

# Developments Regarding Commission-Based Compensation Arrangements with Independent Contractors

**Health Care Law Brief Blog** on April 7, 2021

A recent Fourth Circuit decision, *United States v. Mallory* (988 F.3d 730), upheld damages and penalties for more than \$100 million for violations of the Anti-Kickback Statute ([42 U.S.C. § 1320a-7b\(b\)](#)) (the “AKS”) and the False Claims Act ([31 U.S.C. § 3729](#)) by a blood testing laboratory and its contracted sales agents. The Court held that commission payments made by the laboratory to its sales agents (sales companies that, in turn, hired and contracted salespeople to sell the laboratory blood tests), which were based on the percentage of revenue the sales agents generated for the laboratory through marketing services, constituted improper “remuneration” that intended to induce the sales agents to sell as many laboratory tests as possible. The defendants failed to show that the arrangements fit within an AKS Safe Harbor.

Courts and the Department of Health and Human Services Office of the Inspector General (the “OIG”) have frequently addressed whether commission-based payments to independent contractors violated the AKS. The OIG has long advised that applicable providers and suppliers make all commission-based salespeople bona fide employees. But given the common industry practice of outsourcing or contracting with third party sales agents, the OIG and Courts have addressed the arrangements with mixed results.

The only safe harbor these arrangements would be eligible for is the Personal Services Arrangements Safe Harbor. Historically, however, these arrangements would be disqualified because commission-based payments, by their nature, vary with the value and volume of referrals or other business generated.

The new AKS Safe Harbor Regulations published in its [Final Rule](#) on December 2, 2020 with an effective date of January 19, 2021, however, created a potential opportunity for commission-based payments to fall within the Personal Services Arrangements Safe Harbor. Notably, the new Personal Services Arrangements Safe Harbor requires not that the aggregate compensation not take into account volume or value of referrals or other business generated (as historically was the case), but that the *methodology for determining the compensation* not do so. The OIG, in both the [Proposed Rule](#) and Final Rule commentary and preamble of the new AKS Safe Harbor Regulations, clearly stated it did not intend on protecting arrangements that varied with the volume or value of referrals, but a plain reading of the new Personal Services Arrangements Safe Harbor appears to indicate otherwise.

While the *Mallory* opinion was issued after the effective date of the new AKS Safe Harbor Regulations on February 22, 2021, the actions in question occurred prior to the publication and effective date of the new AKS Safe Harbor Regulations. Additionally, the *Mallory* case contained particularly bad facts including, among other things, direct payments to physicians by the sales agents for the processing and handling of blood draws for the laboratory tests. However, the Court found the Government's arguments regarding commission-based payment to independent contractors compelling and held that such arrangements should be scrutinized. Volume-based payment arrangements with independent contractors may be possible under the ASK, but caution should be heeded until additional guidance is provided.

[View Original](#)

[Related Professionals](#)

---

- **Edward S. Kornreich**