

Marketing, Social Media, & The Physician Practice: *Legal Implications*

AAOE & BONES Chapter Webinar
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Tatiana Melnik
Melnik Legal PLLC
tatiana@melniklegal.com
734-358-4201 | Tampa, FL



Outline

1. My Marketing Employee/Vendor Wants a Bonus Structure. What are my Options?
2. Do I Need Consent from the Patients to Use their Information for Marketing?
3. May I Record this Procedure and Post the Video on my Practice Website or Social Media?
4. May I Give my Patients a Gift on their Birthdays?
5. How do I Remove that Review?
6. Is my Marketing Vendor a Business Associate?

My Marketing Employee/Vendor Wants a Bonus Structure. What are my Options?

- Please check with your employee/vendor if the person likes orange...

rent, expensive hotel stays and meals, and excessive compensation for medical directorships or consultancies. **In some industries, it is acceptable to reward those who refer business to you. However, in the Federal health care programs, paying for referrals is a crime.** The statute covers the payers

Source: HHS Office of Inspector General, A Roadmap for New Physicians, Avoiding Medicare and Medicaid Fraud and Abuse

- “Remuneration includes anything of value and can take many forms besides cash.” (OIG)

My Marketing Employee/Vendor Wants a Bonus Structure. What are my Options?

- The fact that everyone is engaging in this conduct is not a defense...

FOR IMMEDIATE RELEASE

Wednesday, July 20, 2022

Department of Justice
Office of Public Affairs

Justice Department Charges Dozens for \$1.2 Billion in Health Care Fraud
Nationwide Coordinated Law Enforcement Action to Combat Telemedicine, Clinical Laboratory, and Durable Medical Equipment Fraud

The Department of Justice today announced criminal charges against 36 defendants in 13 federal districts across the United States for more than \$1.2 billion in alleged fraudulent telemedicine, cardiovascular and cancer genetic testing, and durable medical equipment (DME) schemes.

The nationwide coordinated law enforcement action includes criminal charges against a telemedicine company executive, owners and executives of clinical laboratories, durable medical equipment companies, marketing organizations, and medical professionals. In connection with the enforcement action, the department seized over \$8 million in cash, luxury vehicles, and other fraud proceeds.

Additionally, the Centers for Medicare & Medicaid Services (CMS), Center for Program Integrity (CPI) announced today that it took administrative actions against 52 providers involved in similar schemes.



My Marketing Employee/Vendor Wants a Bonus Structure. What are my Options?

- **Questions:** What does success mean? What are you rewarding? What are you measuring?
 - The number of existing referring providers the individual visits during a quarter?
 - The number of new providers the individual visits during a quarter?
 - The number of *positive* press mentions they get for your practice during a quarter?
 - The number of business cards collected at an event?

Federal Health Care Laws

- Stark (strict liability)
- Anti-Kickback Statute (criminal statute)
- Eliminating Kickbacks in Recovery Act
(first prosecution, Jan. 10, 2020 - **80-year-old office manager!**)
- Civil Monetary Penalties law
- Also...
 - OIG Advisory Opinions
 - OIG Compliance Guidance
 - Case Law (both Federal and State; could be legal under Federal law, but illegal under State law)
 - Industry Guidance

This area is complex and the analysis is very fact intensive... law is fluid and often not clear in certain situations (particularly with new technologies or service models—e.g., Groupon). Tread lightly . . .



State Health Care Laws

- Mini-Stark
- Mini-AKS
- Fee Splitting
- Provider licensing
- Patient brokering laws
- and others...
- **Note:** For fraud, waste, and abuse purposes, many states give private payers the ***same protections*** as government payers. Practices that are **direct pay/self pay** (no insurance or federal health care programs) have more flexibility.



Other Laws...

- **Telephone Consumer Protection Act**
 - **Generally requires consumer consent** when you call the individual using 'automatic telephone dialing systems' or 'artificial or prerecorded voices'
 - Type of consent required
 - “**prior express consent**” for informational purposes when calling wireless phones
 - “**prior express written consent**” for telemarketing or advertising calls using an automatic telephone dialing systems or artificial or prerecorded voices (exception for certain ‘health care’ messages such as appointment reminders, but billing matters do not qualify)
 - Manually dialed calls not subject to TCPA (but be weary of auto dialers)
 - Applies to faxes as well
 - Statutory damages, **with a private right of action**
 - Consumers who received calls/texts in violation of TCPA can seek up to \$500 per communication (\$1,500 for willful or knowing violations)



Other Laws...

- **Mini TCPA in Florida**

- *Beware if you market in Florida **or** to any Florida residents **or** use a marketing vendor located in Florida to market to residents in other states...*
- Went into effect on July 1, 2021, Fla. Stat. 501.059
- Like the TCPA, allows for a private right of action and provides statutory damages. But, is more pro-consumer as compared to the Federal law.
- “(8)(a) A person may not make or knowingly allow a telephonic sales call to be made if such call involves an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called **without the prior express written consent of the called party.**”



Other Laws...

- **Mini TCPA in Florida**

“(g) ‘Prior express written consent’ means a written agreement that:

1. Bears the signature of the called party;
2. Clearly authorizes the person making or allowing the placement of a telephonic sales call by telephone call, text message, or voicemail transmission to deliver or cause to be delivered to the called party a telephonic sales call using an automated system for the selection or dialing of telephone numbers, the playing of a recorded message when a connection is completed to a number called, or the transmission of a prerecorded voicemail;
3. Includes the telephone number to which the signatory authorizes a telephonic sales call to be delivered; and
4. Includes a clear and conspicuous disclosure informing the called party that:
 - a. By executing the agreement, the called party authorizes the person making or allowing the placement of a telephonic sales call to deliver or cause to be delivered a telephonic sales call to the called party using an automated system for the selection or dialing of telephone numbers or the playing of a recorded message when a connection is completed to a number called; and
 - b. He or she is not required to directly or indirectly sign the written agreement or to agree to enter into such an agreement as a condition of purchasing any property, goods, or services.” Fla. Stat. 501.059(g).

Other Laws...

- **TCPA and Florida Mini-TCPA**
 - Compliance strategy: Get written consent from the individual
 - → Add the consent language to your in-take paperwork
 - → Add the consent language to your Notice of Privacy Practices
 - → Ensure that you have a clear opt-out process and that you *actually opt people out* when they make a request

Other Laws...

- **Trademarks and copyrights**
 - Do you have appropriate rights?
 - Do you have a trademark clearance process?
 - Do you have a copyright clearance process?
 - Do you have consent from your employees to use their likeness and biographical data on your website and your marketing materials?
 - If your marketing vendor is writing content for you:
 - Has that vendor assigned all of the IP rights to your practice?
 - Has that vendor agreed to indemnify you if there is a claim for copyright infringement?
 - Do you prohibit your vendors from using your practice name without your consent?
 - Are you sure you want to endorse that vendor?
 - Trademarks and copyrights have value and can be leveraged as part of the buy-out process
- **Truthful advertising**
 - As explained by the Federal Trade Commission, “Under the law, claims in advertisements must be truthful, cannot be deceptive or unfair, and must be evidence-based. For some specialized products or services, additional rules may apply.”

Other Laws...

FEDERAL TRADE COMMISSION
PROTECTING AMERICA'S CONSUMERS

FTC Finalizes Order Banning Deceptive Marketing by Supplement Seller

Promoters of the Ultimate Heart Formula, BG18, Black Garlic Botanicals, and Neupathic Had History of Unsubstantiated Health Claims

June 30, 2022

Tags: Consumer Protection | Bureau of Consumer Protection | Advertising and Marketing | Health Claims | Advertising and Marketing Basics

The Federal Trade Commission has finalized an administrative consent order against two Texas-based companies and their owner who are permanently banned from advertising or selling dietary supplements, and from making claims that their products treat, cure, or reduce the risk of disease. Today's action stems from an administrative complaint the FTC filed in November 2020 against Health Research Laboratories, LLC, Whole Body Supplements, LLC, and their owner and officer Kramer Duhon.

The complaint alleged the Health Research Laboratories respondents made unsubstantiated claims that their supplements -- The Ultimate Heart Formula (UHF), BG18, and Black Garlic Botanicals -- prevent or treat cardiovascular and other diseases, and that their supplement Neupathic cures, mitigates, or treats diabetic neuropathy.

Related Cases

Health Research Laboratories, LLC, In
the Matter of

Topics

Protecting Consumers

Health Claims

use their likeness and biographical data on

you:

our practice?

is a claim for copyright infringement?

practice name without your consent?

can be leveraged as part of the

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Other Laws...

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The complaint alleged the Health Research Laboratories respondents made unsubstantiated claims about their supplements -- The Ultimate Heart Formula (UHF), BG18, and Black Garlic Botanicals -- prevent or treat cardiovascular and other diseases, and that their supplement Neupathic cures, mitigates, or treats diabetic neuropathy.

FEDERAL TRADE COMMISSION PROTECTING AMERICA'S CONSUMERS

FTC Action Against Benefytt Results in \$100 Million in Refunds for Consumers Tricked into Sham Health Plans and Charged Exorbitant Junk Fees

Court orders also ban two former Benefytt executives from selling or marketing healthcare products

August 8, 2022

Tags: Consumer Protection | Regional Offices | Midwest Region | Bureau of Consumer Protection | deceptive/misleading conduct | Health Care | Advertising and Marketing | Health Claims | Telemarketing

The Federal Trade Commission is taking action against healthcare company Benefytt Technologies, two subsidiaries, former CEO Gavin Southwell, and former vice president of sales Amy Brady, for lying to consumers about their sham health insurance plans and using deceptive lead generation websites to lure them in. According to the FTC complaint, Benefytt also illegally charged people exorbitant junk fees for unwanted add-on products without their permission. The proposed court orders require Benefytt to pay \$100 million in refunds and prohibit the company from lying about their products or charging illegal junk fees. Southwell and Brady will be permanently banned from selling or marketing any healthcare-related product, and Brady will also be banned from telemarketing.

Related Cases

Benefytt Technologies, et al., FTC v.

For Consumers

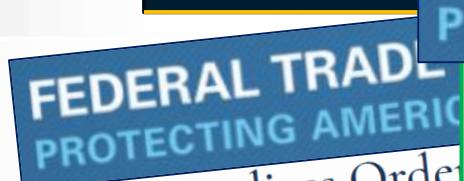
Blog: Is that health insurance, a health product, or a scam?

For Businesses

Blog: Healthcare "plans" and "products" didn't deliver as promised,

"The Federal Trade Commission, "Under the law, companies must be truthful, cannot be deceptive or unfair, and must be honest in their advertising." e-
based. For some specialized products or services, additional rules may apply."

Other Laws



FTC Finalizes Order Supplement Seller

Promoters of the Ultimate History of Unsubstantiated

June 30, 2022

Tags: Consumer Protection | Bureau of
Health Claims | Advertising and Marketing

The Federal Trade Commission has finalized a proposed consent order against Health Research Laboratories, LLC, which makes claims about its dietary supplement products. The order prohibits the company from making false or misleading claims about its products' health benefits.

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that their supplements -- The Ultimate
prevent or treat cardiovascular and ot
mitigates, or treats diabetic neuropat



FEDERAL TRADE COMMISSION

PROTECTING AMERICA'S CONSUMERS

Benefytt II

Federal Trade Commission Scores Two Victories in Separate Actions Against Companies Who Failed to Deliver COVID Personal Protection Equipment During Early Days of the Pandemic

Wins Against Glowyy and American Screening Hold Companies Accountable and Secure More Than \$17 Million For Consumers

August 1, 2022

Tags: Consumer Protection | Bureau of Consumer Protection | Health | Shopping |
Coronavirus (COVID-19) | Retail | Merchandise & Clothing | Advertising and Marketing
Health Claims | Online Advertising and Marketing | Advertising and Marketing Basics

The Federal Trade Commission won victories in two lawsuits against companies, that failed to deliver on orders of personal protective equipment in the early stages of the COVID-19 pandemic. In separate actions against [QYK Brands \(doing business as Glowyy and through related companies\)](#) and [American Screening, LLC](#), the Commission alleged that both companies deceived consumers about the availability of PPE gear at the onset of the COVID-19 pandemic. Commission staff won both actions on summary judgment, holding these companies accountable for their misconduct in the

Related Case

OYK Brands LLC d/b/a Glowww

American Screening LLC

For Consumer

Blog: FTC and American consumers win two cases against pandemic scammers

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Charged

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Is insurance, a scam?

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ever as promised,

based. For some specialized products or services, additional rules may apply.

FTC Sues Marketer of Personal Protective Equipment and Light Fixtures for Lying About Products Being Made in the USA and Government-Certified

Agency Brings Enforcement Actions Under the COVID-19 Consumer Protection Act and the Made in USA Rule

August 9, 2022

Tags: [Consumer Protection](#) | [Bureau of Consumer Protection](#) | [deceptive/misleading conduct](#) | [Manufacturing](#) | [Consumer Goods \(Non Food & Beverage\)](#) | [Advertising and Marketing](#) | [Made in USA](#)

The Federal Trade Commission has referred a complaint to the Department of Justice alleging Adam J. Harmon and two companies he controls falsely told consumers that personal protective equipment they marketed during the pandemic, as well as light fixtures they sold, were made in the United States. The FTC charged Harmon and his two companies, Axis LED Group, LLC and ALG-Health LLC, with violating the COVID-19 Consumer Protection Act, the Made in USA Labeling Rule and the FTC Act. The agency's proposed order would stop them from making deceptive claims that products were Made in USA – or, that because they were Made in USA, they provided superior protection from COVID-19. The order also would require them to pay a civil penalty for their past deceptive claims.

that their supplements -- the ones that prevent or treat cardiovascular and other diseases -- mitigate, or treats diabetic neuropathy.

American Screening, LLC, the Commission alleged that both companies deceived consumers about the availability of PPE gear at the onset of the COVID-19 pandemic. Commission staff won both actions on summary judgment, holding these companies accountable for their misconduct in the

Related Cases

[ALG-Health LLC, et al., U.S. v. Axis LED Group, LLC](#)

Related actions

[Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson in the Matter of ALG-Health LLC, et al., U.S. v. Axis LED Group, LLC](#)

Topics

[Protecting Consumers](#)

Separate COVID-19 of the

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ologies, et al., FTC v. American Screening, LLC

h insurance, a scam?

Blog: [FTC and American consumers win two cases against pandemic scammers](#)

Do I Need Consent from the Patients to Use their Information for Marketing?

- **It depends on what you're doing...**
 - Are you using Facebook to specifically target your patients or marketing to everyone within a specific zip code?
 - Are you sending text messages about a new physician that your group hired, office that you opened, or announcing new hours?
 - Are you mailing a post card to your patients or everyone in the community?
 - Are you selling their information to other organizations for them to use for marketing?
 - Are you contacting them asking them to participate in research for a pharmaceutical company?
 - Are you engaging in joint marketing activities with an insurance carrier?

Do I Need Consent from the Patients to Use their Information for Marketing?

- **It depends on what you're doing...**
 - **HIPAA Privacy Rule applies to marketing**
 - Impacts:
 - Using PHI to market to your patients
 - Providing PHI to your business partners for their marketing
 - Using PHI in joint marketing efforts
 - In general, need patient consent, otherwise improper disclosure of PHI in marketing
 - **Complete P.T., Pool & Land Physical Therapy, Inc.**
(complaint filed on August 8, **2012**, settled on February 16, **2016**) - Settlement of \$25,000

May I Record this Procedure and Post the Video on my Practice Website or Social Media?

- Are you **sure** you want to do that?
- If yes, then need patient's consent
 - Must comply with HIPAA authorization requirements
 - Must comply with right of publicity laws
 - Generally speaking, people have the exclusive right to license the use of their likeness, name, etc. for commercial purposes – applies to everyone, even individuals who are not celebrities
 - Grant in perpetuity or for a limited duration?
 - Include a waiver?
 - Scope of where content can be published?
 - Right to modify?
- See **Complete P.T., Pool & Land Physical Therapy, Inc.**

May I Give my Patients a Gift on their Birthdays?

- How much is the value of the gift?
- Federal Civil Monetary Penalty
 - “Under section 1128A(a)(5) of the Social Security Act (the Act)...., a person who offers or transfers to a Medicare or Medicaid beneficiary any remuneration that the person knows or should know is likely to influence the beneficiary’s selection of a particular provider, practitioner, or supplier of Medicare or Medicaid payable items or services may be liable for **civil monetary penalties (CMPs) of up to \$10,000 for each wrongful act**. For purposes of section 1128A(a)(5) of the Act, the statute defines “remuneration” to include, without limitation, waivers of copayments and deductible amounts (or any part thereof) and transfers of items or services for free or for other than fair market value.... Congress expressed its intent that inexpensive gifts of nominal value be permitted. as of [December 7, 2016], we[at the OIG] are interpreting “nominal value” **as having a retail value of no more than \$15 per item or \$75 in the aggregate per patient on an annual basis**. As with our previous interpretation, the items may not be cash or cash equivalents. If a gift has a value at or below these thresholds, then the gift need not fit into an exception to section 1128A(a)(5).” (OIG General Policy Statement, Dec. 7, 2016)



But, no similar exception under the Federal AKS statute; may be prohibited by state law → What is your risk tolerance?

How do I Remove that Review?



- **Defamation**
 - Libel = written
 - Slander = spoken
 - *Something cannot be defamatory if it is true*
- The First Amendment only applies as between you and the Government... it does not apply to businesses
- **Consumer Review Fairness Act**
 - “Protects people’s ability to share their honest opinions about a business’s products, services, or conduct, in any forum, **including social media**” (FTC)

Is my Marketing Vendor a Business Associate under HIPAA?

- Yes, ***if*** the vendor may have access to or may receive Protected Health Information as part of providing services to your practice
 - Advertising targeted at current or former patients on Facebook, LinkedIn, or other social media website
 - Direct mailers to current or former patients
- BAA
 - Cyber liability insurance?
 - No damages cap? Separate damages cap? Subject to the damages cap in the main agreement?

Disclaimer

This slide presentation is informational only and was prepared to provide a brief overview of marketing issues in healthcare. It does not constitute legal or professional advice.

You are encouraged to consult with an attorney if you have specific questions relating to any of the topics covered in this presentation.

Questions?

Tatiana Melnik

tatiana@melniklegal.com

(734) 358-4201