agency operate a wellness clinic at an apartment building offering free blood pressure checks and other screenings to the senior citizens that live there?

Answer: No.