



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

IRS Approves Financial Assistance from Hospitals to Physicians Establishing EHRs

On May 11, 2007, the Internal Revenue Service (IRS) issued a directive that assured tax-exempt hospitals [under IRS section 501(c)(3)] that they may enter into certain arrangements with physicians regarding the adoption of electronic health record (EHR) technologies without violating federal tax laws. This was in response to concerns raised by hospitals that they could lose their tax-exempt status if they provided EHR technologies to doctors at less than cost.

The result of this directive is seen as a green light for tax-exempt hospitals that have been waiting for IRS approval. Previously, the Centers for Medicare and Medicaid Services (CMS) in the U.S. Department of Health and Human Services had provided similar guidance that this exemption to the Stark law would be permitted.

A hospital that does provide a subsidy must provide the same level of subsidy to all medical staff physicians or vary the level of subsidy by applying criteria related to meeting the healthcare needs of the community. The exception does not apply to any other arrangements except for EHR subsidy arrangements. One outstanding question, however, is whether physicians derive reportable income from the receipt of EHR software.

The U.S. Senate is currently considering legislation regarding the promotion of health records products that would create grant and loan pro-

grams to help healthcare providers acquire EHR products. As currently proposed, Senate Bill 1693 would authorize \$278 million in fiscal years 2008/2009 for competitive matching grants to regional and local health information technology networks. The goal of creating such networks is to unite doctors, hospitals and other healthcare providers into a single network so that information can be shared. ■

Charitable Organizations Must Now Disclose UBI

The IRS has issued an interim guidance (Notice 2007-45) that requires charitable organizations, including tax-exempt hospitals, to publicly disclose Form 990-T reporting unrelated business income (UBI). The new requirement was dictated by the Pension Protection Act of 2006 which mandates that charities make their UBI returns available for public inspection.

This requirement is expected to
Continued on page 2

Proposed Medicare Cuts Could Cost New Jersey Hospitals \$1.6 Billion

CMS has issued its hospital inpatient prospective payment system for Fiscal Year 2008 and is projecting that due to changes in diagnosis related group (DRG) coding, hospitals will need to alter their coding, resulting in an increase in payments by 2.4 percent. The proposed rule would create 745 new Medicare severity DRGs to replace the current 538 DRGs. To compensate for this, the proposed rule includes a 2.4 percent reduction in operating and capital payment for FY 2008 and FY 2009.

CMS has also proposed several changes specifically related to New Jersey's 60 urban hospitals. One pro-

posal is a 0.8 percent reduction for FY 2008 and FY 2009 to capital payments. Another, which would go into effect for FY 2008, is the discontinuation of additional payments to hospitals in large urban areas. These changes would result in a loss of \$211 million over five years.

The last major proposed change is the elimination of the imputed wage index floor policy beginning in FY 2008. This policy has been in place for the last several years and affects over 30 hospitals in New Jersey. The projected result of this change is a loss of \$309 million over five years. ■

New Jersey Health Law Bulletin is written and edited by Jeffrey S. Brown, Andrew E. Blustein, Steven R. Antico, Alan H. Perzley, Rebecca A. Edelman 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.

IRS Rules That PCs Produce Taxable UBI for Hospitals

The IRS recently ruled (PLR 200716034) that captive professional corporations (PCs) affiliated with a tax-exempt hospital (the Hospital) produce income that the Hospital must pay tax on. The PLR addresses two issues – whether the income from operations of the PCs that flowed to the Hospital is taxable unrelated business income (UBI) to the Hospital, and whether interest that accrued on monies loaned to the PCs by the Hospital is UBI.

The PLR involves an integrated healthcare delivery system, which includes a parent entity (the Parent), the Hospital, and several PCs. Licensed physicians employed by the Hospital held the stock of the PCs as an accommodation to the Hospital. As with typical “captive PC” models, the Hospital, the PCs, and the physician-shareholders entered into employment agreements, shareholder agreements, and affiliation agreements, which collectively resulted in the Hospital having effective control over the PCs. Whatever income was derived by the PCs flowed to the Hospital. Also, the Hospital advanced money to capitalize the PCs (the Loans), which accrued interest over time.

The IRS found that the Hospital was the beneficial owner of the PCs and not the individual physician-owners that

held legal title to the stock of the PCs. The IRS based this finding on the fact that the Hospital held all significant rights granted by stock ownership, such as the right to replace the physician-owner and to sell the stock of the PC to another physician of its choosing at a nominal price. Under this analysis, the Hospital is considered a “controlling organization” for purposes of computation of unrelated business taxable income because “control” is defined as ownership of more than 50 percent of the beneficial interests in the entity.

With little analysis, the IRS held that the provision of medical services by the PCs to their patients did not have a substantial relationship to the achievement of the Hospital’s tax exempt purpose. Specifically, the IRS observed that the PCs were conducting activities on a larger scale than was necessary for the performance of the Hospital’s tax-exempt functions. The IRS found that the PCs were engaged in unrelated trade or business with respect to the Hospital and therefore any income of the PCs that was distributed to the Hospital constituted UBI.

The IRS ruled that the interest which accrued on the Loans represents a “specified payment,” the receipt of which constitutes gross income derived from an unrelated trade or business. A

“specified payment” means any interest, annuity, royalty or rent that is received from a “controlled organization.” Because the IRS deemed the Hospital a controlling organization, the specified payments of the accrued interest constitute UBI.

Commentators have expressed doubt that the PLR is controlling for similar situations. Some even believe this decision can be limited to this PLR. ■

CMS Grant to Test Nursing Home Alternatives

The CMS has chosen New Jersey as one of thirteen states that will share \$547 million in grants over five years to build Medicaid long-term care programs targeted at keeping individuals out of institutions. The funding was part of the “Money Follows the Person” initiative that was included in the Deficit Reduction Act of 2005 and is being implemented by CMS. Medicaid traditionally pays for the care of elderly and disabled individuals living in institutions who need help with the activities of daily living.

New Jersey will receive \$200,000 in the first year and \$30 million over the next five years. CMS has ordered that the states receiving these grants meet several objectives, including: (1) eliminating barriers that prevent Medicaid-eligible individuals from receiving support for necessary long-term services in settings of their choice; (2) increasing the ability of the state Medicaid program to assure continued home- and community-based long-term care services to individuals who choose to move from an institutional to a community setting; and (3) ensuring that

Continued on page 4

Charitable Organizations Must Now Disclose UBI

Continued from page 1

have a major impact on tax-exempt organizations that generate a substantial amount of UBI. The information must only be made available by the charitable organization filing Form 990-T — the IRS will not make any copies available.

While it must be available, the

expected result is that few, if any, institutions will post the form on their respective websites. Rather, individuals who require this information will have to go directly to the organization and ask for it. Charities are to rely on this guidance letter until the IRS regulations under Section 6104 are revised. ■

Mandatory Posting of Hospital Staff Levels

To ensure adequate staffing levels in general hospitals and to increase consumer awareness regarding hospital staffing, the New Jersey Department of Health and Senior Services (DHSS) has proposed requiring general hospitals to post their daily *patient care staffing levels* in visible and accessible locations within specified areas of a facility.

The purpose of this rule is to give patients, their families and the public, specific information regarding the extent of direct care staffing levels provided by general hospitals. Staffing levels are determined per each inpatient unit, by counting the number of patients and number of staff providing direct patient care based on hours worked. The emergency department and post-anesthesia care unit must also post staffing levels.

If a language other than English is spoken by 10 percent of the general hospital's patient population, the staff's posting forms must also be translated in that language and posted along with those printed in English. The DHSS proposal would also require the general hospital to report the average of the previous month's daily number of staff for each category of licensed health care professionals. The data must be reported on a monthly basis via a link established on the DHSS website.

Proposed Ban on Use of Registered Mortuaries

In response to several national news stories concerning the recovery of tissue from decedents whose families had

not consented to such donations, the New Jersey State Board of Mortuary Science (the Board) proposed a new rule that would prohibit the use of registered mortuaries as sites for the recovery of decedents' organs and tissues. Though hair is considered a tissue, the rule will not prohibit mortuaries from giving a family member a lock of hair from the deceased.

Due to the proposed rule, an area where recovery of a tissue may be compromised is eye enucleation which is often performed at a funeral home when a body is prematurely removed from the hospital. The Board, in consultation with several groups that could be affected by this rule, concluded that the benefit to the public outweighs the harm of the potential reduction in eye enucleation.

The fact that the public will have the knowledge that all organs and tissues, including eyes, are recovered only in an appropriately equipped and sterile environment, outweighs any negative side effects. The proposed rule does not preclude the continued use of a registered mortuary for conducting autopsies.

Licensing Procedures for PACE Organizations

The DHSS has adopted new rules that will provide for the licensing of Programs of All-Inclusive Care for the Elderly (PACE) organizations. (The DHSS has incorporated the regulations of the U.S. Department of Health and Human Services (HHS) concerning PACE available at 42 C.F.R. 460.)

The PACE model was developed to

address the needs of long-term care patients, providers and payers. For most participants, the comprehensive service package allows them to continue living at home while receiving services, rather than be institutionalized. The program provides social and medical services in adult day health centers or in the home for those PACE participants who choose not to attend the PACE center or to attend infrequently. Home services include skilled and personal care, along with transportation.

PACE also provides referral services in accordance with the participant's needs. A participant must be 55 years old to receive PACE benefits. PACE programs provide social and medical services primarily in an adult day health center, supplemented by in-home and referral services in accordance with the participant's needs. PACE is a capitated benefit.

Currently, 36 PACE organizations operate in New Jersey. The additional requirement of licensure will help eliminate the confusion that occurs when PACE organizations try to obtain licenses for various combinations of individual services. The cost for an initial license will be \$1750. All PACE organizations must renew their license biannually with a renewal fee of \$750.

Ad Requirements for Dentists

To better inform patients, the New Jersey Board of Dentistry has proposed an amendment to the existing regulations regarding information that must be included in advertisements related to dentists.

According to current regulations, a dentist who holds a specialty permit must include the license number of the permit in all ads. The proposed amendment would require that a dentist with a specialty permit disclose the name of

Continued on page 4

New Jersey Health Law Bulletin is the property of Garfunkel, Wild & Travis, P.C. With approval of the editors and proper credit given to the firm, it may be reproduced or excerpted. This newsletter is provided only as an educational source to highlight important issues in health care. It is not intended as a source for legal advice; readers requiring legal assistance should seek competent counsel.

Alan H. Perzley Named Partner

Garfunkel, Wild & Travis is pleased to announce that Alan H. Perzley has been named a partner of the firm. Mr. Perzley joined GWT in 2003 and is a member of the Finance and Real Estate, Business and Health Care practice groups, working out of the firm's Hackensack, NJ, office.

Mr. Perzley represents real estate developers and investors from the land acquisition phase through land use development, including construction, environmental issues and financing. He also represents landlords in commercial leasing matters, as well as banks and private lenders in connection with real estate finance and asset-based lending and equipment leasing transactions. His health care practice includes physicians, physician practice groups, nursing homes, assisted living facilities, adult medical day care centers, medical office buildings and ambulatory surgery centers.

Mr. Perzley is a member of the American Bar Association, the New Jersey Bar Association, the New York Bar Association and the Bergen County Bar Association. He was selected for inclusion in the ninth edition of the Marquis *Who's Who in American Law*. ■

Legislative Update *Continued from page 3*

their specific specialty, rather than their license number.

FN-CSA Regulations Amended

The New Jersey Board of Nursing has concluded that forensic nurses certified in sexual assault (FN-CSA) are sufficiently prepared by their education and the scope of their practice as registered professional nurses to perform pediatric sexual assault forensic examinations. Current regulations prohibit a FN-CSA from performing a sexual assault examination on a child.

Clinical Lab Proficiency Testing Regulations Slated for Change

The DHSS has proposed amending current regulations related to the proficiency of clinical laboratory testing facilities to ensure compliance with CMS standards. CMS has a list of approved testing providers and DHSS seeks to have the same providers approved using the CMS standards as the benchmark.

The expected result is greater uniformity in testing services and increased revenue for those laboratories that are currently approved by CMS. It is also expected that this amendment

would increase competition among CMS-approved proficiency providers. The one potential negative effect of this proposed regulation would be for those clinical testing laboratories that are approved under the current DHSS regulations, but are not approved by CMS.

Professional Nursing Program Accreditation Amended

The New Jersey State Board of Nursing has amended the eligibility criteria of a baccalaureate degree program to qualify as a professional nursing program. According to the new statute, a baccalaureate degree program must now be conducted by an educational institution that trains students to become registered professional nurses. The educational institution must also be licensed by the New Jersey Commission on Higher Education. ■

CMS Grant to Test Nursing Home Alternatives

Continued from page 2

procedures are in place to provide quality assurance for individuals receiving Medicaid home- and community-based long-term care services and to provide for continuous quality improvement.

As part of this CMS initiative, New Jersey will also qualify for a higher percentage of federal matching dollars to help cover the costs of moving people out of nursing homes and into community-based settings. The higher matching rate will be paid for one year after an individual moves from an institution into the community. However, New Jersey will still be required to provide community services after that period for as long as the individual requires such services and is Medicaid eligible. ■

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) or Steven Antico (santico@gwtlaw.com) at 201-883-1030 or visit the firm's website at www.gwtlaw.com.