S T A T E O F T E N N E S S E E
OFFICE OF THE
ATTORNEY GENERAL
PO BOX 20207
NASHVILLE, TENNESSEE 37202

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Opinion No. 13-51

Donations of Electronic Health Records Software

QUESTIONS

1. If a clinical laboratory licensed by the State of Tennessee pays money to an electronic medical records software company so that the company may license and install electronic health record software and furnish related products and maintenance services for a specific physician practice that may refer clinical specimens to the donating medical laboratory company for medical laboratory examinations, does such arrangement violate Tenn. Code Ann. § 68-29-129(7)?

2. May a clinical laboratory licensed by the State of Tennessee lawfully make a direct or indirect monetary donation to or for the benefit of a physician's practice in another state in which such donation is permitted in order to cover the cost of software designed to manage the out-of-state physician's Electronic Health Records ("EHR"), where the physician who receives the EHR donation either continues an existing referral arrangement with the donating laboratory or subsequently initiates an arrangement for referral of specimens to the donating laboratory for analysis?

OPINIONS

1. Yes. As explained in Tenn. Att'y Gen. Op. 13-16 (Mar. 4, 2013), Tenn. Code Ann. § 68-29-129(7) prohibits a medical laboratory licensed in Tennessee from soliciting any referral of specimens to any medical laboratory or from contracting to perform medical laboratory examinations of specimens "in a manner that offers or implies an offer of rebates to a person or persons submitting specimens, other fee-splitting inducements, participation in any fee-splitting arrangements, or other unearned remuneration." This prohibition would extend to the factual situation described in this question.

2. Yes, so long as the donation does not benefit any practice the physician has in Tennessee.

ANALYSIS

1. The Tennessee Medical Laboratory Act ("TMLA"), codified at Tenn. Code Ann. §§ 68-19-101 to -138, provides that it is a violation of the TMLA for any person to

> [s]olicit the referral of specimens to such person's or any other medical laboratory or contract to perform medical laboratory examinations of specimens in a manner that *offers or implies an offer of rebates* to a person or persons submitting specimens, other fee-splitting inducements, participation in any fee-splitting arrangements, *or other unearned remuneration*.

Tenn. Code Ann. § 68-29-129(7) (emphasis added).

This Office has previously opined that this provision of the TMLA "would prohibit a licensed medical laboratory from making any monetary donation to a physician to cover the cost of software designed to manage the physician's electronic health records (EHR) when the physician's office that receives the EHR donation either continues an existing referral arrangement with the donating laboratory or subsequently initiates an arrangement for referral of specimens to the donating laboratory for analysis." Tenn. Att'y Gen. Op. 13-16 at 1-2 (Mar. 4, 2013). The question posed essentially asks if the laboratory can do indirectly what Tenn. Code Ann. § 68-29-129(7) prohibits to be done directly; i.e. pay the EHR software company to license and install EHR software for a physician's office that will either continue an existing referral arrangement with the laboratory or initiate an arrangement for referral of specimens to the laboratory for analysis. The statute is sufficiently broadly worded to prevent both direct and indirect inducements since its terms prohibit any "implied" offer of rebate or any "other unearned remunerations" by the laboratory to the physician's office. Tenn. Code Ann. § 68-29-129(7). *See, e.g.*, *Haynes v. City of Pigeon Forge*, 883 S.W.2d 619, 622 (Tenn. Ct. App. 1994) (stating it "is a well settled principle of law that one cannot do indirectly what cannot be done directly"). *See also Sallee v. Barrett*, 171 S.W.3d 822, 828 (Tenn. 2005) (quoting *State v. Turner*, 913 S.W.2d 158, 160 (Tenn. 1995)) (recognizing that in construing statutes courts "must seek a reasonable construction in light of the purposes, objectives, and spirit of the statute based on good sound reasoning").

2. The TMLA does not preclude a clinical laboratory licensed by the State of Tennessee from making a monetary donation to or for the benefit of a physician's practice in another state where such donation is permitted in order to cover the cost of software designed to manage the out-of-state physician's EHR, so long as the donation does not benefit any practice the physician may have in Tennessee. In this situation, the TMLA would not prevent the physician's office that receives the EHR donation from either continuing an existing referral arrangement with the donating laboratory or subsequently initiating an arrangement for the referral of specimens to the donating laboratory for analysis.

As this Office explained in its earlier opinion, the federal "safe harbor" rule, which is scheduled to sunset on December 31, 2013, does allow certain medical professionals to receive EHR software donations under defined circumstances without violating the federal anti-kickback statute. Tenn. Att'y Gen. Op. 13-16 at 1-2. However, since the legal authority for the EHR safe harbor does not extend to preempt State anti-kickback laws, by enacting Tenn. Code Ann. § 68-29-129(7) the General Assembly made such conduct illegal in Tennessee and, with certain enumerated exceptions, the TMLA applies to all medical laboratories and medical laboratory personnel within the State of Tennessee. Tenn. Code Ann. § 68-29-104. *See* Tenn. Att'y Gen. Op. 13-16 at 1-2.

The prohibition of Tenn. Code Ann. § 68-29-129(7), however, by its terms only extends to donations by a laboratory operating in Tennessee to a physician practice located in Tennessee. TMLA's purpose is defined as follows:

> to protect the public health, safety, and welfare of *the people of this state* from the hazards of improper performance by medical laboratories. Medical laboratories provide essential services to the patient by furnishing the medical practitioner with vital information that is essential to a determination of the nature, cause, extent, and condition involved, and *the people of this state* are entitled to receive the highest level of competency, reliability, and accuracy that may be expected from medical laboratories. Unreliable and inaccurate reports may cause unnecessary anxiety, suffering, financial burdens, and even contribute directly to death. *It is the intent of this chapter to safeguard the people of this state by regulating the operation of medical laboratories.*

Tenn. Code Ann. § 68-29-102(a) (emphasis added).

The reach of the TMLA is thus necessarily confined to transactions occurring within the borders of Tennessee, given TMLA is intended to safeguard "the people of this state." *Id. See Garrison v. Bickford*, 377 S.W.3d 659, 663 (Tenn. 2012) (quoting *U.S. Bank, N.A. v. Tenn. Farmers Mut. Ins. Co.*, 277 S.W.3d 381, 386 (Tenn. 2009)) (stating rule of statutory construction that courts "must ascertain and give effect to the legislative intent without restricting or expanding the statute's intended meaning"). This limitation also conforms with the federal constitutional full faith and credit clause, which requires each state to give full faith and credit to "the public acts. . . of every other state." U.S. Const. art. IV, § 1. *See Franchise Tax Bd. Of California v. Hyatt*, 538 U.S. 488, 494-99 (2003); *Trustmark Nat. Bank v. Miller*, 209 S.W.3d 54, 56-7 (Tenn. Ct. App. 2006).

ROBERT E. COOPER, JR.
Attorney General and Reporter

WILLIAM E. YOUNG
Solicitor General

SARA E. SEDGWICK
Senior Counsel

Requested by:

The Honorable Reginald Tate
State Senator, 33rd Senatorial District
320 War Memorial Building
Nashville, Tennessee 37243