

## Insights

### Does Wining and Dining EHR Prospects Trigger False Claims Act Liability?

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Athenahealth, Inc. (“Athena”), an electronic health records (“EHR”) vendor, recently paid \$18.25 million to settle allegations that it violated the False Claims Act by using extravagant gifts to persuade prospects to buy its electronic medical record system. In its **Complaint**, the government did not allege that the system sold by Athena was defective or that health care providers that implemented it failed to use the technology in a meaningful way. Instead, the government asserted that the lavish gifts and payments Athena used to boost sales violated the Anti-Kickback Statute and tainted all claims submitted by the providers for incentive payments and enhanced Medicare Payments related to use of certified electronic health record systems.

The Department of Justice (DOJ) believed that Athena’s use of gifts and direct payments corrupted the selection process for EHR systems that were later used by health care providers to obtain federal incentive payments and enhanced Medicare reimbursement.

The DOJ’s **press release** accompanying the settlement contained the following quotations from government agents and officials:

“This resolution demonstrates the department’s continued commitment to hold EHR companies accountable for the payment of unlawful kickbacks in any form. EHR technology plays an important role in the provision of medical care, and it is critical that the selection of an EHR platform be made without the influence of improper financial inducements.”

“Across the country, physicians rely on electronic health records software to provide vital patient data. Kickbacks corrupt the market for health care services and risk jeopardizing patient safety. We will aggressively pursue organizations that fail to play by the rules; EHR companies are no exception.”

“If the benefits of Electronic Health Records are to be fully realized, patients must be confident providers have selected the most effective system – not the one paying the largest kickbacks. Time and again, we’ve seen fraudulent activity undermine the integrity of medical decisions, subvert the health marketplace, and waste taxpayer dollars. We will continue to hold accountable those who provide illegal incentives in order to influence the decision-making of health care providers.”

“It is illegal for companies to extend invitations to all-expense-paid sporting, entertainment, and recreational events, and other perk-filled offers to its prospective customers to win business and boost their bottom line through illegal kickback schemes.”

Athena’s EHR sales force implemented three initiatives that the Department of Justice (DOJ) characterized as illegal kickbacks under the Anti-Kickback Statute. They were:

1. Concierge Events Program – Athena provided existing and potential clients with all-expense paid trips to various sporting, entertainment, and recreational events that totaled hundreds of executives, physicians, and other decision makers in an effort to influence the purchase of Athena’s EHR technology.
2. Client Lead Generation Program – Athena incentivized existing clients to recruit new clients by paying for successful referrals to purchase Athena’s EHR technology.
3. Conversion Deals Program – Athena executed deals with competitor companies that had opted to discontinue their health information technology products and paid the competitor companies to transition their client base to Athena’s EHR products.

The DOJ did not allege that Athena itself ever made any claim directly to the federal government. Instead, the DOJ pointed to an amendment Congress made to the Anti-Kickback Statute in 2010. That amendment states that any claim that includes items or services resulting from a violation of the Anti-Kickback Statute constitutes a false or fraudulent claim under the False Claims Act. **42 U.S. Code § 1320a–7b(g)**. This would appear to be a fairly aggressive use of the Anti-Kickback Statute and the False Claims Act. The federal government does not purchase or directly pay for EHR technology. It made incentive payments for providers who adopted EHR and it currently enhances reimbursement for providers who are utilizing EHR in the manner prescribed by the government.

The case is one of a handful of cases in which the DOJ has asserted False Claims Act violations against developers of certified electronic health record technology. It remains to be seen whether the scope of such cases will expand in light of the recently promulgated Information Blocking and Interoperability rules. Alleged damages in such cases can be staggering and developers will need to consider adopting prudent compliance programs related to the marketing and sales of systems.

If you have any questions or would like additional information regarding the Athena settlement and its impact on EHR developers and consumers of their products, please contact **Robert A. Anderson** or **Marc T. Quigley**.

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