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**PUBLIC NOTICES**

**LAW AND PUBLIC SAFETY  
DIVISION OF CONSUMER AFFAIRS  
BOARD OF MEDICAL EXAMINERS**

**N.J.A.C. 13:35-6.16**

**Notice of Action on Petition for Rulemaking**

**Permit Licensed Physicians to Be Employees of a Corporation Under Certain Circumstances**

Petitioner: Elizabeth Christian, Giordano, Halleran & Ciesla on behalf of the New Jersey Hospital Association.

Authority: N.J.S.A. 45:9-2.

**Take notice** that on September 21, 2012, the Board of Medical Examiners (BME) received a petition for rulemaking from Elizabeth Christian, Esq. on behalf of the New Jersey Hospital Association requesting that the Board amend N.J.A.C. 13:35-6.16(f) to permit licensed physicians to be employees of a corporation under certain circumstances. According to the petitioner, physicians should be permitted to be employees of a corporation if: the corporation is a wholly controlled subsidiary of a licensed hospital which monitors the activities of the subsidiary corporation through a quality assessment and performance improvement program and makes the structure of this program available to the Board for review upon request; does not exercise control over employee physicians' independent medical judgments; and has, as part of its governance structure, a committee comprised solely of licensed physicians who have sole responsibility for all corporate decision making involving the exercise of independent medical judgment. The petitioner also recommends that the amendment to N.J.A.C. 13:35-6.16 state that licensed physicians would be permitted to provide input to the governing body of the corporation with regard to operational matters that are not solely clinical.

The petition was referred to a committee for further deliberations. The committee met on October 10, 2012, and November 14, 2012, and determined to invite the petitioner to meet with them to discuss concerns related to the petition.

On January 8, 2013, the Board and the petitioner agreed to extend the period for Board deliberation on the petition for rulemaking for an additional 90 days, to May 13, 2013, consistent

with the requirements of N.J.A.C. 1:30-4.2(b). A notice acknowledging the Board's action was filed with the Office of Administrative Law and was published in the New Jersey Register on February 19, 2013, at 45 N.J.R. 386(a).

On March 13, 2013, legal counsel for the petitioner and General Counsel of the New Jersey Hospital Association met with the Committee and provided additional oral and documentary information in support of the petition. Bayonne Medical Center and St. Peter's University Hospital also submitted letters in support of the petition which were reviewed by the committee.

On June 18, 2013, the Board and the petitioner agreed to an additional extension of the period for Board deliberation to September 30, 2013, consistent with the requirements of N.J.A.C. 1:30-4.2(b). A notice acknowledging the Board's action was filed with the Office of Administrative Law and was published in the New Jersey Register on July 15, 2013, at 45 N.J.R. 1862(a). On September 4, 2013, the Board and petitioner agreed to an extension of the period for deliberation to October 21, 2013, consistent with the requirements of N.J.A.C. 1:30-4.2(b). A notice acknowledging the Board's action was filed with the Office of Administrative Law and was published in the New Jersey Register on October 7, 2013, at 45 N.J.R. 2277(b).

In two separate letters dated June 18, 2013, and July 12, 2013, the petitioner provided additional suggested amendments to N.J.A.C. 13:35-6.16(f), supplementing the original petition. These amendments would require a corporation that employs physicians to appoint a chief medical officer who would be responsible for oversight quality assurance, credentialing activities, and provision of medical services. This chief medical officer would be responsible to the Board for any concerns regarding quality of care, credentialing, or provision of medical services. The petitioner also recommended that the rule indicate that any employees who are Board licensees, including the chief medical officer, are accountable to the Board in connection with any medical services rendered at the corporation. The amended petition was reviewed by the committee on September 11, 2013.

By letter dated September 16, 2013, the Medical Society of New Jersey expressed significant concerns about hospital ownership and control of medical practices, including the effect on quality of care, lack of accountability to the Board, and possible increase in cost of care.

**Take further notice** that at its October 9, 2013, meeting, the Board, after hearing an oral report of the committee, reviewing all materials submitted, considering that the Department of Banking and Insurance representative on the Board advised that it shared the committee's concerns, and after asking legal counsel for the petitioner additional questions, determined to deny the petition for rulemaking. The Board has always maintained that it is necessary to ensure unencumbered oversight and disciplinary control over the conduct of medical practices in this State in order to ensure public health, safety, and welfare. Although the Board acknowledged

that the environment in which healthcare services are offered is changing, the consensus of the members was that, without fiscal control of the practice, exercise of independent medical judgment of the physician in the sole interest of the patient may be compromised. The employment relationship presented by the petitioner does not provide adequate safeguards to ensure the quality of care provided by physicians employed in such a practice. In the structure envisioned by the petitioner, even with the later amendments calling for a chief medical officer, financial control and therefore ultimate decision-making authority, including authority over medical decisions, rests with the corporation and not the physicians employed by the corporation. Among other things, choice of medical supplies and protocols developed by non-professionals regarding, for example, infection prevention and disinfection of instruments, may impact negatively on patient safety. Physicians could be placed in situations where they must choose whether to follow corporate protocol which may not be in the best interest of the patient or suffer employment-related repercussions.

[page=2452] Meanwhile, corporate owners and non-licensees who have true decision-making authority for the corporation will not be subject to the same professional standards, oversight, or regulatory control as licensed entities, would have no impetus to comply with Board statutes or regulations, and would be outside the jurisdiction of the Board. In such a practice, physician employees could be required to refer patients to the employer hospital for diagnostic or other procedures in order to retain employment or receive bonuses. This could negatively impact quality of care, limit a patient's freedom to choose healthcare providers, and possibly increase costs for such procedures. The petition does not address the interplay of the proposed rule and existing statutes and regulations prohibiting self-referral, kickbacks, and possible anti-trust violations.

The Board expressed serious concern that the petition does not address how charity/indigent care would be assured in a corporate atmosphere. Presently, although not required to do so, physicians often choose to offer this care at their own expense, thus providing a much needed public service. A corporate entity could require physician employers not to accept charity care patients in order to increase overall profit.

The Board is concerned that it does not have the resources to engage in the oversight that would be necessary to avoid risk to the public health and maintain the standard of care under the proposed practice structure. The Board compared the level of necessary oversight to that provided by the federal Medicare program over accountable care organizations (ACOs). The Board noted that these ACOs are subject to close federal oversight, monitoring, auditing transparency, and reporting requirements.

A copy of this notice has been mailed to the petitioner pursuant to N.J.A.C. 1:30-4.2.