STATE OF NEW YORK
DEPARTMENT OF HEALTH

Corning Tower The Governor Nelson A. Rockefeller Empire State Plaza Albany, New York 12237

Antonia C. Novello, M.D., M.P.H., Dr.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

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Hayden S. Wool, Esq.
Garfunkel, Wild & Travis, P.C.
111 Great Neck Road
Great Neck, NY 11021

DOH GC Opinion No. 04-04
Ancillary Services in State Stark Law

Dear Mr. Wool:

I am responding to your letter in which you sought clarification of the precise relationship required in order for the person who furnishes ancillary services to be "employed by" a practitioner or group practice for purposes of the in-office ancillary services exception to the self-referral ban set forth at New York State's Public Health Law § 238-a(2)(b). Specifically, you asked whether the in-office ancillary services exception can be met where a "professional employer organization" is the employer of the person who furnishes the in-office ancillary services for tax purposes, but the practitioner or group practice is the "client" of the professional employer organization under a "professional employer agreement" under which the person who furnishes the in-office ancillary services is a "worksite employee" of, and is "co-employed" by, the client practitioner or group practice (see, Labor Law §§ 916, 922).

In DOH GC Opinion No. 04-01 (January 28, 2004), DOH observed that, generally:

> the legal relationship of employer and employee exists when the employer "has the right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to what shall be done but how it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so" (26 CFR 31.3121(d)-1(c)).

Provided that such a relationship exists between the person who furnishes the in-office ancillary services and the practitioner or group practice, the answer to your question is "yes, in some circumstances." The in-office ancillary services exception can be met where a professional employer organization is the employer of the person who furnishes the in-office ancillary services for tax purposes. However, the practitioner or group practice must be the client of the professional employer organization under a professional employer agreement making the person who furnishes the in-office ancillary services a worksite employee of and co-employed by the client practitioner or group practice. Also, the professional employer agreement must provide, as

required by Labor Law § 922(1)(a)(i), that the client practitioner or group practice "shall maintain such direction and control over the worksite employees as is necessary to conduct the client's business and without which the client would be unable to conduct its business, discharge any fiduciary responsibility which it may have, or comply with any applicable licensure[.]"

Very truly yours,

Donald P. Berens, Jr.
General Counsel