Are Your Sober Home / Recovery Residence Business Practices Legal?

/ Medicare, Medicaid & Private Payor Updates / By Robert Liles

(September 12, 2020): This has been a rough year for sober home and recovery residence owners, operators and their health care business partners. Literally everyone has been adversely impacted by the public health crisis generated by the rapid spread of COVID-19. While most health care and providers obtained a temporary reprieve from, Medicare, Medicaid and private payor administrative audits[1], many state and federal law enforcement agencies (such as the Federal Bureau of Investigation (FBI), the Department of Health and Human Services, Office of Inspector General (OIG), state Medicaid Fraud Control Units (MFCUs) have continued to investigate allegations of wrongdoing against sober home and recovery residence owners, operators, managers and their health care business partners. Moreover, these investigative agencies have continued to make referrals to federal and state prosecutors for possible civil and / or criminal enforcement. This article provides a review of the government's sober home and recovery residence prosecution efforts and examines the current enforcement landscape.

I. Alcohol and Drug Addiction Treatment Industry Overview:

The care and treatment of individuals with alcohol and drug abuse issues is estimated to cost $42 billion in 2020. More than 14,000 treatment and aftercare facilities current treat more than 3.7 million individuals in the United States.[2] With the expansion of insurance eligibility under the Affordable Care Act,[3] the number of individuals who covered by health insurance has continued to grow over the last decade.

A broad continuum of care is available to individuals seeking treatment for alcohol and drug addiction and dependency issues. The most intensive level of care is typically provided in an inpatient setting. Patients residing in inpatient treatment centers are often still dependent on alcohol or drugs and need the intensive level of care to complete a supervised detoxification (detox) program.[4] After successfully completing a supervised detox program, these individuals are typically discharged from an inpatient treatment facility to a lower level of care such as afforded in a Partial Hospitalization Program (PHP), Intensive Outpatient Program (IOP),[5] or Outpatient Program (OP). Individuals being treated on an outpatient basis (whether PHP, IOP or OP) often elect to live in a drug and alcohol-free group home or similar facility with other individuals going through recovery. These supportive, drug and alcohol-free facilities are often referred to as a:

- ***Sober Home.***
- ***Halfway House.***
- ***Recovery Residence.***

In this article, we will collectively refer to the three recovery facilities listed above as a ***sober home*** or ***recovery residence.*** These facilities are primarily group homes and residential facilities comprised of individuals with a shared history of alcohol or drug abuse who are now in recovery. Individuals who reside in a sober homes or a recovery residence typically pay rent to live in this supportive, group setting.

II. Sober Home and Recovery Residence Business Relationships Can Lead to Violations of the Anti-Kickback Statute or the Eliminating Kickbacks in Recovery Act:

Living in a sober home or recovery residence has traditionally served as an essential step in the drug and alcohol recovery process. While most sober homes do not directly provide and bill insurance for clinical services, the residents of a sober home or recovery residence have a number of ongoing primary care and drug screening needs that must be met. For instance, recurrent laboratory testing may be needed to verify that a resident is, in fact, remaining alcohol and drug free. A number of sober homes have therefore engaged a licensed physician to serve as the facility's Medical Director to oversee and order periodic drug screening tests to verify an individual's compliance with the rules.[6] Drug screening tests (such as a urinalysis) conducted on insured patients are then billed by the testing In addition to engaging a Medical Director, a sober home may also establish a business relationship with a testing laboratory and with other types of medical providers (such therapists, counselors, DME suppliers). When a sober home's Medical Director orders drug screening for residents, it isn't unusual for a favored testing laboratory to collect blood and urine samples from residents at their sober home. Physicians, testing laboratories and other health care providers and suppliers would then bill a sober home resident's insurance company (such as Medicare, Medicaid, TriCare, FEHBP, Railroad Retirement or a private payor).[7] Unfortunately, this is where the sober home business model typically runs afoul of state and federal regulatory and statutory requirements. Depending on the facts, the conduct could represent a violation of the federal Anti-Kickback Statute.

Kickbacks arrangements between referring sober homes / recovery residences and testing laboratories are problematic even if only private payors are affected by the improper conduct. Under the Eliminating Kickbacks in Recovery Act (EKRA)(covered in section 8122 of "The Substance Use-Disorder Prevention that Promotes Opioid Recovery and Treatment for Patients and Communities Act" (SUPPORT Act)), it is unlawful to solicit, receive or pay any remuneration (including any kickback, bribe or rebate) directly or indirectly, in return for referring a patient or patronage to a recovery home, clinical treatment facility or laboratory. This is intended to address a number of opioid related issues and it extends these prohibitions to services covered by a private payers as Medicare, Medicaid and other government programs. In addition, since the language of the act is very broad and the term laboratory is not limited to just those laboratories associated with substance abuse services, enforcement actions under EKRA could potentially reach laboratories outside the scope of substance abuse treatment. It could also implicate sales and marketing procedures that have been standard components of many laboratory business models and criminal sanctions under EKRA include fines up to $200,000 and up to 10 years imprisonment for kickbacks with respect to services covered by any type of health care benefit program in or affecting interstate or foreign commerce.

III. Sober Home / Recovery Home Risk Areas:

In recent years, federal auditors have dedicated considerable resources to their assessment of sober homes and recovery residence. As the Government Accountability Office (GAO) found, the national prevalence of sober homes (referred to as "recovery residences" in GAO's report) is unknown because there is not comprehensive data that can be relied on to arrive at this figure.[8] The GAO found that four of the five states it reviewed had conducted (or were in the process of conducting) law enforcement investigation of:

> *"unscrupulous behavior and potential insurance fraud related to recovery homes and outcomes of some of these investigations included criminal charges and changes to health insurance policies."*[9]

While not exhaustive, there are a number of common regulatory fraud risk areas that have been identified by state and federal investigators and prosecutors when investigating treatment centers, sober homes and recovery residences. For example:

> ***Fraudulent Coding. (Massachusetts Medicaid False Claims Act -- M.G.L.c. 118E, § 21A ET SEQ.).*** *In this Massachusetts case, a physician and his addiction treatment clinic have been indicted for allegedly committing health care fraud against MassHealth, the state's Medicaid program.* ***One of the allegations is that the physician billed for the administration of Vivitrol and was able to circumvent the limits on Vivitrol reimbursement by coding some of the Vivitrol treatments as chemotherapy treatments rather than as a treatment to prevent a relapse associated with alcohol or drug abuse****. The government has not detailed how the defendants were able to get past the Medicaid payment restrictions.*

> ***Patient Brokering. (Massachusetts "All-Payor" State Anti-Kickback Statute -- G.L.c. 175H, §3) (Federal Anti-Kickback Violations -- 42 U.S.C. § 1320a-7b(b)(1)(A):*** *When investigating allegations of* ***"patient brokering,"*** *a representative of the Massachusetts Attorney General's Office testified before Congress that the AG's Office had been receiving reports that state residents have been lured to out-of-state addiction treatment providers by paid recruiters "****who promised them free travel to an addiction treatment center in a warm-weather state. When the patients discovered that the treatment they were to receive was low quality or nonexistent, they were often left thousands of miles from home with no health insurance, no access to the medical care they needed, and no resources to return home. In the most tragic cases, these young people suffered fatal overdoses following their continued opioid use without treatment.****"* [10] *As a result, the Massachusetts AG's Office opened criminal investigations into addiction treatment fraud and issued a Consumer Advisory, alerting patients and their families that they should be wary of unsolicited offers for free out-of-state addiction treatment.*
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> ***Illegal Business Relationships (Involving Claims Submitted to Federal / State Payors). (Federal Anti-Kickback Violations -- 42 U.S.C. § 1320a-7b(b)(1)(A))*** [11]*: Generally, sober home and recovery residences do not qualify as health care providers or suppliers and are unable to be credentialed and participate in health benefits programs. As a result, they cannot bill insurance payors. Some sober home and recovery residence owners and operators have entered into unscrupulous, often illegal referral business relationships with physicians, nurse practitioners, physician assistants, testing laboratories, and others. In exchange for the referral of their residents for medical and clinical services (often in the form of drug screen testing), sober home and recovery home owners, operators (and affiliated Medical Directors) have received a "referral fee" or kickback from the servicing health care provider or supplier who then bills the resident's insurance company for payment.*
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> ***Illegal Business Relationships (Involving Submitted to Private Payors). (Illegal remunerations for referrals to recovery homes, clinical treatment facilities, and laboratories -- 18 U.S.C. § 220):*** *Despite the fact that EKRA has now been in place for almost two years, only a handful of cases have been prosecuted under EKRA. While illegal sober home conduct was not cited, a recent EKRA case out of the District of New Jersey did allege that a drug treatment center illegally paid a marketing company for patient referrals. To identify patients, the marketing company used a nationwide network of recruiters who were instructed to identify individuals addicted to alcohol or drugs* ***AND*** *were covered under a health care benefit program. The drug treatment center allegedly paid the marketing company approximately $5,000 for each referral. The marketing company then supposedly paid a percentage of the referral funds received to its recruiters. Notably, the government alleged that the drug treatment facility tried to disguise the kickbacks as a "monthly fee" paid to the marketing company.*
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> ***Business Relationships Resulting in the Violation of the Health Care Fraud and Anti-Kickback Statutes. (Conspiracy to Commit Health Care Fraud -- 18 U.S.C. §1349).*** [12] *In this recent case a multi-agency task force*[13] *investigated the business practices of a Florida osteopathic physician in his role as "****Medical Director****" for more than 50 addiction treatment facilities and sober homes. Unlike most relationships where a physician has been engaged to serve as Medical Director, the physician in this case was paid only a nominal salary. Instead, federal prosecutors have alleged that the physician benefited from the relationship by getting access to a "stable" of insured addiction treatment patients residing in sober homes and addiction treatment centers. As Medical Director, the physician in this case is alleged to have signed more than 136 standing orders for medically unnecessary urinalysis tests. These urinalysis tests were processed by testing laboratories that sometimes paid kickbacks to referring sober homes and addiction treatment centers. As the Criminal Complaint states: "****In addition, the entire referral network made possible by [Medical Director] authorizing such false and fraudulent testing for these addiction treatment centers, sober homes, and testing laboratories by his signing of standing orders often facilitated kickback relationships between these parties and individual recruiters or brokers for these entities, as the sober home and treatment center owners (through these brokers) received kickbacks from the owners and operators of the laboratories in return for sending specimens their way for testing****." Ultimately, the government has further alleged the standing orders signed by the government resulted in the improper billing of hundreds of millions of dollars of medically unnecessary urinalysis tests and other fraudulent treatments. Finally, prosecutors have claimed that the defendant Medical Director did not meaningfully review the results of the tests he ordered. The government has estimated that the fraudulent conduct resulted in approximately $681 million for urinalysis laboratory tests and other medical services billed to the Medicare program and to private payors. Of this total, approximately $121 million was paid to government and private payors. The defendant physician (serving as Medical Director) is currently charged with* ***Conspiracy to Commit Health Care Fraud and Wire Fraud (18 U.S.C. §1349).*** *The government has also filed a* ***Criminal Forfeiture (18 U.S.C. §982(a)(7)*** *count against the physician in an effort to recover to losses incurred by federal health care benefit programs due to the fraud.*

> ***Ordering of Medically Unnecessary Controlled Substances, Distributing Controlled Substances Without a Legitimate Medical Purpose. (21 U.S.C. § 841(a)(1).*** [14] *In a recent Florida case, an internal medicine physician and a licensed mental health counselor were indicted for their roles*[15] *in the distribution of controlled substances that were not medically necessary and had no legitimate medical purpose. As the indictment statement, the defendant physician "****knowingly and intentionally distribute and dispense outside the scope of professional practice and not for a legitimate medical purpose, a controlled substance****."*

> ***Aiding or Abetting in the Performance of Illegal Conduct. (Principals -- 18 U.S.C. § 2).*** *In the same Florida case discussed above, a licensed mental health counselor was implicated in the illegal dispensing conduct of the principal offender, the ordering physician.*

> ***Wrongfully Prescribing Controlled Substances After a Medical License or Controlled Substance Registration has been Suspended. (Conspiracy to Unlawfully Distribute a Schedule III Controlled Substance -- 21 U.S.C. 846).*** [16] *In one case, a physician employed as the Medical Director at a substance abuse treatment center was charged by indictment with one count of conspiracy to distribute controlled substances in relation to his employment at the center. While serving as Medical Director, his medical license was suspended. Nevertheless, the physician continued to prescribe controlled substances for individuals at the treatment center over a five-month period.*

IV. Conclusion:

The business practices of sober homes and recovery residences are under microscope. It is therefore essential that you carefully review your business relationships and practices to ensure that you are complying with state and federal regulations and statutes. Steps you can take include, but are not limited to:

> ***Develop and implement an effective Compliance Program for your sober home / recovery residence.***

> ***Properly train your staff on their duties and obligations under the law.***
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> ***Exercise caution before entering into any business relationships with drug treatment centers, physicians, DME companies, and other entities to whom your sober home / recovery residence may make referrals. Additionally, watch our for marketing companies who may want to send you possible patient referrals. Contact your attorney before entering into these relationships!***
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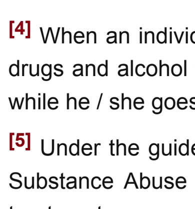
> ***Conduct a GAP analysis of your business practices.***

> ***DOJ is holding owners, operators and management officials to a level of responsibility consistent with their position in the organization.***

> ***Educate your owners, operators and managers regarding the "Yates Memo" and DOJ's interest in individual accountability.***

> ***Have your contracts and agreements reviewed by health law counsel before executing the documents.***

Finally, if you or your sober home / recovery residence is ever investigated, it is critical that you engage qualified health law counsel to represent your interests. Need assistance? Give us a call for a free consultation: 1 (800) 475-1906.



Robert W. Liles serves as Managing Partner at the health law firm, Liles Parker, Attorneys and Counselors at Law. Liles Parker attorneys represent individuals and entities around the country in connection with administrative audits (UPIC audits / private payor audits), civil False Claims Act cases, and criminal violations of the Federal Anti-Kickback Statute and EKRA. Are your Sober Home or Recovery Residence business practices currently being audited or under investigation? We can help. For a free initial consultation regarding your situation, call Robert at: 1 (800) 475-1906.

[1] On March 30, 2020, the Centers for Medicare and Medicaid Services (CMS) suspended most Medicare Fee-For-Service (FFS) medical reviews because of the COVID-19 pandemic. Many private payors also curtailed their audit activities for several months.

[2] The U.S. Addiction Rehab Industry (January 2020). A summary of this report can be found at: **https://www.marketresearch.com/Marketdata-Enterprises-Inc-v416/Addiction-Rehab-12943155/?progid=91619**

[3] The Affordable Care Act was enacted on March 23, 2010. Pub. L. 111- 148.

[4] When an individual stops using drugs or taking alcohol, detoxification (commonly referred to a "detox") occurs. Detox is essentially the process of allowing drugs and alcohol to be removed or flushed out of an individual's body. Inpatient detox programs are designed to medical and mental support to an individual while he / she goes through the withdrawal process.

[5] Under the guidelines issued by U.S. Department of Health and Human Services, Substance Abuse and Mental Health Services Administration, Center for Substance Abuse Treatment (SAMHSA) ***and*** the American Society of Addiction Medicine (ASAM), Intensive Outpatient Programs (IOPs) are formal abuse treatment programs that are required to be overseen by a qualified medical professional, and to have a formal treatment plan to be used in the patient's care.

[6] A sober home's Medical Director may also offer primary care services to residents.

[7] Both governmental and private payor health plans qualify as "health care benefit programs" under 18 U.S.C. §24(b).

[8] Government Accountability Office (GAO) report entitled "*SUBSTANCE USE DISORDER – Information on Recovery Housing Prevalence, Selected States' Oversight, and Funding.*" (GAO-18-315) (March 2018, Page 6). **https://www.gao.gov/assets/700/690831.pdf.** A representative of GAO was subsequently asked to testify before the Committee on Finance, United States Senate on October 24, 2019 (GAO-20-214T). GAO's report on this testimony is available at: **https://www.gao.gov/assets/710/702271.pdf**

[9] GAO-18-315, page 7.

[10] Hearing Before the Subcommittee on Oversight and Investigations of the Committee on Energy and Commerce, House of Representatives, Testimony of Eric M. Gold. **Serial No. 115-87,** (December, 12, 2017).

[11] Federal Anti-Kickback Violations, **42 U.S.C. § 1320a-7b(b)(1)(A.**

[12] Attempt and Conspiracy, **18 U,S,C, §1349.**

[13] Comprised of the FBI, the Drug Enforcement Administration (DEA), and the Internal Revenue Service – Investigative and Forensic Service (IRS).

[14] See **21 U.S.C. § 841(a)(1)**.

[15] In this case, the licensed mental health counselor was implicated in the illegal dispensing conduct through the operation of **18 U.S.C. §2**. As the statutory provision provides:
"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal.

(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Aider and abettor liability is distinct from accessory after the fact under **18 U.S.C. § 3**. An aider and abettor, unlike an accessory after the fact, is punishable as a principal.

[16] See **21 U.S.C. 846**