New Anti-Kickback Provisions: Get Up To Speed

By Mark Opara & Bailie Schnackenberg The Eliminating Kickbacks in Recovery Act of 2018 ("**EKRA**"), signed into law late last month, imposes new anti-kickback regulations applicable to recovery homes, clinical treatment facilities, and clinical laboratories. Unlike the federal anti-kickback statute ("**AKS**"), EKRA is not limited to federal health care program payors, but instead imposes penalties on kickbacks related to all commercial business. The penalty for violating EKRA is a fine up to $200,000 and or imprisonment for up to ten years. EKRA includes several safe harbors and directs federal agencies to develop further exceptions. The statutory safe harbors include general and special discounts, patient copayments and coinsurance and payments to employees or independent contractors. In contrast to the safe harbors in the AKS, EKRA prohibits employers from basing compensation to employees or independent contractors on a volume-related basis. For example, an employer may not base an employee or independent contractor's compensation on the number of individuals referred to a particular laboratory, the number of tests or procedures performed, or the amount billed to or received from the payor for the individual referred to the laboratory. Due to the distinctions between EKRA and AKS, recovery homes, clinical treatment facilities, and clinical laboratories may no longer satisfy their anti-kickback obligations by simply relying on the AKS employee safe harbor and/or limiting volume-based commission compensation to employees engaged in soliciting business from commercial payors. We urge you to contact your existing SB attorney or one of the experienced healthcare practice attorneys listed below to discuss whether your company should revise its commission structures or remuneration policies in light of EKRA's parameters. **Questions about this client alert can be directed to Mark Opara or Bailie Schnackenberg, (the authors of this client alert, at 816.421.4460), your usual Seigfreid Bingham contact attorney, or any of the following Seigfreid Bingham healthcare attorneys: Mark Thompson mthompson@sb-kc.com Mark Gilgus markg@sb-kc.com John Neyens jneyens@sb-kc.com Lori Beam lorib@sb-kc.com Joseph Hiersteiner jhiersteiner@sb-kc.com Heath Hoobing hhoobing@sb-kc.com John Fuchs johnf@sb-kc.com** *This article is general in nature and does not constitute legal advice. Consult your attorney prior to making any legal decisions.