



# Riker Danzig Health Care Update January 24, 2018

## Publication:

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### New Jersey State: Selected Proposed and Adopted Legislation

- P.L. 2017, c. 283 – Adopted – Requires surgical practices to apply for licensure as ambulatory care facilities, but excludes physical plant requirements and payment of annual assessments. The bill also allows for the combination of surgical practices with one another and with currently licensed facilities under certain conditions.
- P.L. 2017, c. 361 – Adopted – Extends health benefits coverage of a newborn infant.
- P.L. 2017, c. 294 – Adopted – Requires DOH to establish single license for facilities providing integrated behavioral and physical health care.
- P.L. 2017, c. 383 – Adopted – Regulates pharmacy benefits managers as organized delivery systems and limits use of prior authorization.
- P.L. 2017, c. 281 – Adopted – Provides for licensing of radiologist assistants by DEP under “Radiologic Technologist Act” and requires State Board of Medical Examiners to approve procedures and establish level of supervision necessary for the practice of radiologist assistants.
- A. 918/S. 377 – Amended/Substituted – Requires hospital patient’s medical record to include notation if patient is at increased risk of confusion, agitation, behavioral problems, and wandering due to dementia-related disorder.
- A. 2343 – Amended/Substituted – Requires insurance companies to provide coverage to Good Samaritan injured at scene of accident.
- A. 5267/S. 3608 – Amended/Substituted – Requires DOH to license certain qualifying hospitals providing elective angioplasty services.

- S. 3531 – Introduced – Prohibits carriers that withdraw from New Jersey individual or small employer health insurance markets from acting as Medicaid program carriers in the state.
- S. 3527 – Introduced – Establishes limitations on and conditions associated with prescribers' acceptance of compensation from pharmaceutical manufacturers.
- S. 3590 – Introduced – Allows gross income tax deduction for first \$200,000 earned by certain new physicians in their first seven taxable years of practice in New Jersey.
- S. 3574 – Introduced – Prohibits non-disclosure clauses in certain contracts.
- A. 5261 – Introduced – Limits certain provisions in and enforceability of restrictive covenants.
- S. 3597 – Introduced – Prohibits offering of health benefit plans in the state that do not meet certain standards; requires Commissioner of Banking and Insurance to take enforcement action against offering of plans not in compliance.
- S. 3602 – Introduced – Requires health insurers to disclose broker commissions to purchasers.
- 5310 – Introduced – Expands Medicare health care coverage to all New Jersey residents.

### **New Jersey State: Selected Adopted Regulations**

- 49 N.J.R. 3981(a) – Adopted – This adopted regulation amends N.J.A.C. 8:37 and the licensing standards for dementia care homes.
- 49 N.J.R. 3987(a) – Adopted – This adopted regulation amends N.J.A.C. 10:42A and the rules concerning life-threatening emergencies at facilities for persons with developmental disabilities or traumatic brain injuries.
- 49 N.J.R. 4013(a) – Adopted – This adopted regulation makes a change to the definition of “Debilitating Medical Condition” in N.J.A.C. 13:35-7A.2 as it relates to persons eligible to obtain and use marijuana for medicinal purposes.
- 49 N.J.R. 4013(b) – Adopted – This adopted regulation concerns N.J.A.C. 13:44H-3.6 and supervision of an orthotist assistant, prosthetist assistant, prosthetist-orthotist assistant, and student or holder of a temporary license. Specifically, the supervising licensee must be physically present at both the initial evaluation of the patient and the final provision of the orthotic or prosthetic device to determine the appropriateness of the device delivered.

### **Federal: Selected Proposed and Adopted Regulations**

- 82 FR 57066-01 – Adopted – This final rule cancels the Episode Payment Models and Cardiac Rehabilitation Incentive Payment Model and rescinds the regulations governing these models. It also implements certain revisions to the Comprehensive Care for Joint Replacement model.
- 82 FR 59216-01 – Adopted – This final rule with comment period revises the Medicare hospital outpatient prospective payment system and the Medicare ambulatory surgical center payment system for calendar year

2018.

- 82 FR 60912-01 – Adopted – This interim final rule with comment period establishes policies for assessing the financial and quality performance of Medicare Shared Savings Program Accountable Care Organizations.
- 82 FR 61184-01 – Adopted – This rule corrects technical errors that appeared in the final rule with comment period published in the Federal Register on December 14, 2017 entitled “Hospital Outpatient Prospective Payment and Ambulatory Surgical Center Payment Systems and Quality Reporting Programs.”
- 82 FR 61229-01 – Proposed – The OIG issued its annual notification soliciting proposals and recommendations for developing new, and modifying existing, safe harbor provisions under the federal anti-kickback statute.

### **Federal: Selected Proposed Legislation**

- H.R. 3245 – Introduced – Amends Title XI of the Social Security Act to increase civil money penalties and criminal fines for federal health care program fraud and abuse.
- H.R. 4552 – Introduced – Amends Title XVIII of the Social Security Act to establish rules for payment for graduate medical education costs for hospitals that establish a new medical residency training program after hosting resident rotators for short durations.
- H.R. 4701 – Introduced – Amends Title XVIII of the Social Security Act to eliminate the 3-day prior hospitalization requirement for Medicare coverage of skilled nursing facility services in qualified skilled nursing facilities.
- H.R. 4704 – Introduced – Amends Titles XVIII and XIX of the Social Security Act to codify the emergency preparedness final rule for skilled nursing facilities and nursing facilities as conditions of participation under the Medicare and Medicaid programs.

### **New Jersey State Litigation**

- The New Jersey Supreme Court recently ruled that employment contracts barring third-party lawsuits over workplace injuries run afoul of public policy. Specifically, the justices ruled that a security guard could file a personal injury suit against Schering Plough Corp., despite the fact that he had already collected workers' compensation benefits from his employer, AlliedBarton Security Services, LLC and had a contract with AlliedBarton Security Services, LLC barring third-party lawsuits. Schering Plough Corp. had an independent contract with AlliedBarton Security Services to provide security services. For more information on the case, see, [Philip Vitale v. Schering-Plough Corporation](#) before the Supreme Court of New Jersey.

### **Federal/Other State Litigation**

- The New York Court of Appeals recently ruled on “wrongful birth” claims. Specifically, the case centered

around when the one-and-a-half year statute of limitations for medical malpractice began to run for couples who claimed they would not have had children through a certain fertility clinic had they known the egg donor was a genetic defect carrier. The couples argued that the statute of limitations should begin to run at birth, *i.e.*, the earliest date they found out the fertility clinic they used did not screen the egg donor for Fragile X. The Court of Appeals agreed that, under these circumstances, the statute of limitations should begin to run at birth. For more information on the suits, *see*, B.F. et al. v. Reproductive Medicine Associates of New York LLP et al., case number 126, and Marie Dennehy et al. v. Alan B. Copperman M.D. et al., case number 127, in the New York Court of Appeals.

- A North Dakota federal judge recently issued a preliminary injunction to block a proposed merger between Sanford Health, Sanford Bismarck and Mid Dakota Clinic PC based on a request from the FTC and the State of North Dakota, who allege that the merger would substantially decrease competition and cause significant harm to consumers. For more information on the suit, *see*, FTC et al. v. Sanford Health et al., case number 1:17-cv-00133, in the U.S. District Court for the District of North Dakota.
- A California physician recently appealed his case to the Ninth Circuit, arguing that the lower court improperly ruled to enforce his settlement agreement with California Emergency Physicians Medical Group (“CEP”), an agreement which prohibits him from being rehired by the health care chain. Specifically, the physician argued that the “no-rehire” provision in the settlement agreement has the effect of banning him from practicing in his field, especially given CEP’s plans to expand further around the state. For more information on the suit, *see*, Golden v. California Emergency Physicians Medical Group et al., case number 16-17354, in the U.S. Court of Appeals for the Ninth Circuit.
- The Ninth Circuit recently ruled on whether an arbitrator’s ability to demand evidence extends beyond parties to a hearing. Specifically, the Ninth Circuit upheld a lower court’s ruling that two pharmacies could not subpoena sealed court documents from a suit against a third party, Express Scripts Inc., for their antitrust arbitration with CVS Health, asserting that the Federal Arbitration Act does not grant the power to compel documents from third parties. For more information on the suit, *see*, Vividus LLC et al v. Express Scripts Inc., case number 16-16187, in the U.S. Court of Appeals for the Ninth Circuit.
- An Illinois federal district court judge recently granted the American Board of Medical Specialties’ (“ABMS”) motion to dismiss a lawsuit filed by the Association of American Physicians and Surgeons Inc. (“AAPS”) alleging the ABMS violated antitrust laws. Specifically, the AAPS alleged that a relationship between ABMS and the Joint Commission requires the Joint Commission to impose ABMS’s certification requirements on doctors who work at Joint Commission-accredited hospitals, which blocks doctors who want to work at Joint Commission-accredited hospitals from receiving privileges if the doctors are not certified through ABMS. The judge believed, however, that all AAPS had alleged was that the Joint Commission arrangement had resulted in some hospitals imposing some of the board’s requirements on doctors, which was insufficient to

sustain a claim. For more information on the suit, see, Association of American Physicians & Surgeons, Inc. v. American Board of Medical Specialties, case number 1:14-cv-02705 in the U.S. District Court for the Northern District of Illinois.

## In the News

- The Medical Society of New Jersey recently launched a new health information exchange that purportedly will make it easier for physicians to access the medical histories of their patients. The platform, called OneHealth New Jersey, will offer a secure platform for patients to record their own health information, removing the need for patients to log into multiple portals, hand-carry their records or rely on another office sending information via fax.
- The OIG recently issued an advisory opinion regarding a startup company arranging nursing home discounts for Medicare and Medicaid beneficiaries who have private health insurance. Specifically, in the advisory opinion, the OIG evaluated an unnamed startup's plan to create a network of nursing homes that offer discounts to policyholders and their long-term care insurers, which would pay an administrative fee to the startup. The OIG concluded that, while the scenario implicated the Anti-Kickback Statute, based on the possibility that the plan could result in a scenario where nursing homes are effectively paying Medicare patients to use their services, the risk of fraud appeared "sufficiently low."

*The list above does not include every proposed or adopted legislation, litigation or guidance document that may impact the health care industry. Instead, it includes only a select few chosen by the authors, and any information in this Update is not intended to provide legal advice. If you are concerned that a proposed or adopted legislation, litigation or guidance document may impact your practice, then you should seek legal advice. We send these Updates to our clients and friends to share our insights on new developments in the law. Nothing in this Update should be relied upon as legal advice in any particular matter. © 2018 Riker Danzig Scherer Hyland & Perretti LLP.*

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