

# New Jersey Academy of Otolaryngology-Head & Neck Surgery New Jersey Academy of Facial Plastic Surgeons

## Monthly Report - February 2012

SAVE THE DATE

**APRIL 25, 2012**

**NJAO-HNS/NJAFPS 29th ANNUAL SYMPOSIUM**

PNC Bank Arts Center

Holmdel, NJ

### Legal Report

**Kern Augustine Conroy & Schoppmann, PC**

**Governor Pocket Vetoes Surgical Practice Licensure Bill; Registration Rules Adopted:** Four times in the first weeks of 2012, one-room surgical practices have been the subject of legislative, gubernatorial, and regulatory activity. Legislation that would have required the licensure of such practices as ambulatory care facilities passed both houses of the legislature on the last day of the session, only to be pocket-vetoes by Governor Christie. In response, the New Jersey Department of Health and Senior Services (DHSS) formally adopted its long pending rules requiring the registration of one-room surgical practices, as required by legislation enacted in 2009.

Not to be denied, State Senator Joseph Vitale, in the first days of the new legislative session, re-introduced a bill in an effort to keep the licensure momentum going. That bill, S1210, is scheduled for a vote by the Senate Health Committee on January 30<sup>th</sup>. The bill preserves the language negotiated into the previous S2780 that exempts non-CMS certified, accredited surgical practices from CMS and DHSS physical plant requirements. Such practices would still be subject to all other DHSS licensing requirements as an ambulatory surgery facility. S1210 also preserves the exemption for such surgical practices from the state's gross receipts tax on ambulatory care facilities. That exemption, which CMS considered to be discriminatory treatment among ambulatory surgery facilities serving Medicare beneficiaries, was one of the concerns voiced by Governor Christie in refusing to approve the legislation.

Despite this continued state of flux, one-room surgical practices must comply with the registration requirement that is clearly in place by statute and regulation, as follows:

- Surgical practices in operation as of January 17, 2012 (the regulations' effective date) and that were in operation as of March 21, 2009 (the date the 2009 legislation was enacted) must apply for registration with DHSS by April 16, 2012, or cease operation by such date.
- Surgical practices in operation as of January 17, 2012, but which had not commenced operation prior to September 17, 2009, must register by April 16, 2012. However, in order to be eligible to register with DHSS, such a practice must have filed its plans, specifications and/or any other required building, zoning or construction documents with the municipality in which the surgical practice is located prior to September 17, 2009 (the six-month deadline established by the 2009 law).
- Surgical practices that have not commenced operations by January 17, 2012, but which filed the required municipal documentation prior to September 17, 2009, must register with DHSS prior to commencing operation. Such practices must apply to DHSS for registration within two years of

receiving municipal approval to operate.

Under current law, surgical practices that cannot comply with one of the above registration categories may not operate beyond April 16, 2012. (Note that a medical office that has a room designed to perform procedures, such as endoscopies, but the construction of the room (e.g., the presence of a sink) would not permit surgery to be performed in the room, is not required to register with DHSS.) All medical offices and all registered surgical practices continue to be subject to State Board of Medical Examiners regulations regarding the practice of medicine, including the Board's regulations governing surgical and anesthesia services in the physician office setting.

The DHSS registration regulations, registration application, and instructions for completing and filing the application are available at: <http://nj.gov/health/healthfacilities/industrynews.shtml>. The DHSS contact person for questions related to the registration process is Eugene Brenycz, DHSS Regulatory Officer, 609-292-5960.

**Cosmetic Tax Repealed:** Under legislation just enacted, New Jersey's tax on cosmetic procedures will be repealed over the course of the next three years. The law provides that the six (6%) percent tax will be reduced to four (4%) percent effective July 1, 2012, reduced to two (2%) percent effective July 1, 2013, and be completely eliminated as of July 1, 2014.

**DOBI Bulletin Addresses "Limited-Panel" Practices:** The NJ Department of Banking & Insurance (DOBI) has issued a new bulletin on "retainer medicine" stating that it doesn't want to hinder such arrangements but must ensure that patients who choose to enter into a retainer arrangement with a network physician continue to receive the full benefit of their managed care plans and are not asked to pay extra for already covered services. Bulletin No. 12-02, *Provision of Non-Covered Services by Limited-Panel Network Physicians*, provides that in-network physicians offering retainer services will not be considered a discriminatory practice if all of the following safeguards are in place: (1) retainer agreements requiring additional payments are only permissible with respect to services above and beyond the services already covered in the member's plan and those additional services must be clearly described to members by the provider; (2) providers limiting their practices to patients buying additional services should not be counted by health plans for purposes of establishing network adequacy; (3) materials available to members that list network providers should not include limited practices without identifying them as such, allowing payors to either exclude the providers from the materials or indicating in the listing the limitation on the practice; and (4) members already receiving services from a provider when the provider first begins to limit his or her practice to retainer medicine should have all of the rights of a patient whose provider drops out of the network, including the right of such patients to statutorily required periods of continuity of care, without making any retainer payments. The new Bulletin can be accessed at: [http://www.state.nj.us/dobi/bulletins/blt12\\_02.pdf](http://www.state.nj.us/dobi/bulletins/blt12_02.pdf).

**Schedule II CDS Prescriptions Subject to New Regulation:** The NJ Division of Consumer Affairs has adopted a rule amendment governing the manner in which multiple prescriptions for Schedule II CDS are presented to and filled by a pharmacy, under the statutory authority allowing a physician to issue multiple prescriptions for such drugs, up to a total of a 90-day supply. To view the adoption, go to: [http://www.nj.gov/oag/ca/adoption/cdsado\\_010312.htm](http://www.nj.gov/oag/ca/adoption/cdsado_010312.htm).

**Annual Breach Notices Due to HHS:** In addition to notifying affected individuals and the media (where appropriate), HIPAA covered entities must notify the U.S. Department of Health & Human Services (HHS) of breaches of unsecured protected health information. If a breach affects 500 or more individuals, covered entities must notify HHS without unreasonable delay and in no case later than 60 days following a breach.

If a breach affects fewer than 500 individuals, the covered entity may notify HHS of such breaches on an annual basis. Reports of breaches affecting fewer than 500 individuals are due to HHS no later than 60 days after the end of the calendar year in which the breaches occurred. Such notification is made by accessing the HHS data breach website:

<http://www.hhs.gov/ocr/privacy/hipaa/administrative/breachnotificationrule/brinstruction.html> and electronically submitting a breach report form: <http://ocrnotifications.hhs.gov/>. For information on data breach notification requirements and policies, contact KACS at 800-445-0954.

**NLRB Posting Deadline Further Delayed:** The NLRB has again postponed the deadline by which employers, both unionized and non-union, must post a notice advising employees of their rights under the National Labor Relations Act. Employers affected by the National Labor Relations Board (NLRB) rule include medical and dental practices that generate at least \$250,000 in gross business volume annually. The posting deadline is now April 30, 2012, extended from January 31, 2012, because of litigation challenging the NLRB's authority to require employers to post the notice. For more information, and to obtain the required notice, go to: <https://www.nlr.gov/poster>.

### **From the Statehouse     Beverly Lynch & AJ Sabath, Advocacy & Management Group**

At midnight on January 9, 2012, the 213<sup>th</sup> Legislative Session ended - with 8,200+ bills introduced; and 4.5% (or 371) were signed into law.

The very next day, January 10, 2012, the new 214<sup>th</sup> Legislature was sworn in, and thus began a new two year legislative session. To date, already 3,500+ bills have been filed for consideration, and committee hearings are beginning in earnest.

Of note to the physician community, at the end of the session, two important issues were considered:

New Jersey's tax on cosmetic procedures will be eliminated in 3 years under a measure pushed by Democrats in the Legislature and signed into law by Republican Gov. Chris Christie on January 17, 2012. The new law calls for the tax to drop 4 percent on July 1, 2012, then to 2 percent from July 1, 2013, to July 1, 2014, and then completely disappear after July 1, 2014.

This action is very significant considering New Jersey was one of the first states to institute the tax which drove business out of New Jersey and prompted patients to go into other states to have their procedures performed to save that 6 percent.

The bills to license one-room surgical practices (A.4099/A. 3909 & S.2780) were pocket vetoed by Governor Chris Christie and therefore, "died." Currently one-room surgical practices **WILL NOT** be required to become licensed by the state Department of Health and **WILL NOT** be subject to any new regulatory criteria such as physical plant standards or surprise state inspections.

The word in Trenton is that the Governor passed on signing the bill due to Department of Health concerns that the measure may jeopardize federal matching funds from CMS because of the unequal tax policy for one-room and multi-room ASCs. Regardless, proponents of one-room licensing will have to start all over again at the beginning of the legislative process and introduce a new licensing bill.

This process has already begun - with the Senate Health Committee debating this same measure on January 30. Stay tuned.

The New Jersey Lawsuit Reform Alliance has identified a handful of bills introduced in the new legislative session that will be important for the medical community to follow.

| <b>Summary</b>   | <b>Old Bill #</b> | <b>New Bill #</b>     | <b>Sponsors</b>   |
|--|-------------------|-----------------------|---|
| Caps noneconomic damages in medical malpractice actions at \$250,000.  | A1367/S610        | <a href="#">A966</a>  | Weber, Chiusano, McHose   |
| Establishes a medical malpractice part in the Superior Court.  | A260              | <a href="#">A1689</a> | Russo   |
| Concerns liability in good faith treatment cases, standards of care, insurance coverage for medical malpractice actions and also sets time limits on medical malpractice claims being filed. | A1982/S670        | <a href="#">A1806</a> | Conaway, O'Scanlon, Weber, Handlin, McHose, Angelini, Riley, Huttie, Chiusano |
| Establishes limits for certain damages in medical malpractice actions.   | A1806/S1844       | <a href="#">A1926</a> | Casagrande  |