The Changing Landscape of Sales Compensation in the Lab Industry

by
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Medical Laboratory Observer published one of my articles in their 2016 March issue entitled "Lab Sales Compensation." The content consisted of answers to numerous questions upper management might ask regarding common pay practices for field reps.

More than 2.5 years after *MLO* published that article, Congress passed a new law called Eliminating Kickbacks in Recovery Act of 2018 (EKRA), which became effective October 24, 2018. This EKRA Law is part of Section 8122 of the SUPPORT Act—a combination of more than 70 bills aimed at fighting the opioid epidemic. Specifically, EKRA addresses patient brokering in exchange for kickbacks of individuals with substance abuse disorders. However, as written, EKRA is far more expansive. It affects *all* clinical laboratories, irrespective if the lab performs drug testing.

Surprise, Surprise!
It may be astonishing to know that the initial version of the bill entitled "Opioid Crisis Response Act" (passed in the Senate on 9/17/18) did *not* include laboratories. The "laboratory" designation was thrown into EKRA at the last minute. "It did not go through regular order and was not properly vetted....", according to Congressman Frank Pallone, Jr of New Jersey's 6th Congressional District.

This eleventh-and-three-quarter-hour entry turned the lab reference testing business on its head.

Taking a Step Back
To fully understand the relevance of the EKRA law, one needs to be reminded of the federal Anti-Kickback Statute (AKS) proclamation that prohibits improper remuneration in return for referring an individual or purchasing, leasing, ordering, or arranging for or recommending purchasing, leasing, or ordering any good, facility, service, or item directly

or indirectly reimbursable by a federal healthcare program. The Office of Inspector General (OIG) for the Department of Health and Human Services (DHS) imposes a broad interpretation of the AKS and has taken the position that a pure marketing relationship to generate federal health care program business would be a violation. However, compliance with the regulatory criteria under the Bona Fide Employee safe harbor has been heavily relied upon in the healthcare industry to permit commission payments to sales personnel based on the generation of federal health care program business. Naturally, most all labs have based sales rep commissions rooted in sales volume in a bifurcated manner: (a) rewarding account maintenance and (b) gaining new accounts (including up-sell business).

EKRA: Setting New Parameters

The EKRA Law makes two declarations that disrupts the time-honored method of compensating salespeople:

1. It states that *all* payers—public and private—are subject to the anti-kickback rule to the health care fraud laws concerning improper remuneration for patient referrals to, or in exchange for an individual using the service of, a recovery home, clinical treatment facility, or clinical laboratory. In essence, the new law lacks the exceptions and safe harbors that have heretofore applied to the AKS. The EKRA language authorizes the government to monitor provider arrangements intended to generate business for *any* laboratory services—not only those related to individuals in treatment for substance abuse disorders that are payable by a federal healthcare program *or* commercial health insurer.
2. Payment arrangements to sales personnel must now meet three criteria in order to be compliant with EKRA. The commission payment cannot be determined or vary by:
    a. The number of individuals referred;
    b. The number of tests or procedures performed; or
    c. The amount billed or received

Penalties

EKRA is a criminal statute, and the penalties can be austere—up to a $200,000 fine, up to 10 years imprisonment, or both, per occurrence. Given that there has been no major enforcement nor guidance issued by the Department of Justice (DOJ) or DHS, the risk of enforcement seems relatively low for most reference labs that have strong sales compliance programs and management oversight.

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Alternatives

Historically, it was relatively straightforward to evaluate test volumes and/or lab receivables in relation to an established territory sales budget (e.g., using prior monthly, quarterly or yearly figures). For account up-sells, it was the only way to accurately compute significant additional business from a customer. EKRA guidelines, however, create a dead end for that precise calculation.

Many laboratories have decided to ignore the EKRA Law. But there are those that have decided to accept it.

Examples are to compensate bona fide W-2 reps a base salary (with annual adjustments), plus (e.g., monthly or quarterly) variable compensation based on:

1. The number of prospective new accounts visited that include a "material client engagement" (phone, video, in-person).
2. The number of activated new accounts (irrespective of specimen volume/revenue)
3. No accounts lost
4. Use and completeness of a Client Relationship Management (CRM) tool
5. Number of current clients visited (service calls)
6. Maintain/improve territory profitability
7. Avoid/reduce delinquent account balances
8. Avoid/reduce medical necessity denials
9. Customer satisfaction survey results
10. A quarterly (or 6-month or yearly) discretionary bonus determined by the CEO or COO

Obviously, there would need to be specific definitions, explanations, and financial rewards associated with the above criteria. Many of the points create more storm and stress for those responsible for calculating variable compensation. In addition—with some of the suggestions—a lab's IT Department will have to maintain robust programing capabilities.

Another way to avoid the three-legged EKRA Law is for lab administration to evaluate the previous year's total commissions for each field person. Dependent on the individual's base salary, if previous variable payments equaled in the neighborhood of half of a rep's base compensation, management could add that average to construct a new yearly wage (and may also offer a bonus program based on a discretionary money pool). The company's position is that now it bears a financial risk of poor performance. Understandably, this no-commission design may collide with self-motivation, meaning that no (or minimal) new business could impact losing one's job. As a side note, this author was under a no-commission plan for nine years when first hired to market lab testing services. However, he performed well enough in the field to get promoted twice and receive commendable yearly written reviews concomitant with merit raises.

With respect to 1099 reps, the EKRA law does not exclude this group. This makes things more sensitive with this type of salesperson, because they are predominantly dollar-driven ("you eat what you kill"). Independent 1099 reps are not favored by the federal government because of past widespread abusive practices and the lack of adequate control and supervision. However, if a lab hires such an individual, it should make the representative sign a one-year written contract that describes a fixed fee set in advance, in addition to specifying a schedule of services.

Other Potentially Problematic Arrangements

While this paper focuses on sales compensation with respect to EKRA, there are additional problematic areas that may involve salespeople and, certainly, upper management.

1. Leasing space in a physician's office. While some states already prohibit this practice, both AKS and Stark create exceptions for labs to make legitimate arrangements to lease space in referring physicians' offices. EKRA, however, does not include any such exception or safe harbor.
2. Accountable Care Organizations (ACOs) Participation Agreements. Many labs have taken advantage of current federal waivers to AKS that permit labs to enter into participating agreements with ACOs. However, the federal waiver does not include EKRA, which brings uncertainty on the legality of existing lab/ACO participation agreements.

The Future

When Congress passed the EKRA Law in late 2018, immediate outbursts by the lab testing industry zipped through the communication highway of e-mails, texts, phone calls and written articles. Most considered there would be instantaneous rebuttals by labs and industry organizations to get certain guidelines and questions clarified and to spur swift revisions. Afterall, this was a stunning proclamation that appeared as an insouciant thought at the last minute. Now, it seems that the DOJ and Congress are staring at each other—waiting for the other to say something.

So, here we are. Nothing has changed thus far with the EKRA Law. There remain many "ifs."

- If Congress (or the DOJ) will make further clarifications
- If Congress will revise any part of the law
- If so, when
- If a lab has not made the transition, and they choose to do so, it's not too late to implement an EKRA-compliant sales compensation plan
- If a lab decides to make changes, decisions rest with what incentive components to implement and how much money to ascribe to each one

Something to Ponder

If the original time-honored commission plan of evaluating lab rep performance based on test volume and/or value should ever become reality again, it begs the question: Will labs still incorporate into their commission plans (or yearly evaluations) any extra considerations that have been wrought from the EKRA Law? It could be this law may have produced several adscititious sales incentives that management may feel important enough to integrate when assessing the performance of their field personnel.

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