



New Jersey Health Law

Bulletin

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A summary of recent developments provided by the health care law firm *Garfunkel, Wild & Travis, P.C.*

Governor Signs Legislation to Ensure Viability of New Jersey Hospitals

New Jersey Governor Jon S. Corzine recently signed four bills into law that are aimed at preventing the systemic closure of hospitals in New Jersey and ensuring quality care to the public. In this year alone, five acute-care hospitals have closed. The package of laws was drafted in response to the findings and recommendations for improving the fiscal accountability and financial health of the State's hospital industry from the New Jersey Commission on Rationalizing Health Care.

One law will expand training requirements to include all persons serving as members of general hospital board of trustees (the Board). The training program must cover a variety of topics including, but not limited to, the ethical and fiduciary responsibilities of a member, the role of the governing body in improving health care quality and hospital financial management.

A second law requires each general hospital and State psychiatric hospital in New Jersey to conduct annual public meetings for the communities they serve, allowing the community to discuss concerns related to the delivery of health services. At a minimum, the chief

executive officer of the hospital, the chairman of the Board and at least 25% of the members of the Board must be present at the meeting to take questions.

Another law, aimed at protecting uninsured patients, provides that hospitals shall charge a patient who is an uninsured resident of New Jersey and whose family gross income is less than 500% of the federal poverty level, an amount no greater than 15% more than the applicable payment rate under the federal Medicare Program for health services rendered to the patient.

Finally, a law was enacted that authorizes the New Jersey Department

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Third Circuit Refuses to 'Rush In Where Angels Fear to Tread'

The United States Court of Appeals for the Third Circuit recently affirmed the decision of the United States District Court for the District of New Jersey, dismissing, with prejudice, the Plaintiff's case in *DiCarlo v. St. Mary Hospital*. In that case, patients had filed a class action lawsuit against St. Mary Hospital and its affiliates (collectively, the Hospital), alleging breach of contract, breach of the covenant of good faith and fair dealing, unjust enrichment, breach of fiduciary duty and violation of the New Jersey Consumer Fraud Act. These claims stemmed from the

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Joint Commission Issues Standards Aimed at Reducing Disruptive Acts by Hospital Personnel

A July report issued by the Joint Commission (the Commission), which evaluates and accredits more than 15,000 health care organizations and programs in the U.S., concluded that intimidating and disruptive behavior by physicians can "foster medical errors, contribute to poor patient satisfaction

and preventable adverse outcomes, increase the cost of care, and cause qualified clinicians, administrators and managers to seek new positions in more professional environments."

A survey conducted by the Institute for Safe Medication Practices has found that 40% of clinicians have kept quiet or remained passive during physician outbursts rather than question the known intimidator. Health care organizations that ignore these behaviors expose themselves to potential litigation from

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New Jersey Health Law Bulletin is written and edited by Jeffrey S. Brown, Andrew E. Blustein, Steven R. Antico, Alan H. Perzley and Kimberly Kempton-Serra of Garfunkel, Wild & Travis, P.C., Hackensack, NJ. Reader questions are welcomed; the editors can be contacted at 201-883-1030.

Hospitals No Longer Permitted to Bill Medicare for Their Mistakes

Effective October 1, 2008 hospitals are no longer able to bill Medicare for certain results viewed as mistakes. The Institute of Medicine estimates that medical errors cost between \$17 billion and \$29 billion per year, with most of the cost being shifted to outside payers, such as Medicare. The changes in payment reimbursement "will mean that hospitals will not benefit from higher reimbursement for [specific] conditions that were not present at the patient's admission."

The Centers for Medicare & Medicaid Services, in consultation with the Centers for Disease Control and Prevention, created a list of "hospital

acquired conditions," that will not be reimbursed. These conditions include: objects inadvertently left inside a patient after surgery; certain types of falls and trauma; air embolism; blood incompatibility; catheter-associated urinary tract infection; bed sores; vascular catheter-associated infection; chest infections after coronary artery bypass graft surgery; surgical site infections following elective procedures; certain manifestations of poor control of blood sugar levels; deep vein thrombosis or pulmonary embolism following total knee replacement and hip replacement procedures. ■

IRS Releases Final Instructions for Redesigned Form 990

The Internal Revenue Service (IRS) recently released final instructions for its redesigned Form 990 that sets forth reporting requirements that must be filed by tax-exempt organizations, including hospitals and other health care providers. In revising Form 990, the IRS followed three guiding principles – enhancing transparency, promoting tax compliance and minimizing the burden on the filing organization.

Some areas of major change include the reporting requirements associated with tax-exempt governance and compensation of officers, directors, trustees, key employees, and "highest compensated employees." Specifically, tax-exempt organizations completing Form 990 must describe their governance structure, policies and disclosure practices. Along with new definitions of "officer" and "key employee," Form 990 extends reporting of compensation paid to a tax-exempt organization's five highest

compensated individuals and five highest paid independent contractors (beyond charities) to all filing organizations. The reporting threshold for the top five highest compensated employees and independent contractors was also increased from \$50,000 to \$100,000. ■

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employees, as well as patients. Studies by the *Journal of the American Medical Association*, as well as the *American Journal of Medicine*, have linked patient complaints about unprofessional physician behavior and malpractice risks.

The Commission has issued new leadership standards to ensure that health care organizations have a code of conduct that defines acceptable, disruptive and inappropriate behaviors, as well

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Hospital's alleged practice of charging uninsured patients higher rates than those charged to patients with Medicare, Medicaid and insurance or managed care plans that have negotiated discounts with the Hospital.

While the Court was sympathetic to the plight of the Plaintiff, it agreed with the District Court that the Plaintiff was, in effect, asking the District Court to solve the health care crisis in the U.S. In so concluding, Judge Fuentes stated that "[a] court could not possibly determine what a 'reasonable charge' for hospital services would be without wading into the entire structure of providing hospital care and the means of dealing with hospital solvency. These are subjects with which state and Federal executives, legislatures, and regulatory agencies are wrestling and which are governed by numerous legislative acts and regulatory bodies. For a court to presume to address these problems would be rushing in where angels fear to tread." *DiCarlo v. St. Mary's Hosp.* 530 F.3d 255, 264 (3rd Cir. 2008). ■

as implements a process for managing disruptive and inappropriate behavior. The Commission also recommends adopting a "zero tolerance" policy for intimidating and/or disruptive behaviors, implementing a reporting/surveillance system for detecting unprofessional behavior, and instituting a mechanism for responding to patients and/or family members who are involved in or witness such behavior. ■

Proposed Regulations for Emergency Care

The New Jersey Department of Health and Senior Services (DHSS) has proposed new regulations to implement the Health Care Facilities Planning Act (the Act). The Act requires general hospitals and satellite emergency departments (collectively Emergency Health Care Facilities) to provide emergency care and medically and factually accurate and objective verbal and written information about emergency contraception and sexually transmitted diseases to all sexual assault victims. The Act also requires emergency health care facilities to inform sexual assault victims of their option to be provided emergency contraception at the facility. Emergency Health Care Facilities will be required to develop and implement policies and procedures for training personnel who treat victims of sexual assault. The DHSS has also developed a brochure that must be provided to each sexual assault victim.

Outpatient Mental Health Reimbursement

The New Jersey Department of Human Services (the Department) has proposed amendments to the Hospital Service Manual. The amendments would set rates for reimbursement for providers of hospital outpatient mental health/behavioral health services for youth and young adults who are Medicaid and NJ FamilyCare beneficiaries. The proposed amendments also adjust the age standard regarding existing adult mental health services to

include individuals who are 21 years old. The amendments set the basis of reimbursement of services for youth and young adults (meaning those under the age of 21). Comments for the proposed amendments were due October 17, 2008.

Proposed Codey Law Amendments

A proposed bill by the New Jersey Legislature (S787/A1933) (Bill), provides that it would not be improper for a practitioner to make referrals to an ambulatory surgery center (ASC) in which the practitioner or the practitioner's immediate family have an ownership interest, provided certain conditions are met. An ASC licensed by the New Jersey Department of Health and Senior Services prior to the effective date of the Bill would be deemed compliant if (a) the referring practitioner performs the procedure; (b) written disclosure of the referring practitioner's ownership in the facility is made to the patient, as well as notification as to whether the ASC is "in-network" or "out of network;" and (c) there is no relation between the practitioner's compensation as an owner or investor in the ASC and the volume of patient referrals the practitioner makes to the ASC.

Deficit Reduction Act in New Jersey

The New Jersey Department of Human Services has proposed amendments to implement the Federal Deficit Reduction Act of 2005 to address the prevention of fraud, waste and abuse in

the Medicaid program and other Federally funded health care programs. The proposed amendments apply to entities receiving or making payments of at least five million dollars annually under the Medicaid program. The provisions require, among other things, that such an entity establish written policies for all employees (including management), contractors and agents of the entity that "provide detailed information about the Federal False Claims Act...administrative remedies for false claims and statements...any State laws pertaining to civil or criminal penalties for false claims and statements and whistleblower protections under such laws." Entities will also be required to include information regarding those laws in any existing employee handbook as well as and the entity's policies and procedures for detecting and preventing fraud, waste and abuse. Comments of the proposed amendments must be submitted by December 22, 2008. ■

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of Health and Senior Services to monitor hospitals' financial performance and intervene in the management of identified distressed hospitals. Pursuant to the law, a hospital in financial distress would be appointed a monitor to participate in the development and oversight of corrective measures to resolve the distress. ■

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DHSS Proposes Regulations to Implement Trustee Training Program

A new law signed by New Jersey Governor Jon. S. Corzine requires all members of a general hospital's board of trustees to complete a trustee training program (the Program) approved by the Commissioner of Health and Senior Services (the Commissioner). Originally, only those appointed to serve as members after April 30, 2007 had to complete the Program. The law was enacted in response to findings reported by the New Jersey Commission on Rationalizing Health Care Resources and is part of a package of four new laws aimed at ensur-

ing State hospital viability. In consultation with the New Jersey Hospital Association, the Hospital Alliance of New Jersey and the New Jersey Council of Teaching Hospitals, the Commissioner has proposed amendments and new rules to the regulations for implementing the law.

Members appointed after April 30, 2007 would be required to complete the Program within six months of the member's appointment or reappointment to the board of trustees. Members appointed prior to April 30, 2007 would have to complete the Program no later than six months

after the effective date of the law. The law takes effect 180 days after enactment, which is February 4, 2009, and the training must be completed six months thereafter, which is August 4, 2009. The Program must be seven hours in length and cover a variety of topics including: a) the ethical and fiduciary responsibilities of a member of a hospital governing body; b) the role of the governing body in improving health care quality and the mechanisms available for doing so; c) hospital financial management and understanding the financial statements of healthcare institutions and reimbursement and finance payment systems; d) Hospital organization and governance; and e) legal and regulatory compliance issues.

The Program may be offered in-person at a classroom or seminar, as well as online or via audio or simulcast. At least 60 days prior to the offering of the Program, a general hospital must submit a description of the Program to the Department of Health and Senior Services (DHSS), as well as to the Office of Certificate of Need and Healthcare Facility Licensure. It is anticipated that the DHSS will finalize and adopt regulations in the spring of 2009. ■

About Garfunkel, Wild & Travis, P.C.

Garfunkel, Wild & Travis, P.C. (GWT) is among the most active health care specialty law firms in the country, with offices in New Jersey, New York and Connecticut. It serves numerous New Jersey hospitals, licensed health facilities, medical practices, physicians and other health care practitioners, and health care related companies.

The firm specializes in addressing the complex legal, regulatory, business and financial needs of its clients: it helps clients negotiate favorable reimbursement rates from insurers and government; gain regulatory approval for facilities expansion or new services; merge, acquire or network with other organizations; and purchase or lease new technology and equipment. GWT also assists numerous health care providers and others to comply with complicated, costly, and often onerous state and federal regulations.

For more information, please contact Jeffrey Brown (jbrown@gwtlaw.com), Andrew Blustein (ablustein@gwtlaw.com), Steven Antico (santico@gwtlaw.com) or Alan Perzley (aperzley@gwtlaw.com) at 201-883-1030 or visit the firm's website at www.gwtlaw.com.

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