

Can Physicians Legally Invest in a Startup-Owned Pharmacy?

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By Michael H. Cohen

In today's video, we address whether a physician can legally invest in a pharmacy that is owned by a startup that provides online telehealth services, including diagnosis and prescription based on a questionnaire to its customers.

Hi everyone, I'm Michael H. Cohen, founding attorney of the Cohen Healthcare Law Group. We help healthcare industry clients just like you, navigate healthcare and FDA legal issues so you can grow your healthcare business. In a prior video we said that the proposed venture that we're talking about is legally risky from a variety of standpoints, including the way that telehealth rules in many States tend to require an in-person, good faith exam prior to physician prescribing, and the way regulators can frown upon prescription based solely on an online questionnaire. So, there are risks there depends on how aggressive you want your model to be.

On the pharmacy side, many States do prohibit physicians from owning or investing in a pharmacy. So, that's problematic.

One State that is a little bit unusual in this regard is Texas. In Texas, physicians may own or invest in a pharmacy, as long as the ownership structure fits within the Texas Patient Non-Solicitation Law exceptions. So, we have to look at those.

Now, even with that, physicians have to bear in mind that there is a federal Stark law, which prohibits self-referral; and the federal Anti-Kickback Statute (AKS), which prohibits payment in exchange for referrals for items or services paid for by Federal health care programs. Texas like many states has its own State law prohibitions against self-referral and kickbacks. Wherever you look: New York, California, you'll find those prohibitions.

So, in analyzing the proposed compensation arrangement, one thing physicians and startups should bear in mind is that legal or regulatory trouble can come from a variety of places, including some side doors that one might not expect. For example, many States have, as we know, been reviewing physician investment into compounding pharmacies and looking there for unlawful or medically unnecessary referrals. So, it might be that kind of regulatory activity that triggers legal jeopardy.

Regulators possibly could see, for example, this as an arrangement where physicians are given a financial incentive (also known as an inducement) to refer patients to medications, where the physicians themselves benefit or profit as soon as the patient buys the medicine from the pharmacy where the physician has an ownership interest.

Some of these arrangements, for example, might involve creams to alleviate pain; DNA tests; genetic tests; or referrals to affiliated labs for urine testing, there are lots of different varieties and flavors.

Some States will impose on physicians the requirement of disclosing their ownership or investment or other compensation interest to an entity or in an entity to which they refer patients.

Remember that kickbacks are often defined to involve any remuneration, “direct or indirect.” This is a powerful catch-all, “indirect,” it can be used where the business structure involves multiple entities and a roundabout way of getting compensation to the clinician.

So, it pays to have these innovative business structures well vetted by experienced legal counsel, and we’ve seen many.

Thanks for watching. Feel free to [contact us](#) with your questions or book an appointment. We have helped hundreds and hundreds of healthcare industry clients just like you build their dream. We look forward to working with you on your journey to success!

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