

Re: Recent Legislation Authorizing Independent Physicians and Dentists to Jointly Negotiate with Carriers

Dear Doctor:

We are writing to share an exciting development in the law about which you should be aware. One of the last bills that Acting Governor DiFrancesco signed into law before leaving office authorizes joint negotiations by physicians and dentists with insurance companies and HMOs over contractual terms and conditions. This law is an important step toward leveling the playing field in the negotiation of contracts. For your reference, we have provided an overview of the law below.

Background

The law's introductory language acknowledges the imbalance of power that has historically characterized the relationship between health care providers and carriers. Some of the articulated reasons for sponsorship of the bill include:

- carriers control the flow of patients to physicians and dentists through financial incentives for patients to utilize only the providers with whom the carrier has contracted;
- the agreements created by the carriers are virtually contracts of adhesion, containing terms that jeopardize the ability of providers to deliver superior care; and
- physicians and dentists do not have enough market power to reject unfair provider contract terms; inadequate reimbursement and other unfair payment terms;

Goals of the New Legislation

The stated objectives of the law are: to empower independent physicians and dentists to jointly negotiate with carriers; to help to restore the competitive balance, improve competition in the markets for health care and dental services; provide benefits for consumers, physicians and dentists and less dominant carriers; and promote the health care infrastructure and medical progress.

A “Nutshell” Version of the Law

The law provides that two or more independent physicians or dentists who are practicing in the service area of a carrier may jointly negotiate with a carrier and engage in related joint activity regarding non-fee related matters which may affect patient care, such as: utilization management criteria and procedures; clinical practice guidelines; patient referral standards; and credentialing standards. Furthermore, upon a finding by the Attorney General, in consultation with the Commissioners of Banking and Insurance and Health and Senior Services, that a carrier has substantial market power in its service area and that any of the terms or conditions of the contract pose an actual or potential threat to the quality and availability of patient care among coveted persons, two or more independent physicians or dentists who are practicing in the service area of

the carrier may jointly negotiate with the carrier and engage in related joint activity regarding fees and fee-related matters, such as: amount of payment or methodology for determining payment for a health care or dental service; procedure codes, etc.

Doctors wishing to exercise the joint negotiation rights conferred by this law must select an individual to act as a joint negotiation representative (“Representative”). Before entering into any negotiations, the Representative must submit a petition, along with a fee, to the Attorney General of the State of New Jersey. The petition must include, among other things, the ratio of physicians or dentists requesting joint representation to the total number of physicians or dentists who are practicing within the geographic service area of the carrier; and the intended subject matter of the proposed negotiations. Within thirty days, the Attorney General either approves or declines the petition.

Once negotiations between the Representative and the carrier have concluded, the Representative must submit a copy of the proposed contract to the Attorney General for approval, and within thirty days of receipt of the proposed contract, the Attorney General either approves or rejects the proposal. - One stated factor that will influence the Attorney General’s decisions on petitions or proposals is whether the proposed negotiation or contract demonstrates that the benefits which are likely to result from the joint negotiations over a contractual term or condition outweigh the disadvantages attributable to the reduction in competition that may result from the negotiations or contract.

How This Law Will Interact with Federal Antitrust Law

Ordinarily, joint negotiations between independent providers and carriers would raise concerns over possible antitrust violations. Under the new law, qualified joint negotiations will qualify for the State-action exemption to federal antitrust laws. The Attorney General’s participation in the joint negotiation process is twofold: his active supervision protects against undue threats to competition in the negotiating process, and his involvement justifies the State-action exemption for the resulting contracts, which might otherwise be viewed as anti-competitive.

Conclusion

At the time of this writing, the law remains unpublished and available only by request from the State Legislative Affairs Office. While some logistical issues remain undetermined, the groundwork has been laid for substantial empowerment of New Jersey’s physicians and dentists.

We intend to stay abreast of developments concerning this exciting new law, and would be pleased to assist you in exercising your joint negotiation rights. If we can assist you in this or any other capacity, please feel free to contact our office.