



STATE OF NEW YORK DEPARTMENT OF HEALTH

Corning Tower

The Governor Nelson A. Rockefeller Empire State Plaza

Albany, New York 12237

Barbara A. DeBuono, M.D., M.P.H.
Commissioner

Dennis P. Whalen
Executive Deputy Commissioner

April 19, 1996

Dear

I am responding to your December 1, 1995 letter. You ask a number of questions regarding Public Health Law (PHL) § 238-a, each of which is set forth and answered below.

FACTS

A neurologist would like to provide his/her patients with MRI tests in a manner which meets the requirements for the in-office ancillary services exception set forth at PHL § 238-a(2)(b). The tests would be performed in an MRI facility located in a building which is not the building in which the neurologist practices. The neurologist would pay the MRI facility a fee which includes payment for space, equipment, and technicians and other support staff. You further state that the facility would do the billing. Since the MRI facility is compensated by the physician, I assume the MRI facility will bill the patient on behalf of the medical practice. A radiologist will be retained by the neurologist as an employee or independent contractor to read the MRI results. The radiologist, and not the neurologist, will be present during the testing of the neurologist's patients in order to supervise the tests. We are asked to assume that all payments between the neurologist, radiologist and facility are at fair market value (fmv).

Question 1

Can the neurologist reimburse the facility (a) by paying a fixed fee for each MRI taken, or (b) by leasing the facility for a fixed fee for a set number of hours per week?

ANSWER

PHL § 238-a prohibits a neurologist from ordering MRI services from a facility with which the neurologist has a financial relationship. Under the facts you present, the

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neurologist would have a financial relationship with the MRI facility whether the facility is reimbursed for each MRI taken or for a set number of hours per week, and so, absent a statutory exception, the neurologist could not refer patients to the facility. Further, the neurologist's method of reimbursing the facility for space, equipment and staff, does not impact whether the provision of MRI services meets the PHL § 238-a(2)(b) exception.

Question 2

Can the neurologist reimburse the radiologist: (a) as an independent contractor for a reading fee for each MRI, (b) as an independent contractor based on the number of hours actually worked each week, (c) as an employee for a reading fee for each MRI, (d) as an employee based on the number of hours actually worked each week?

Answer

Under the facts you describe, it is immaterial how the neurologist reimburses the radiologist because under any payment method the in-office ancillary services exception is not met. This is because you state that the support staff of the MRI facility performs the tests under the supervision of the radiologist. The PHL § 238-a(2)(b) exception requires that either the neurologist, or a member of the same group practice as the neurologist, or individuals employed by the neurologist or the group practice, perform the referred tests under the supervision of the neurologist or another practitioner in the group practice. The support staff of the MRI facility are not members of the same group practice as the neurologist, or employees of the neurologist or of his/her group practice. The only relationship between the MRI facility's support staff and the neurologist is that the support staff does the testing and the facility is paid for that service by the neurologist. You offer no evidence to suggest that the payment arrangement between the facility and the neurologist results in an employment relationship between the facility's staff and the neurologist or his/her group practice, and it is difficult to imagine an arrangement whereby the facility is leased (whether for a fixed number of hours per week or for each MRI taken) and the facility's staff thereby become the employees of the lessor. Because the individuals performing the MRI tests are not employees within the meaning of the in-office ancillary services exception, the exception is not met independent of how the radiologist is compensated by the neurologist.

Question 3

Does a neurologist practicing as the sole shareholder of a P.C. qualify as a group practice by (a) hiring a radiologist

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as an independent contractor on a part-time basis, or (b) hiring a radiologist as an employee on a part time basis?

Answer

PHL § 238(5) defines a group practice as "a group of two or more practitioners organized as a partnership, professional corporation, foundation, not-for-profit corporation, faculty practice plan or similar association; and.....". Therefore, in order to qualify as a group practice for 238-a purposes, at a minimum a group of two practitioners must form an entity organized in one of the enumerated fashions, which includes "similar association".

A neurologist and radiologist are two practitioners who could organize as a similar association, and if the other statutory criteria set forth in PHL § 238(5) are met, could qualify as a group practice. Organization as a similar association is a necessary but not sufficient condition for meeting the definition of group practice.

We would consider a full time employee or independent contractor who offered services on a full time basis to meet the statutory requirement that two practitioners organize as a similar association. Whether a part-time employee or part-time contractor meets the statutory criteria is a question of fact depending not just on the number of hours worked but on the overall facts and circumstances, including those conditions set forth at PHL §§ 238(5)(a) through(c). For example, the part-time radiologist/employee or contractor would have to provide substantially the full range of radiologist services through the use of office space, facilities, equipment and personnel jointly with the neurologist, substantially all of the services provided by the radiologist would have to be provided through the group and be billed in the group's name and treated as receipts of the group, and overhead expenses of the income from the practice would have to be distributed in accordance with methods previously determined by the radiologist and neurologist.

Question 4

Can a physician who does not practice as a member of a group qualify for any of the exceptions under PHL § 238-a.

Answer

Yes. By way of example only, a solo practitioner could qualify for the in-office ancillary services exception by furnishing the referred services personally or through individuals who he/she supervises and employs, in a building where the practitioner furnishes his/her services unrelated to the furnishing of the referred services, and where the

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practitioner or an entity wholly owned by the practitioner bills for the services.

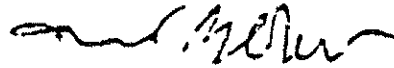
Question 5

What are the elements that a physician must satisfy to be deemed a member of a group practice under PHL § 238-a.?

Answer

A group practice must satisfy each and every element of the definition set forth at PHL § 238(5).

Sincerely,



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Senior Attorney

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