Hayden S. Wool, Esq.
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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).

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