

31ST ANNUAL HEALTH LAW CONFERENCE

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**Health Law Fundamentals:
Fraud and Abuse Laws
and
HIPAA (Privacy Rule)**

Violet M. Anderson

Violet M. Anderson
Regional General Counsel
CHRISTUS Health
Irving, Texas

violet.anderson@christushealth.org
(469) 282 - 2352

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HEAT PROVIDER COMPLIANCE TRAINING
TAKE THE INITIATIVE.
Cultivate a Culture of Compliance With Health Care Laws

COMPARISON OF THE ANTI-KICKBACK STATUTE AND STARK LAW*

| | THE ANTI-KICKBACK STATUTE (42 USC § 1320a-7b(b)) | THE STARK LAW (42 USC § 1395nn) |
|------------------------------|---|--|
| Prohibition | Prohibits offering, paying, soliciting or receiving anything of value to induce or reward referrals or generate Federal health care program business | <ul style="list-style-type: none"> Prohibits a physician from referring Medicare patients for designated health services to an entity with which the physician (or immediate family member) has a financial relationship, unless an exception applies Prohibits the designated health services entity from submitting claims to Medicare for those services resulting from a prohibited referral |
| Referrals | Referrals from anyone | Referrals from a physician |
| Items/ Services | Any items or services | Designated health services |
| Intent | Intent must be proven (knowing and willful) | <ul style="list-style-type: none"> No intent standard for overpayment (strict liability) Intent required for civil monetary penalties for <i>knowing</i> violations |
| Penalties | Criminal: <ul style="list-style-type: none"> Fines up to \$25,000 per violation Up to a 5 year prison term per violation Civil/Administrative: <ul style="list-style-type: none"> False Claims Act liability Civil monetary penalties and program exclusion Potential \$50,000 CMP per violation Civil assessment of up to three times amount of kickback | Civil: <ul style="list-style-type: none"> Overpayment/refund obligation False Claims Act liability Civil monetary penalties and program exclusion for <i>knowing</i> violations Potential \$15,000 CMP for each service Civil assessment of up to three times the amount claimed |
| Exceptions | <i>Voluntary</i> safe harbors | <i>Mandatory</i> exceptions |
| Federal Health Care Programs | All | Medicare/Medicaid |

*This chart is for illustrative purposes only and is not a substitute for consulting the statutes and their regulations.



HEALTH CARE FRAUD PREVENTION AND ENFORCEMENT ACTION TEAM (HEAT)
 OFFICE OF INSPECTOR GENERAL (OIG)

See: <https://www.oig.hhs.gov/compliance/provider-compliance-training/files/StarkandAKSChartHandout508.pdf>

B. The Stark Statute

Commonly known as the Stark Statute, The Ethics in Patient Referrals Act, Section 1877 of the Social Security Act (42 U.S.C. §1395nn), restricts referrals by physicians to providers of certain **“designated health services” (“DHS”)** under the Medicare and Medicaid programs and prohibits designated health services entity from submitting claims to Medicare for services resulting from prohibited referrals. The Stark regulations are located in Title 42 of the Code of Federal Regulations §411.350 - §411.389.

1. DHS

The following items or services are DHS:

- (a) Clinical laboratory services;
- (b) Physical therapy services;
- (c) Occupational therapy services;
- (d) Outpatient speech-language pathology services;
- (e) Radiology and certain other imaging services;
- (f) Durable medical equipment and supplies;
- (g) Parenteral and enteral nutrients, equipment, and supplies;
- (h) Prosthetics, orthotics, and prosthetic devices and supplies;
- (i) Home health services;
- (j) Outpatient prescription drugs; and
- (k) Inpatient and outpatient hospital services.

The Centers for Medicare and Medicaid Services maintain and annually update a **List of Current Procedural Terminology (CPT)/Healthcare Common Procedure Coding System (HCPCS) Codes (Code List)**, which identifies all items and services included within certain DHS categories. The updated Code List is published in the Federal Register as an addendum to the annual Physician Fee Schedule final rule. The DHS categories defined by the Code List are: clinical laboratory services; physical therapy services, occupational therapy services, outpatient speech-language pathology services, radiology and certain other imaging services, and radiation therapy services and supplies. The 2015 Code List is available for download at: https://www.cms.gov/Medicare/Fraud-and-Abuse/PhysicianSelfReferral/List_of_Codes.html

The following DHS categories are **defined at 42 C.F.R. §411.351 without reference to the Code List**: durable medical equipment and supplies; parenteral and enteral nutrients, equipment and supplies; prosthetics, orthotics, and prosthetic devices and

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