New Laws Affect the Corporate Practice of Medicine Doctrine

By Laura Hebert

In 2011, the Texas legislature enacted new laws that affect the corporate practice of medicine doctrine. The purpose of the doctrine is to shield physicians’ ability to meet their ethical obligations and to act on their professional medical judgment free from the control or influence of business entities and non-licensed persons. The doctrine is given effect by the Texas Medical Practice Act (TMPA), which is part of the Texas Occupations Code (the “Code”). The TMPA prohibits, among other things, non-licensed persons and businesses from employing physicians for the purpose of providing medical care. Texas is one of only a handful of states that maintains this prohibition, but the TMPA does include some exceptions for certain types of organizations. Under current law, the types of organizations that may employ physicians in Texas are non-profits operating migrant, community or homeless health centers, certain federally qualified rural health centers, so-called “501(a)” organizations, and certain hospital districts. Such organizations are governed by Chapter 162 of the Code and Title 22, Chapter 177 of the Texas Administrative Code. Laws enacted in 2011 created new restrictions and requirements for organizations already able to employ physicians with the intent of insuring physician freedom and preventing the corporate practice of medicine.

Certain of the 2011 laws apply only to 501(a) organizations. The exception permitting 501(a) organizations to employ physicians appears in a statute that was originally Section 501(a) of the TMPA, but has been codified in Section 162.001(b) of the Code. It is the only type of Texas organization able to employ physicians that is not restricted to certain types of patients or communities. The 501(a) organizational structure is widely used by hospitals to employ physicians in affiliated practices. The laws and regulations governing 501(a) organizations permit non-physicians to control much of their administrative operations, but require that the board of directors, which must be made up entirely of licensed physicians who are actively engaged in the practice of medicine, control certain matters likely to affect medical decision making. For example, only the board of directors may terminate a physician’s employment. In addition, all credentialing, quality assurance, utilization review, and peer review policies are required to be made exclusively by the board of directors.

Three of the new statutory provisions contained in the code enacted in 2011 affect only 501(a) organizations, and not the other types of organizations that may employ physicians. Two of these provisions became effective on September 1, 2011. The first of these explicitly states that a 501(a) organization “may not interfere with, control, or otherwise direct a physician’s professional judgment” in violation of the TMPA or its rules or regulations. CODE § 162.0021. The other confirms that physicians employed by 501(a) organizations “retain their independent medical judgment in providing care to patients” and prohibits a 501(a) organization from disciplining a physician for “reasonably advocating for patient care.” CODE § 162.0023. A third new provision affecting only 501(a)s became effective January 1, 2012. It requires 501(a) organizations to “adopt, maintain and enforce policies to ensure that a physician employed by the
health organization exercises independent medical judgment when providing care to patients.” Code § 162.0022. The policies, which must be developed by the board of directors, must include policies relating to credentialing, quality assurance, utilization review, and peer review.

Two additional provisions contained in the Code, both effective as of September 1, 2011, affect all types of organizations that employ physicians. One states that the laws governing the employment of physicians may not be voided or waived by contractual agreements, but specifies that a 501(a) “may establish ethical and religious directives and a physician may contractually agree to comply with those directives.” Code § 162.0024. The other creates an additional penalty for violations of the laws governing the employment of physicians. Code § 162.003(3). In addition to refusing to certify or revoking the certification of an organization, the Texas Medical Board may now impose a penalty on the organization of up to $5,000 per violation for each day that the violation continues. Code § 165.003. The amount of the penalty is to be determined based on a number of factors, including the seriousness of the violation and the potential hazard it creates to the health, safety, or economic welfare of the public.

Of the new laws, the only one that requires an affirmative act is the new statutory provision requiring 501(a)s to adopt credentialing, quality assurance, utilization review and peer review policies. Code § 162.0022. Neither the Texas legislature nor the Texas Medical Board has provided any guidance as to how the policies should be structured or what they should contain. Existing 501(a) organizations may already have such policies in place, though perhaps not in writing, because Texas Medical Board rules had already required their bylaws to state that the same policies – for credentialing, quality assurance, utilization review, and peer review – be reserved exclusively to the board of directors. The rules had not previously, however, contained an explicit requirement that such policies be adopted. In order to comply with the new law, 501(a) organizations should have their boards develop the required policies and put them in writing.

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