1) ANTI-KICKBACK

There are two sets of health care Anti-Kickback Statutes in Massachusetts: those set forth at Mass. Gen. Laws ch. 175H, §§ 1-8 as part of several broadly worded anti-fraud statutes that apply to all types of health care providers and payer types; and those outlined at Mass. Gen. Laws ch. 118E, §§ 36-46A, which are specific to the Commonwealth’s public health benefit programs, including the state’s Medicaid program.

Mass. Gen. Laws ch. 175H, § 3
This statute makes it a felony to solicit, receive, offer, or pay any remuneration (including a bribe or rebate) “for purchasing, leasing, ordering or arranging for or recommending purchasing, leasing, or ordering of any good, facility, service or item for which payment is or may be made in whole or in part by a health care insurer.” Mass. Gen. Laws ch. 175H, § 3. Unlike its federal counterpart, the state statute defines a “health care insurer” as “any insurance company authorized to provide health insurance in this state or any legal entity which is self-insured and providing health care benefits to its employees.” Mass. Gen. Laws ch. 175H, § 1.

The statute provides an exception for certain discount/free product vouchers provided by retail pharmacies to consumers in connection with transactions involving certain biological and prescription drug products. The permitted use of these discount or free product vouchers is limited in several respects. First, the vouchers can only be offered if there is no AB-rated generic equivalent of the product available on the market. Second, the voucher can only be distributed in certain ways, such as direct distribution to the consumer, distribution at the point of sale, via mail-in rebate, or “similar means.” This exception is only effective until July 1, 2019, but it is
expected to be reauthorized. Mass. Gen. Laws. ch. 175H, § 3(b). Left unanswered is the question of whether a pharmaceutical company can provide vouchers to prescribing physicians to distribute to patients. Mass. Gen. Laws. ch. 175H, § 3(b).

The authority to prosecute offenses under this chapter rests exclusively with the Attorney General’s Office. Mass. Gen. Laws ch. 175H, § 5. Penalties include fines up to $10,000, or imprisonment of up to two-and-a-half years in jail or five years in state prison, or both fines and imprisonment. Mass. Gen. Laws ch. 175H, § 2. A person convicted under the statute may also face civil liabilities including restitution for the full amount of the benefit or payment made, reasonable attorneys’ fees and costs, and the costs associated with the government’s investigation. Mass. Gen. Laws ch. 175H, § 7.

Other than as set forth in Mass. Gen. Laws ch. 175H, § 3(b), there are no established statutory exceptions to this statute, and to date, the Attorney General has not promulgated any safe harbor regulations. As a practical matter, however, most Massachusetts attorneys have assumed that practices satisfying a federal Anti-Kickback Statute statutory exception or regulatory safe harbor would not be the likely subject of state prosecutorial interest.

Section 41 of Chapter 118E makes it a felony to solicit or receive any form of remuneration in exchange for “purchasing, leasing, ordering, arranging for, or recommending the purchase, lease, or ordering of any good, facility, service, or item” for which Medicaid (or another state health benefit program) pays, in whole or in part. Penalties for violating the law include fines of up to $10,000, imprisonment of up to two-and-a-half years in jail or five years in state prison, or both fines and imprisonment. Mass. Gen. Laws ch. 118E, § 41.

Unlike Mass. Gen. Laws. ch. 175H, § 3 described above, ch. 118E, § 41 contains a broad statutory exception for discounts. More specifically, the statute exempts from prosecution any “discount or other reduction in price obtained by a provider of services or other entity . . . if the reduction in price is properly disclosed and appropriately reflected in the costs claimed or charges made by the provider or entity.” A second exception outlined in Mass Gen. Laws ch. 118E, § 41 protects bona fide employment arrangements and more specifically, “any amount paid by an employer to an employee . . . for employment in the provision of covered items or services.”

Section 43 of Chapter 118E makes it a crime to knowingly and willfully charge, solicit, accept, or receive “any gift, money, donation, or other form of consideration as a precondition or guarantee” of admitting a Medicaid recipient to, or keeping a Medicaid recipient in, a hospital or nursing facility. The penalties imposed for violations of Section 43 are the same as those specified under Mass. Gen. Laws ch. 118E, §§ 41 and 42: fines of up to $10,000, or imprisonment of up to two-and-a-half
years in jail or five years in state prison, or both fines and imprisonment. Mass. Gen. Laws ch. 118E, § 43.

Section 44 of Chapter 118E provides that in addition to (or instead of) seeking criminal penalties for a kickback violation, either the Attorney General or any district attorney may elect to pursue a civil recoupment action against a provider or other entity. Pursuant to law, the state may recover up to three times the amount of actual damages, including the costs of investigation and/or litigation. The statute of limitations on civil recoupment actions is six years. Mass. Gen. Laws ch. 118E, § 44.

Section 46A of Chapter 118E provides that if a case is brought under any section of the Medicaid Anti-Kickback Statute, a provider may avoid liability if it can demonstrate to the satisfaction of the commissioner for the Division of Medical Assistance that any non-compliant claims or actions were solely the result of mere clerical or administrative error. Mass. Gen. Laws ch. 118E, § 46A.

Note that Massachusetts laws do not include mandatory debarment provisions for state kickback violations; however, eligibility to participate in state health care programs is limited to those providers who have not been convicted of larceny, fraud, or “any other crime in connection with” state health care program services. See Mass. Gen. Laws ch. 118E, § 36. Regulations set forth at 130 C.M.R. § 450.224 further specify that any provider who has been convicted of a crime involving Medicare, Medicaid, or any other federal health care program, or of a crime that “will compromise the integrity” of a state health care program may be terminated from the program. See also 130 CMR § 450.213 (authorizing termination from program participation upon failure to satisfy all program eligibility criteria).

**Anti-Kickback Enforcement**
The Medicaid Fraud Division (Medicaid Fraud Division) of the Massachusetts Office of the Attorney General is very active in the investigation and prosecution of fraud against the state Medicaid program. The Medicaid Fraud Division works closely with the U.S. Department of Justice and the U.S. Attorney’s Office to conduct its investigations. The Massachusetts Attorney General maintains an online tool allowing individuals to report instances of fraud and abuse related to the Commonwealth’s Medicaid system electronically.

In May 2016, the Attorney General announced the largest Medicaid fraud recovery in state history: Wyeth and Pfizer agreed to pay nearly $68 million to MassHealth to settle claims that it knowingly underpaid mandated drug rebates. See press release. Following two whistleblower lawsuits filed in the District of Massachusetts, the United States, 35 states and the District of Columbia intervened in the lawsuit. The United States and the states involved alleged that Wyeth, acquired by Pfizer in 2009 after the alleged conduct, failed to accurately report best prices on the bundled sales of two Protonix products to hospitals and failed to properly allocate discounts available under the relevant contracts. As a result, the rebate amounts Wyeth paid to MassHealth were substantially reduced. Pursuant to the national settlement, Wyeth
will pay $784.6 million to the federal and state governments. Of that amount, $68 million will resolve claims relating to MassHealth.

2) PROHIBITIONS ON SELF-REFERRAL

In July 2014, Massachusetts amended the statutes governing licensed clinical labs to create a broad prohibition on clinical laboratory self-referrals. Massachusetts physicians may not refer Medicaid and private pay patients to clinical laboratories in which they or a family member have a direct or indirect ownership interest.

Specifically, the law prohibits a clinical laboratory from knowingly soliciting, accepting, or testing any specimen “received from, ordered, requested or referred by: (a) any person or company in which the clinical laboratory or its directors, owners, partners, employees or family members thereof have any direct or indirect ownership interest; or (b) any person or company or its directors, owners, partners, employees or family members thereof having any direct or indirect ownership interest in the clinical laboratory.” Mass. Gen. Laws ch. 111D, § 8. It also prohibits any person or company from knowingly referring, requesting, ordering, or sending any “specimen derived from the human body for examination to a clinical laboratory in which the person or company, or any of its owners, directors, partners, employees or family members thereof have a direct or indirect ownership interest.” Mass. Gen. Laws ch. 111D, § 8A.

Both statutes include exceptions for: (1) any arrangement exempted under the federal Stark Law, (2) clinical laboratories owned by a physician or group of physicians used exclusively in connection with the diagnosis and/or treatment of a physician’s or group’s patients and where all testing is performed by or under the direct supervision of the physician or group, or (3) hospitals or clinics used exclusively in connection with diagnosis or treatment of the hospital’s or clinic’s own patients.

The Massachusetts Attorney General may bring a civil or criminal enforcement action for violations of the above provisions. Civil penalties range from $5,000 - $10,000 per violation, as well as treble damages and consequential damages. Any person or company that “solicits, offers or enters into a referral arrangement or scheme with a clinical laboratory which the person or company knows or should know has a principal purpose of assuring referrals by the person or company to a particular clinical laboratory which, if the person or company directly made referrals to such clinical laboratory,” would violate the above provisions could face civil penalties of up to $100,000 for each referral, plus treble damages and consequential damages. Mass. Gen. Laws ch. 111D, § 13.

Finally, the law requires clinical laboratories to disclose ownership interests in writing to the Department of Public Health every two years. Failure to make the required disclosures can result in fines up to $5,000. Mass. Gen. Laws ch. 111D, § 14.
In addition to the above statutes, the language in Mass. Gen. Laws ch. 118E, §§ 39-43 and ch. 175H, §§ 1-8 is broad enough to encompass conduct that would violate the federal self-referral prohibitions.

Massachusetts law also requires physical therapists to disclose if physicians, physician assistants, osteopaths, or other licensees who make referrals to the physical therapy practice have either an ownership interest in or otherwise derive income from the physical therapy practice. 259 CMR § 5.05-(2)-(3).

Speech-language pathologists and audiologists are required to comply with the American Speech-Language Hearing Association (ASLHA) Code of Ethics, which requires that individuals make referrals based on the interests of the patient and not on any personal interest, financial or otherwise. See 260 CMR § 1.03, ASLHA Code of Ethics.

3) FALSE CLAIMS/FRAUD & ABUSE

Massachusetts has several categories of false claims statutes, two of which are specific to health care benefit claims.

Mass. Gen. Laws ch. 12, §§ 5A-5O Massachusetts’ Civil False Claims Act (MFCA) is modeled on the federal civil false claims statute, as set forth at 31 U.S.C. §§ 3729-33. It is not limited to false claims associated with public health care programs. The critical qui tam provisions (e.g., filing, intervention, and secrecy) may be found at Mass. Gen. Laws ch. 12, § 5C, while Section 5D addresses the intervention and declination processes. Section 5F outlines the recoveries available to relators in the event of a successful resolution of claims by settlement or judgment. More specifically, relators may recover between 15%–25% of any funds recovered through litigation or settlement when the state intervenes, or between 25%–30% when there is no intervention but the case is successfully resolved. Mass. Gen. Laws ch. 12, § 5F(1), (3). The relator’s recovery may be reduced below 10% of the total recovery amount if the Commonwealth can show a material portion of the information provided by the relator was already available in some public forum. Mass. Gen. Laws ch. 12, § 5F(2). If a court determines that the relator planned, initiated, or knowingly participated in the violations, the relator’s share of the recovery may be reduced or eliminated in its entirety. Mass. Gen. Laws ch. 12, § 5F(5).

The MFCA provides relators and the state with the ability to seek extensions of a sealing order beyond the previous extension limit of 120 days and to put procedures in place that will allow information sharing by the Commonwealth with other state or federal agencies serving as co-plaintiffs in a particular matter. See Mass. Gen. Laws ch. 12, § 5C(7).
The MFCA defines the conduct that may violate the statute broadly and uses the same "knowledge" standards as set forth in the federal statute (e.g., actual knowledge, reckless disregard, or deliberate ignorance). See Mass. Gen. Law ch. 12, § 5B. Civil penalties under the MFCA include fines of $5,500 to $11,000 per claim, plus up to three times the amount of damages incurred (including consequential damages), and the costs of investigation. See Mass. Gen. Law ch. 12, § 5B. Section 5B of the MFCA includes the following:

- A materiality standard with regard to claims based on statements used to obtain payment or otherwise support a claim;
- A provision that knowingly presenting or causing to be presented a claim that includes items or services resulting from a violation of the federal or state Medicaid Anti-Kickback Statutes constitutes a false claim;
- A provision mirroring federal requirements that a beneficiary of an inadvertent false claim or overpayment disclose such false claim or overpayment within 60 days of the date on which the false claim or overpayment was identified (or the date on which a cost report is due, if applicable); and
- A provision specifying that in the event of a self-disclosure of a false claim within 30 days, and full cooperation, damages may only be reduced to double damages, including consequential damages (previously, the state was not required to impose any multiplier on damages).

The MFCA also permits the Attorney General to proceed administratively rather than in litigation (Section 5E) to recover a civil penalty. Importantly, any finding of fact or conclusion of law made in the administrative proceeding is, by operation of law, deemed conclusive on all parties in a civil suit brought under the Act. Mass. Gen. Laws ch. 12, § 5E.


Section 39 of Chapter 118E makes it a misdemeanor for any person or institution to knowingly make a false representation, or to knowingly fail to disclose any material fact pertaining to an individual’s eligibility for Medicaid benefits. Violations of Section 39 are punishable by fines of not less than $200 or more than $500, or imprisonment of not more than one year. A prosecution under Section 39 does not exempt a person from prosecution under any other applicable statute. Mass. Gen. Laws ch. 118E, § 39.

Section 40 of Chapter 118E makes it a felony to knowingly and willfully make or cause anyone to make a false statement or representation of material fact having anything to do with the payment of a public health benefit, or to conceal or fail to disclose information pertaining to the right to receive or continue to receive public health benefits. Mass. Gen. Laws ch. 118E § 40. The penalties for violating Section 40 include fines of up to $10,000, or imprisonment of up to two-and-a-half years in jail or five years in prison, or both fines and imprisonment. In addition, defendants who are alleged to have violated or are convicted of violating Section 40 may also be subject to civil recoupment proceedings under Mass. Gen. Laws ch. 118E, § 44. (See discussion in Anti-Kickback section, supra).
Non-Medicaid providers who are prosecuted under Section 40 of Chapter 118E may be subjected to lesser fines and terms of imprisonment. See also Mass. Gen. Laws ch. 266, § 30 (the general larceny statute) and Mass. Gen. Laws ch. 266 § 111A (the general insurance fraud statute).

Section 42 of Chapter 118E makes it a felony to knowingly and willfully charge for any Medicaid service in any amount higher than publicly established rates. The penalties for violating Section 42 include fines of up to $10,000, imprisonment of up to two-and-a-half years in jail or five years in prison, or both fines and imprisonment. Mass. Gen. Laws ch. 118E § 42.

Under this statute, it is a felony to knowingly and willfully make any false statement or false representation of a material fact in any claim seeking payment of health care benefits or in connection with an application for or determination of rights to health care benefits. It is also a violation of the statute to conceal information affecting one’s initial or continued right to any health care benefit with an intent to fraudulently secure a benefit to which the individual or entity is not entitled. Mass. Gen. Laws ch. 175H, § 2. The penalties for violating Section 2 include fines of up to $10,000, or imprisonment of up to two-and-a-half years in jail or five years in prison, or both fines and imprisonment. Any person who violates Section 2 may also be sued civilly for restitution. Mass. Gen. Laws ch. 175H, § 7. (See discussion of Mass. Gen. Laws ch. 175H, § 7 in Anti-Kickback section, above).

In January 2018, the Attorney General announced a suit against South Bay Mental Health Center, Inc., which operates mental health facilities throughout the state, for fraudulently billing Massachusetts’s Medicaid program, known as MassHealth, for mental health care services provided to patients by unlicensed, unqualified, and unsupervised staff members. The investigation began following a whistleblower lawsuit filed in 2015. The AG’s office estimates that a significant portion of $124 million submitted claims were fraudulent because they were rendered by unqualified staff to more than 30,000 MassHealth members. The AG’s office is seeking treble damages, civil penalties, and prejudgment interest for the false claims.

4) UNFAIR BUSINESS PRACTICES

Chapter 93A is commonly referred to as the Massachusetts Consumer Protection Act (MCPA) and targets unfair methods of competition and unfair or deceptive acts and practices across all industries. It permits consumers, or persons engaged in “trade or commerce,” to bring actions for damages, and/or equitable (injunctive) relief, individually or by means of a class action. See Mass. Gen. Laws ch. 93A, § 2. While the terms “unfair,” “methods of competition,” “unfair or deceptive,” and “acts or practices” are left undefined in the MCPA itself, there is a wealth of case law interpreting what constitutes unfair competition or a deceptive act or practice.
A successful MCPA consumer plaintiff may recover the greater of actual damages or a statutory minimum, plus attorneys’ fees. If a consumer plaintiff also is able to demonstrate the defendant’s acts were willful or knowing, then the plaintiff will recover at least double and up to treble actual damages. Mass. Gen. Laws ch. 93A, § 9. Business plaintiffs have rights similar to those of consumers, and those rights are outlined in Section 11 of the MCPA.

Notably, the MCPA also specifically creates a private right of action for violations of Mass. Gen. Laws ch. 176D, the Massachusetts statute that makes unlawful any unfair methods of competition or unfair or deceptive acts or practices in the business of insurance. Mass. Gen. Laws ch. 93A, § 9.

**Attorney General’s Regulations**
The Massachusetts Attorney General has promulgated a variety of regulations defining certain conduct as unfair and deceptive under the MCPA, see, e.g., 940 CMR § 3.00. These regulations, however, are not exhaustive and do not limit the types of conduct that may give rise to a Chapter 93A violation. Of particular note in the health care context is the broadly worded regulation that makes it a violation of the MCPA to fail to comply with any existing statute, law, rule, or regulation intended to protect the “public’s health, safety or welfare.” 940 CMR § 3.16(3). In addition, the Attorney General has promulgated a series of regulations regarding specific unfair and deceptive practices by nursing home administrators. See 940 CMR §§ 4.00, 4.02 and 4.05.

**Mass. Gen. Laws ch. 176D, §§ 1-14**
These statutes target a wide array of unfair methods of competition and unfair and deceptive acts and practices in the business of insurance, which by definition includes health care insurance. Mass. Gen. Laws ch. 176D, § 3. For example, false advertising, false statements of a company’s financial condition, discriminating between individuals in the same “class,” providing rebates, and violations of the pharmacy bidding process all violate Chapter 176D. In general, actions to remedy alleged violations of the statute may be brought only by the commissioner of insurance unless a plaintiff satisfies the necessary criteria set forth in the MCPA.

**5) GENERAL WHISTLEBLOWER PROTECTIONS**

**Mass. Gen. Laws ch. 12, § 5J**
This statute forbids all employers from adopting any rule, regulation, or policy that prevents an employee (or a contractor or agent) from disclosing or threatening to disclose to the government information about alleged false claims violations or from taking action to further efforts to stop one or more violations of the MFCA. Mass. Gen. Laws ch. 12, § 5J. It also forbids employers from retaliating or taking any adverse employment action against an employee who discloses such information, or from requiring an employee to waive the rights granted under Mass. Gen. Laws ch. 12, §§ 5B through 5O, inclusive. An employer who commits any of the conduct...
referred to above will be liable for damages and/or equitable relief, including employee reinstatement with seniority, two times back pay with interest, special damages, and litigation costs (including attorneys’ fees).

The statute specifies that whistleblowers must bring a civil action against their employer within three years of the date of alleged violation of the law. Mass. Gen. Laws ch. 12, § 5J.

**Mass Gen. Laws ch. 149, § 185**
This statute provides whistleblower protection for public employees who report violations of any law by their employer that the employee "reasonably believes poses a risk to public health, safety or the environment." Section 185 protections also are available to any public employee who testifies or provides any information about such alleged conduct to a public investigative body, or who complains or refuses to participate in any activity he or she “reasonably believes” is in violation of a law or “poses a risk to public health, safety or the environment.” A successful whistleblower plaintiff is entitled to all of the remedies available at common law for tort claims, as well as injunctive relief including reinstatement with full benefits and seniority, three times lost wages, and costs (including attorneys’ fees). On the other hand, if the employer is successful in demonstrating the employee’s action was “without basis” in law or fact, then the court may award attorneys’ fees and costs to the employer. Mass Gen. Laws ch. 149, § 185.

**Mass. Gen. Laws ch. 149, § 187**
This statute provides licensed private health care providers—e.g., physicians, nurses, physician assistants, social workers—with the same types of protections against retaliation and remedies that are extended in Section 185 to public employees. Thus, if a private employee discloses or threatens to disclose to a public investigative body that a licensed health care facility has committed an act or practice the employee “reasonably believes” is in violation of law or rule or regulation, or professional standards of practice, which the health care provider believes poses a risk to public health, then the employee is entitled to full protection under Section 187. The employee also will be protected if he or she objects or refuses to participate in the conduct or activity at issue, or participates in the peer review process, or files incident reports alleging unsafe, dangerous, or potentially dangerous care. Mass. Gen. Laws ch. 149, § 187.

6) **HELPFUL LINKS**
- Access to all Massachusetts Agencies
- Executive Office of Health and Human Services
- Division of Medical Assistance
- Department of Public Health
- Massachusetts Attorney General
- Attorney General Press Releases
- Massachusetts Statutes