1) ANTI-KICKBACK

**South Carolina Anti-Kickback Statute § 44-113-60**
A kickback is any “remuneration or payment back pursuant to an investment interest, compensation arrangement, or otherwise by a provider of health care services or items of a portion of the charges for services rendered to a referring health care provider as an incentive or inducement to refer patients for future services or items when the payment is not tax deductible as an ordinary and necessary expense.” It is unlawful for a health care provider or a provider of health care services to offer, pay, solicit, or receive a kickback, directly or indirectly, overtly or covertly, in cash or in kind, for referring or soliciting patients. A violation is punishable by imprisonment for not more than 30 days or a fine of not more than $1,000.

**Recovery of Kickbacks § 8-13-790**
The value of anything transferred or received in breach of the ethical standards of Articles 1 through 11 of Title 8, Chapter 13 of the South Carolina Code of Laws or regulations promulgated under them by a public employee, public official, or a nonpublic employee or official may be recovered from the public employee, public official, or nonpublic employee or official. Recovery from one offending party does not preclude recovery from other offending parties.

**Hospice Programs and the Anti-Kickback Statute § 44-71-100**
*Rebates, Kickbacks, and Fee-Splitting Prohibited.*
Hospices may not participate in, or offer, or imply an offer to participate in the practice known generally as rebate, kickbacks, or fee-splitting arrangements.
**Home Health Agencies and the Anti-Kickback Statute § 44-69-90**

*Rebates, Kickbacks, and Fee-Splitting Prohibited.*

Home health agencies shall not participate in, or offer, or imply an offer to participate in the practice known generally as rebate, kickbacks, or fee-splitting arrangements.

**Physical Therapists and the Anti-Kickback Statute § 40-45-110**

The State Board of Physical Therapy Examiners may restrict or refuse to grant a license to an applicant and may refuse to renew the license of a licensed person who: requests, receives, participates, or engages directly or indirectly in the dividing, transferring, assigning, rebating, or refunding of fees received for professional services or profits by means of a credit or other valuable consideration including, but not limited to, wages, an unearned commission, discount, or gratuity with a person who referred a patient, or with a relative or business associate of the referring person.


A physical therapist is prohibited from working for pay for a licensed physician or group of physicians when the physician (or a member of the group) refers a patient to the physical therapist for physical therapy services. A physical therapist is similarly prohibited from working for pay for a professional corporation owned by one or more licensed physicians when a physician owner or employee of the corporation refers a patient to the physical therapist for physical therapy services. In these situations, the employer would, in essence, receive the fees from the work of the physical therapist. This type of relationship is prohibited by S.C. CODE ANN. § 40-45-110.

**Case Law**

**Joseph v. South Carolina Dep’t of Labor, Licensing and Regulation, 417 S.C. 436, 790 S.E.2d 763 (2016).**

*Case:* Physical therapist and orthopedic surgeons filed declaratory judgement actions against the Board of Physical Therapy, challenging position statements interpreting S.C. CODE ANN. § 40-45-110 as prohibiting physical therapists from being employed by physicians or physician groups and providing services to the employer’s referred patients but permitting physical therapists to be employed by other physical therapists or physical therapy groups.

*Holdings:* (1) S.C. CODE ANN. § 40-45-110 prohibits only referral-for-pay situations rather than prohibiting all employer-employee relationships between physicians and physical therapists; and (2) The Physical Therapy Board’s position statement interpreting S.C. CODE ANN. § 40-45-110 violated equal protection and due process, and further did not comply with the South Carolina Administrative Procedures Act.

2) PROHIBITIONS ON SELF-REFERRAL

**Provider Self-Referral Act of 1993 § 44-113-10, et seq.**
A health care provider may not refer a patient for the provision of designated health services (DHS) to an entity in which the health care provider is an investor or has an investment interest. DHS include health care procedures, services, or items provided by a health care provider. Section 44-113-30 contains exceptions to the general prohibition on referrals. If a referral is made under one of the enumerated exceptions, a signed disclosure is required. This disclosure must include the existence of the investment interest, the patient’s right to obtain services elsewhere, the names and addresses of at least two alternate providers, and a schedule of typical fees for the services. Section 44-113-40 contains the complete list of items to be included in the disclosure. This Act also provides an opportunity for an employer providing health insurance benefits to report instances of alleged over-utilization of services to the South Carolina Department of Insurance pursuant to Section 38-55-170. (See False Claims Section below).

A physician who owns shares of stock in a publicly held corporation that does not constitute a prohibited “investment interest” under the Provider Self-Referral Act may refer patients for diagnostic services to an entity owned by that corporation. The prohibition against referrals is inapplicable where the provider’s investment interest is in registered securities purchased on a national exchange or over-the-counter market and issued by a publicly held corporation whose shares are traded on a national exchange or an over-the-counter market and whose total assets at the end of the most recent fiscal quarter exceed $50 million. Moreover, referring physicians are not required to disclose their permissible investment interest in publicly held corporations that meet the above criteria. These publicly held corporations are exempt from Section 44-113-40 disclosure requirements.

**South Carolina Department of Labor, Licensing and Regulation Advisory Opinion Office of General Counsel**

**Clarendon County Memorial Hospital/Manning Diagnostics, LLC Provider Self-Referral Act (April 6, 2005)**
A health care provider cannot refer patients to a freestanding facility in which the health care provider is an investor. The facts of this case include a limited liability company (LLC) that provides diagnostic and imaging services. The members of the LLC include six physicians, one family nurse practitioner, and the spouse of one of the physicians. The physician and nurse practitioner members are in a position to make referrals to the LLC in the normal course of their practices. The LLC asserted that it fell within either one of two exceptions of the Provider Self-Referral Act. First, it argued that it was the sole provider of DHS in a rural area. The advisory opinion held that the LLC was not the sole provider because Clarendon County Memorial Hospital had a radiology department that provided service to outpatients as well. The LLC asserted that it was the sole free-standing facility in the area and that it could provide services more conveniently than the hospital. The advisory opinion states, “However,
the exception in Section 44-113-20(10)(a) turns on the provision of the designated health services rather than the nature of the facility in which the services may be provided. Distinctions such as convenience cannot be the basis for an exception under Section 44-113-20(10)(a) because the manifest intent of the law is to allow access to designated health services where no access currently is provided.” The LLC also asserted that it fell into the exception listed in Section 44-113-30(A)(1) as a health care professional who directly provides services within its entity or is personally involved in the provision, supervision, or direction of care to the referred patient. The South Carolina Department of Labor, Licensing, and Regulation concluded that the referring health care provider neither directly provides the health care services within the LLC’s facility nor is personally involved in the provision, supervision, or direction of care to the referred patient while at the LLC.

3) FALSE CLAIMS/FRAUD & ABUSE

Despite several recent legislative proposals, South Carolina has not yet enacted a comprehensive state False Claims Act. The most recent attempt to enact a False Claims Act, S. 223, was pre-filed on December 10, 2014, and was referred to the Committee on the Judiciary on January 13, 2015. There has been no recent movement with this Bill.

**South Carolina State Medicaid False Claims Statute § 43-7-60**

Provides criminal, civil, and administrative penalties and sanctions for health care providers who knowingly and willfully make or cause to be made a false claim in an application or request for a benefit, payment, or reimbursement from a state or federal agency that administers or assists in the administration of the state’s medical assistance or Medicaid program. It is also unlawful for a provider to knowingly and willfully conceal or fail to disclose any material fact, event, or transaction that affects payment or reimbursement under the state’s Medicaid plan. Each fact, event, or transaction concealed or not disclosed constitutes a separate offense.

A person who violates the provisions of this section is guilty of medical assistance provider fraud, a Class A misdemeanor and, upon conviction, must be imprisoned for not more than three years and fined not more than $1,000 for each offense.

The Attorney General may also bring an action to recover damages equal to three times the amount of an overstatement or overpayment and the court may impose a civil penalty of $2,000 for each false claim made to a state or federal agency that administers funds under the state’s Medicaid program. The state agency that administers the Medicaid program also has the authority to impose other administrative sanctions against the provider.

**South Carolina State Medicaid False Application Statute § 43-7-70**

Provides criminal penalties for a person who knowingly and willfully makes or causes to be made a false statement or representation of material fact on an application for
services under the state’s Medicaid program when the statement is made for the purpose of determining eligibility. Similarly, any concealment or failure to disclose any material fact affecting the applicant’s or recipient’s initial or continued entitlement to receive assistance under the state’s Medicaid program is unlawful. It is also unlawful for a person eligible to receive benefits, services, or goods under the Medicaid program to sell, lease, lend, or otherwise exchange rights, privileges, or benefits to another person.

A person who violates the provisions of this section is guilty of medical assistance recipient fraud, a Class A misdemeanor and, upon conviction, must be imprisoned for not more than three years or fined not more than $1,000, or both.

**Presenting False Claims for Payment § 38-55-170**
A person who knowingly causes to be presented a false claim for payment to an insurer or health maintenance organization in this state, or who knowingly assists, solicits, or conspires with another to present a false claim for payment is guilty of a felony if the amount is greater than $2,000. If the false claim is between $2,000 and $10,000, the person, upon conviction, must be fined in the discretion of the court or imprisoned for not more than five years. If the false claim is greater than $10,000, the person, upon conviction, must be imprisoned for not more than ten years or fined not more than $10,000. For false claims less than $2,000, the person is guilty of a misdemeanor triable in magistrate’s court. Upon conviction, the person must be fined not more than $1,000 or imprisoned for not more than 30 days, or both.

**South Carolina Administrative Code 126-403**
*Grounds for Sanction.*
A Medicaid provider may be subject to sanctions for: (1) presenting or causing to be presented for payment any false or fraudulent claim for services or merchandise; (2) submitting or causing to be submitted false information for the purpose of obtaining greater compensation than that to which the provider is legally entitled, including charges in excess of the fee schedule or usual and customary charges; (3) submitting or causing to be submitted false information for the purpose of meeting prior authorization requirements; (4) over-utilizing the Medicaid program by including, furnishing, or otherwise causing a recipient to receive services or merchandise not otherwise required by the recipient; (5) rebating or accepting a fee or portion of a fee or charge for a medical patient referral; (6) conviction against a provider for a criminal offense related to his or her involvement in the Medicaid or Medicare program; (7) exclusion from Medicare because of fraudulent or abusive practices. A complete list of the grounds for sanction is available in this part of the Code.

**South Carolina Administrative Code 126-404**
*Fair Hearings.*
Any Medicaid provider who has been notified in writing by the single state agency of a proposed recoupment of overpayments, a proposed exclusion, suspension, or termination due to an administrative determination of abuse, or a proposed exclusion, suspension, or termination due to a program-related conviction in a state or federal court, may exercise his right to a fair hearing pursuant to R126-150 prior to
implementation of the sanctions. Any individual Medicaid practitioner who has been convicted of a criminal offense related to his involvement in the Medicare or Medicaid program and who is subsequently excluded, suspended, or terminated pursuant to 42 CFR § 420, Part B, may exercise his appeal rights as set forth in the written notice of exclusion, suspension, or termination from the Health Care Financing Administration.

**Grounds for Discipline of Dentist, Dental Hygienist, or Dental Technician. § 40-15-190.**

Misconduct that constitutes grounds for revocation, suspension, probation, reprimand, or other restriction of a license or certificate or a limitation or other discipline of a dentist, dental hygienist, or dental technician occurs when: (1) the holder of a license or certificate has used a false, fraudulent, deceptive, or misleading statement in a document including, but not limited to, claims for reimbursement from third parties connected with the practice of dentistry, dental hygiene, or dental technological work; (2) making a false, fraudulent, or forged statement or document or committed a fraudulent, deceitful, or dishonest act in connection with a licensure or registration requirement; (3) unable to practice dentistry or dental hygiene or to perform dental technological work except as permitted; (4) has obtained a fee which is charged or a reimbursement from third parties or has assisted in obtaining the fees or reimbursement through dishonesty or under false or fraudulent circumstances. A complete list of grounds for sanction is available in Part A of this Code.

In order to investigate misconduct under subsection (A)(3), listed above, the board may require a license, registrant, or applicant to submit to a mental or physical examination by physicians designated by the board. The board may also obtain records specifically relating to the mental or physical condition of a licensee, registrant, or applicant that is the subject of an authorized investigation.

4) **UNFAIR BUSINESS PRACTICES**

**South Carolina Unfair Trade Practices Act § 39-5-10, et seq.**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful. It is the intent of the legislature that in construing the previous sentence, the courts will be guided by the interpretations given by the Federal Trade Commission and the federal courts to Section 5(a)(1) of the Federal Trade Commission Act (15 U.S.C. 45(a)(1)), as from time-to-time amended. It shall be an unlawful trade practice under Section 39-5-20 to use an assumed or fictitious name in the conduct of a business to intentionally misrepresent the geographic origin, ownership of manufacturing facilities, or location of such business. If a court finds that any person is willfully using or has willfully used a method, act, or practice declared unlawful by Section 39-5-20, the Attorney General, upon petition to the court, may recover on behalf of the state a civil penalty not exceeding $5,000 per violation. If the court finds that the use or employment of the unfair or deceptive method, act, or practice was a willful or knowing violation of Section 39-5-20, the court shall award three times the actual damages sustained and may provide such other relief as it deems
necessary or proper. Reasonable attorney’s fees and costs may also be awarded by the court upon a finding of a violation of this article. No action may be brought under this article more than three years after discovery of the unlawful conduct that is the subject of the suit.

**Unfair Methods and Deceptive Acts Prohibited. § 38-57-30**
No person may engage, in this state, in any trade practice that is defined in this chapter as, or determined pursuant to this chapter to be, an unfair method of competition or an unfair or deceptive act or practice in the business of insurance.

5) **GENERAL WHISTLEBLOWER PROTECTIONS**

**South Carolina General Statute § 8-27-10, et seg.**
The South Carolina whistleblower statute prohibits retaliation against state employees for reporting "wrongdoing," meaning any action by a public body that results in substantial abuse, misuse, destruction, or loss of substantial public funds or public resources. Wrongdoing also includes an allegation that a public employee has intentionally violated federal or state statutory law or regulations or other political subdivision ordinances or regulations or a code of ethics, which violation is not merely technical or of a minimum nature.

6) **HELPFUL LINKS**
- South Carolina Medicaid Fraud Program
- South Carolina DHHS