

**American Health Lawyers Association**

**Fraud and Abuse Practice Group**

**SUMMARY OF FRAUD AND ABUSE STATUTES & REGULATIONS**

**NEW HAMPSHIRE**

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[\*\*ANTI-KICKBACK\*\*<sup>†</sup>](#)

**False Claims Act: N.H. Rev. Stat. Ann. § 167:61-a(I)(i-j)**

It is a criminal offense to knowingly solicit or receive any remuneration, including any bribe or rebate, directly or indirectly, overtly or covertly, in cash or in kind (1) in return for purchasing, leasing, ordering or arranging for or recommending the purchase, lease,

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\* The author wishes to thank Foley Hoag LLP summer associate Nell Richmond for her invaluable contributions to this summary.

† The New Hampshire law concerning the prohibition of kick-backs is located in N.H. Rev. Stat. Ann. 167 of the Revised Statutes Annotated which addresses public assistance to blind, aged, or disabled persons, and to dependent children. Section 61-a of Chapter 167, which addresses kickbacks, is referred to as the state's "False Claims Act."

or ordering of any good, service, accommodation, or facility; or (2) as a precondition of admitting or expediting the admission of a patient to a hospital, skilled nursing facility, or intermediate care facility for which payment may be made by the New Hampshire Medicaid Office. Violation of these provisions by a natural person constitutes a class B felony. A violation by any other person is a felony.

<http://www.gencourt.state.nh.us/rsa/html/xii/167/167-mrg.htm>

It is a criminal offense to knowingly offer or pay any remuneration, including any bribe or rebate, directly or indirectly, overtly or covertly, in cash or in kind, to induce a person to purchase, lease, order, or arrange for or recommend the purchase, lease, or ordering of any good, service, accommodation, or facility for which payment may be made by the New Hampshire Medicaid Office. Violation of these provisions by a natural person constitutes a class B felony. A violation by any other person is a felony.

<http://www.gencourt.state.nh.us/rsa/html/xii/167/167-mrg.htm>

**Pharmacists and Pharmacies: N.H. Rev. Stat. Ann. § 318:1, § 318:16-a, § 318:55**

It is a criminal offense for either the attending practitioner or the pharmacist in a collaborative pharmacy practice agreement to seek to gain personal financial benefit by participating in any incentive-based program that influences or encourages therapeutic or product changes or the ordering of tests or services. “Collaborative pharmacy practice” means the practice of pharmacy where one or more pharmacists jointly agree to work in conjunction with one or more attending practitioners under written protocol whereby the collaborating pharmacist or pharmacists may perform medication therapy management authorized by the attending practitioner or practitioners under certain specified conditions and limitations. Any person who violates these provisions may be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person. In addition, the New Hampshire Pharmacy Board may impose a civil penalty not to exceed \$5,000 per violation upon any person who willfully or repeatedly violates these provisions.

<http://www.gencourt.state.nh.us/rsa/html/xxx/318/318-mrg.htm>

**Price of Filling Prescriptions: N.H. Rev. Stat. Ann. § 318:47-h**

A pharmacy benefits manager or insurer shall require a contracted pharmacy to charge an enrollee or insured person the pharmacy’s usual and customary price of filling the prescription or the contracted copayment, whichever is less. This provision shall take effect January 1, 2009.

<http://www.gencourt.state.nh.us/legislation/2008/HB1230.html>

**Commercial Bribery: N.H. Rev. Stat. Ann. § 638:7**

It is an unlawful commission of commercial bribery for any person, including health care providers and other members of the health community, to hold himself out to the public as being engaged in the business of making a disinterested selection, appraisal or criticism of goods or services while simultaneously soliciting, accepting, or agreeing to accept any benefit to influence his selection, appraisal or criticism. Depending on the value of the benefit, commercial bribery may constitute (1) a class A felony (more than \$1,000); or (2) a class B felony (more than \$500 but not more than \$1,000); or (3) a misdemeanor (\$500 or less).

<http://www.gencourt.state.nh.us/rsa/html/lxii/638/638-7.htm>

**Insurance Companies and Agents: N.H. Rev. Stat. Ann. § 402:39, § 402:42**

No insurance company, by itself or another, and no insurance agent, solicitor, or broker, personally or by another, shall offer, promise, allow, give, sell or purchase, set off or pay, directly or indirectly, as inducement to insurance or in connection therewith, (1) any rebate of or part of the premium payable on any policy or of the agent's commission thereon on any risk in New Hampshire; or (2) any earnings, profits, dividends or other benefit, founded, arising, accruing, or to accrue on such insurance or therefrom; or (3) any stocks, bonds, securities, or property; or, except as promised or provided for in the policy contract, (4) any other thing of value whatever. Violations of these provisions may result in (1) a fine of not more than \$2,500; or (2) license suspension or revocation; or (3) both.

<http://www.gencourt.state.nh.us/rsa/html/xxxvii/402/402-39.htm>

**PROHIBITIONS ON FEE SPLITTING**

**Pharmacists and Pharmacies: N.H. Rev. Stat. Ann. § 318:1, § 318:29(V)(h)**

The New Hampshire Pharmacy Board may suspend or revoke a pharmacy permit or registration if the pharmacy or one of its pharmacists has participated in fee splitting for professional services. "Fee splitting" means any discount, rebate, dividend, shared income, or economic benefit from the sale of prescription medicine by a pharmacist or pharmacy with an individual licensed to prescribe medicine or such individual's spouse or dependent children.

<http://www.gencourt.state.nh.us/rsa/html/xxx/318/318-mrg.htm>

**FALSE CLAIMS**

**False Claims Act: N.H. Rev. Stat. Ann. § 167:61, *prospective repeal effective Jan. 1, 2010***

It is a civil offense for a Medicaid provider to (1) make or cause to be made or present or cause to be presented for payment or approval any claim upon or against the department of health and human services or upon any funds administered by the department, knowing or having reason to know such claim to be false, fictitious or fraudulent; or (2) make any false document which [the provider] does not believe to be true for the purpose of obtaining or aiding another to obtain the payment or approval of such claim; or (3) enter into any written agreement, combination or conspiracy to defraud the department by obtaining the payment or approval of any false, fictitious or fraudulent claim; or (4) participate in any combination of the above. Recovery for violation of these provisions may include restitution of the amount of excess benefits or payments made; interest; and punitive damages in an amount which is the greater of three times the amount of such excess benefits or payments, or \$2,000 for each false claim for assistance, benefits or payments, or \$2,000 for each document submitted in support of such false claim. The recoveries provided in this section shall be in addition to and not in lieu of any criminal penalties that may be provided by law. These provisions will remain in effect until 2010 and operate in accordance with § 167:61-b which was passed in 2005.

<http://www.gencourt.state.nh.us/rsa/html/xii/167/167-mrg.htm>

**False Claims Act: N.H. Rev. Stat. Ann. § 167:61-b**

It is a civil offense for a Medicaid provider to (1) knowingly present or cause to be presented to the department of health and human services a false or fraudulent claim for payment or approval; or (2) knowingly make, use, or cause to be made or used, a false record or statement to get a false or fraudulent claim paid or approved by the department; or (3) conspire to defraud the department by getting a false or fraudulent claim allowed or paid; or (4) have possession, custody, or control of property or money used, or to be used, by the department and, intending to defraud the department or willfully to conceal the property, deliver, or cause to be delivered, less property than the amount for which the person receives a certificate of receipt; or (5) knowingly make, use, or cause to be made or used, a false record or statement to conceal, avoid, or decrease an obligation to pay or transmit money or property to the department; or (6) fail to disclose to the department within a reasonable time after discovery, that the provider is the beneficiary of an inadvertent submission of a false claim. Any person who violates this provision shall be liable to the state for a civil penalty not less than \$5,000 and not more than \$10,000, plus three times the amount of damages that the state sustained as a result of the unlawful act.

<http://www.gencourt.state.nh.us/rsa/html/xii/167/167-mrq.htm>

**False Claims Act: N.H. Rev. Stat. Ann. § 167:61-a(I)(a-e), § 167:61-a(II)**

It is a criminal offense to knowingly make, present or cause to be made or presented, with intent to defraud, any false or fraudulent (1) claim for payment for any good, service or accommodation; or (2) statement or representation for use in determining rights to benefits or payments; or (3) report or filing which is or may be used in computing or determining a rate of payment for goods, services, or accommodations; or (4) any claim for payment for any good, service or accommodation, which is not medically necessary in accordance with professionally recognized standards; or (5) any wholly or partially false or fraudulent book, record, document, data, or instrument which is required to be kept or which is kept as documentation for any good, service or accommodation for which payment may be made by the New Hampshire Medicaid Office. Violation of these provisions by a natural person constitutes a class B felony. A violation by any other person is a felony.

<http://www.gencourt.state.nh.us/rsa/html/xii/167/167-mrq.htm>

**Health Carrier Disclosure of Third Party Liability: N.H. Rev. Stat. Ann. § 167:4-b**

“Health carrier” means a health carrier as defined in RSA 420-G:2 and any health insurer; administrator of self-insured plans, group health plans, as defined in section 607(1) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. section 1167 (1), and service benefit plans; any third party administrator of health benefits, provider of health benefits under an ERISA plan, or provider of health benefits under a self administered plan; health management organizations, health service corporations, managed care organizations, pharmacy benefit managers, or other parties that are, by statute, contract, or agreement, legally responsible for payment of a claim for a health care item or service. This provision shall take effect on September 5, 2008.

<http://www.gencourt.state.nh.us/legislation/2008/SB0319.html>

**Unfair Insurance Trade Practices: N.H. Rev. Stat. Ann. § 417:4(VI), § 417:13**

It is unlawful for any insurance company to knowingly (1) make any false entry in any book, report, or statement of any insurer; or (2) mislead any public official to whom such insurer is required by law to report, or who has authority by law to examine into its

condition or into any of its affairs; or (3) omit to make a true entry of any material fact pertaining to the business of such insurer in any book, report or statement of such insurer. The New Hampshire insurance commissioner may suspend, revoke, or refuse to renew the license of any person who violates a cease and desist order. The commissioner in the commissioner's discretion, in addition to or in lieu of such suspension, revocation, or refusal to renew, may impose upon that person an administrative penalty of not more than \$2,500 for each method of competition, act, or practice found to be in violation of these provisions.

<http://www.gencourt.state.nh.us/rsa/html/xxxvii/417/417-mrg.htm>

## **SELF-REFERRAL**

### **Public Health General Provisions: N.H. Rev. Stat. Ann. § 125:25-a, § 125:25-b**

Any health care practitioner who has an ownership interest in an entity which provides diagnostic or therapeutic services, or receives remuneration for referral of a patient to an entity which provides such services, shall disclose such interest to any patient prior to referring the patient to such entity. This information must be disclosed to the patient on a written referral containing the following statement written conspicuously on its face:

The referring health care practitioner maintains an ownership interest in the facility to which you are being referred. You are not required to utilize the facility to which you are being referred for these services. These services may be available elsewhere in the community. This office will provide an alternative referral upon your request.

Failure to provide written disclosure of an ownership interest may result in suspension of one's professional license or registration. This provision does not apply to in-office diagnostic services. A "health care provider" means any person licensed or registered as a health care provider in the state of New Hampshire. "Ownership interest" means any and all ownership interest by a health care practitioner or such person's spouse or child. Ownership interest does not include ownership of investment securities purchased by the practitioner on terms available to the general public and which are publicly traded.

<http://www.gencourt.state.nh.us/rsa/html/x/125/125-mrg.htm>

### **Relevant case law:**

*Heritage Home Health, Inc. v. Capital Region Health Care Corp.*, 1996 U.S. Dist. LEXIS 22387 (D.N.H. Oct. 1, 1996)

The district court held that §125:25-b is intended to prevent patients from making uninformed decisions about the receipt of medical care but found that the statute does not provide a private right of action to health care providers who have been victims of anticompetitive activity in violation of §125:25-b. The court noted that enforcement of the statute is intended to be executed through disciplinary action by the department of public health services.

### **Public Health General Provisions: N.H. Rev. Stat. Ann. § 125:25-c**

Any health care practitioner who has an ownership interest in an entity which provides diagnostic or therapeutic services shall disclose such interest to the appropriate licensing authority regardless of whether any referrals are provided to the health care

practitioner's entity or any other entity. Disclosure of ownership shall be made upon application for and renewal of the health care practitioner's license. Failure to report such ownership interest may result in disciplinary action by the licensing authority.

**Workers' Compensation: N.H. Rev. Stat. Ann. § 281-A:23(IV)**

"Health care providers shall not refer an injured worker for medical care or related services to any other health care provider, organization, association, corporation, partnership, or group practice in which the referring health care provider or any member of its professional association or group practice has a financial or ownership interest unless the referral is ethically appropriate and medically indicated. The commissioner shall confirm in writing that an exception is authorized for the welfare of the specific injured worker." This provision "shall not affect emergency situations, referrals from a specialist to a subspecialist, referrals from a health care provider to a specialist in another field, or referrals from a primary care practitioner to a specialist."

<http://www.gencourt.state.nh.us/rsa/html/xxiii/281-a/281-a-23.htm>

**Pharmacists and Pharmacies: N.H. Rev. Stat. Ann. § 318:29(V)(i)**

The New Hampshire Pharmacy Board may suspend or revoke a pharmacy permit or registration upon discovery that an individual licensed to prescribe medicine, or a corporation, professional association or partnership consisting of such prescriber or prescriber's immediate family members has any ownership or control of an ownership interest in that pharmacy. This provision does not apply to (1) corporations that are expressly exempt from income taxation under § 501(c)(3) of the United States Internal Revenue Code; or (2) ownership of investment securities purchased by the practitioner on terms available to the general public and which are publicly traded; or (3) the ownership or control of an ownership interest of an institutional pharmacy operated within the state by or for hospitals.

<http://www.gencourt.state.nh.us/rsa/html/xxx/318/318-mrg.htm>

## **UNFAIR BUSINESS PRACTICES**

**Physicians and Surgeons: N.H. Rev. Stat. Ann. § 329:24**

It is unlawful for anyone who is not licensed or otherwise authorized according to the laws of New Hampshire, to advertise themselves as practicing medicine, or practice medicine, or in any way hold himself out as qualified to do so. Violation of these provisions constitutes a class A misdemeanor for all natural persons, and a felony for any other person.

<http://www.gencourt.state.nh.us/rsa/html/xxx/329/329-mrg.htm>

**Regulation of Business Practices for Consumer Protection: N.H. Rev. Stat. Ann. § 358-A:2, § 358-A:6**

It is unlawful for any person to use any unfair method of competition or any unfair or deceptive act or practice, V including (1) causing confusion or misunderstanding as to the source, approval, or certification of goods or services; (2) representing that goods or services are of a particular standard or quality; and (3) disparaging the services or business of another by false or misleading representation of fact, in the conduct of any trade or commerce within the state of New Hampshire. Violation of this provision constitutes a misdemeanor for all natural persons, and a felony for any other person.

<http://www.gencourt.state.nh.us/rsa/html/xxxi/358-a/358-a-mrg.htm>

**Pharmacists and Pharmacies: N.H. Rev. Stat. Ann. § 318:40, § 318:55**

It is unlawful to (1) engage in the practice of pharmacy without first being licensed by the New Hampshire Pharmacy Board; or (2) impersonate a pharmacist or falsely claim to be a pharmacist; or (3) exhibit within or outside any store, or include in any advertisement, the words “drug store”, “pharmacy”, “apothecary”, “drug”, “drugs”, “medicine”, or “medicine shop”, or any combination of these terms or other words indicating that such store is a place where medicines are compounded or sold; or (4) exhibit within or without a place of business any “show bottle or globe of colored glass or globe filled with colored liquid which creates the impression that prescription drugs are being offered for sale.” Any person who violates these provisions may be guilty of a misdemeanor if a natural person, or guilty of a felony if any other person. In addition, the New Hampshire Pharmacy Board may impose a civil penalty not to exceed \$5,000 upon any person who willfully or repeatedly violates these provisions.

<http://www.gencourt.state.nh.us/rsa/html/xxx/318/318-mrg.htm>

**Health Maintenance Organizations: Prohibited Practices: N.H. Rev. Stat. Ann. § 420-B:12, § 420-B:13**

No health maintenance organization, or representative thereof, may cause or knowingly permit the use of advertising which is untrue or misleading, solicitation which is untrue or misleading, or any form of evidence of coverage which is deceptive. If a health maintenance organization violates any of these provisions, the New Hampshire insurance commissioner may, in his discretion, pursue any one or more of the following courses of action: (1) suspend or revoke the certificate of authority to operate as a health maintenance organization under this chapter; (2) impose a penalty of not more than \$2,500 for each and every unlawful act committed; (3) issue an administrative order requiring the health maintenance organization to cease or modify inappropriate conduct or practices; (4) apply to any court for such legal or equitable relief as the commissioner deems appropriate.

<http://www.gencourt.state.nh.us/rsa/html/xxxvii/420-b/420-b-mrg.htm>

**WHISTLEBLOWER PROTECTIONS**

**Whistleblowers’ Protection Act: N.H. Rev. Stat. Ann. § 275-E:2, § 275-E:4**

Employers are prohibited from discharging, threatening, or otherwise discriminating against any employee regarding such employee’s compensation, terms, conditions, location, or privileges of employment because the employee, in good faith, verbally or in writing (1) reported or caused to be reported what the employee had reasonable cause to believe was a violation of a local, state or federal law or rule; or (2) participated in an investigation conducted by any governmental entity concerning allegations that the employer violated a local, state or federal law or rule. This protection is only available to an employee if the employee first brought the alleged violation to the attention of a supervisor, and then “allowed the employer a reasonable opportunity to correct that violation, unless the employee had specific reason to believe that reporting such a violation to his employer would not result in promptly remedying the violation.” If an employer violates these provisions, the employee may obtain a hearing with the commissioner of labor, or a designee, and shall be awarded damages that the commissioner or designee considers appropriate consisting of reinstatement of the employee, payment of back pay, fringe benefits and seniority rights, any appropriate injunctive relief, or any combination of these remedies.

<http://www.gencourt.state.nh.us/rsa/html/nhtoc/nhtoc-xxiii-275-e.htm>

**Relevant Case Law:**

*Appeal of Northeast Rehab. Hosp.*, 816 A.2d 970 (N.H. Sept. 24, 2003)

The Supreme Court of New Hampshire found that Rev. Stat. Ann. 275-E applies only to persons who are employees at the time that they report an employer's violation of law. Accordingly, the court found that the statute did not protect an occupational therapist who, during a temporary lapse in employment, reported that other occupational therapists at the hospital were conducting medical procedures outside the scope of their expertise.

**Unfair Insurance Trade Practices: N.H. Rev. Stat. Ann. § 417:28**

Any person or entity regulated under title XXXVII which has reason to believe that an insurance fraud or insurance-related criminal activity has been committed shall make a report to the unit within 60 days or within a shorter period under such circumstances as the commissioner may prescribe by rule. No waiver of any such regulated person's or entity's applicable privilege or claim of confidentiality in the documents, materials or information shall occur as a result of such disclosure to the unit. Such report shall be made on a form prescribed by the unit and shall contain the information requested and such additional information as the unit may require. In the absence of fraud or malice, no public official or insurance company or person who furnishes information on behalf of the insurance company shall be liable for damages in a civil action or subject to criminal prosecution for any oral or written statement made or any other action taken that is necessary to supply information required.

<http://www.gencourt.state.nh.us/rsa/html/xxxvii/417/417-mrg.htm>

**HELPFUL LINKS**

New Hampshire Medicaid Fraud Unit:

<http://doj.nh.gov/medicaid/index.html>

New Hampshire State Board of Medicine:

<http://www.nh.gov/medicine/>

New Hampshire Department of Health and Human Services:

[http://www.dhhs.state.nh.us/DHHS/DHHS\\_SITE/default.htm](http://www.dhhs.state.nh.us/DHHS/DHHS_SITE/default.htm)

New Hampshire Attorney General:

<http://doj.nh.gov/>

New Hampshire Courts:

<http://www.courts.state.nh.us/>

New Hampshire Board of Pharmacy:

<http://www.nh.gov/pharmacy/>

New Hampshire Insurance Department:

<http://www.nh.gov/insurance/>