California Adds Personal Services Exception to Physician Self-Referral Law

On August 28, the Governor of California signed into law a new personal services exception to California’s physician self-referral law (commonly known as PORA or the Speier Act).1 The new law is effective January 1, 2003.

Impact on Health Care Entities
The new personal services exception will protect many common compensation arrangements (e.g., medical directorships) between physicians and health care facilities such as comprehensive outpatient rehabilitation facilities, community clinics, ambulatory surgery centers, clinical laboratories, home health agencies, and Medicare-certified independent diagnostic test facilities that could not meet existing PORA exceptions. In the past, broad PORA exceptions generally protected referrals by physicians to physician offices, hospitals, skilled nursing facilities and facilities owned or leased by them, but did not extend to these other kinds of facilities. The new state exception differs somewhat from a similar exception in federal law (namely, the personal services exception to the Stark Law, 42 USC 1395nn). As such, health care entities desiring to take advantage of the new exception should consult with counsel to ensure that their arrangements satisfy the specific provisions of the new law (i.e., compliance with the Stark Law does not ensure compliance with state law).

PORA
PORA provides that it is a misdemeanor for a healing arts licensee (including physicians, surgeons, psychologists, acupuncturists, optometrists, dentists, podiatrists and chiropractic practitioners) to refer a person for certain health care services2 if the licensee has a financial interest,3 with the person or entity that receives the referral, unless an exception is met. Exceptions include:

- when there are no alternative providers within a reasonable distance (25 miles or 40 minutes travelling time) to whom patients can be referred; and
- situations where the type of financial arrangements that exist between the practitioner and the entity to whom the referral is being made do not create an improper financial incentive for making a patient referral, such as a loan or lease under commercially reasonable terms, or ownership of corporate securities that may be purchased on terms generally available to the public.4

New Personal Services Exception
The new personal services exception5 exempts from the referral prohibition a personal services arrangement between a licensee or an immediate family member of the licensee
and the recipient of the referral if the arrangement meets all of the following requirements:

1. The arrangement is set out in writing and signed by the parties.
2. The arrangement specifies all the services to be provided by the licensee or immediate family member.
3. The aggregate contracted services do not exceed those that are reasonable and necessary for the legitimate business purposes of the arrangement.
4. The person being referred is provided with a written notice disclosing the personal services arrangement, including information indicating where a person may go to file a complaint against the licensee or the immediate family member.
5. The term of the arrangement is for at least one year.
6. The compensation to be paid over the term of the arrangement is set in advance, does not exceed fair market value, and is not determined in a manner that takes into account the volume or value of any referrals or other business generated between the parties.
7. The services to be performed under the arrangement do not involve the counseling or promotion of a business arrangement or other activity that violates any existing state or federal law.

**Legislative Background**

Both Congress and the California Legislature enacted legislation in the early 1990s intended to prohibit health care practitioners from making unnecessary referrals of patients to entities in which they had a financial interest. Under the federal Stark Law, which applies only to federal health care program business, physicians are prohibited from referring patients to a health care facility for ten designated health services if the physician possesses an ownership interest in, or a compensation arrangement with, the health care facility, and no exception to the law is met. Health care entities are also prohibited from submitting a claim for payment or receiving payment for services provided pursuant to a prohibited referral. The Stark Law includes an exception for personal service arrangements that are written, signed, specify the services to be provided, specify compensation that is consistent with fair market value and do not vary based on the volume or value of referrals, and meet certain other requirements.

California Senate Bill 1907, introduced by Senator Kevin Murray and sponsored by the Comprehensive Occupational Rehabilitation Facilities (CORF), creates a personal services exception in state law. PORA’s existing exceptions have covered personal service arrangements for certain providers (permitting physicians to refer to their own office practices and to hospitals and skilled nursing facilities and facilities owned or leased by them), but not for an array of other facilities. The new personal services exception would cover other kinds of health care entities, including comprehensive outpatient rehabilitation facilities, community clinics, ambulatory surgery centers, clinical laboratories, home health agencies, and Medicare-certified independent diagnostic test facilities. CORF secured the new exception by arguing that it would streamline the referral process by conforming federal and state law without running afoul of the referral prohibition or endangering patients.

**Conclusion**

The new exception to the California physician self-referral law protects many of the common business arrangements of certain health care providers that were not previously permitted under state law. However, compliance with the federal Stark Law personal services exception does not ensure compliance with the new state law exception. Health care entities should consult counsel to ensure that a proposed arrangement complies with the requirements of the personal services exception (or another applicable exception) under both state and federal self-referral laws.
Endnotes

1 See California Senate Bill No. 1907. PORA stands for the Physician Ownership Referral Act, and the Speier Act refers to the law’s original author, Senator Jackie Speier. The new law also amends a corresponding provision in California workers’ compensation law, which is not discussed here.

2 Services covered include laboratory, diagnostic nuclear medicine, radiation oncology, physical therapy, physical rehabilitation, psychometric testing, home infusion therapy, and diagnostic imaging goods or services. See Cal. Bus. & Prof. Code Section 650.01.

3 “Financial interest” includes, but is not limited to, any type of ownership interest, debt, loan, lease, compensation, remuneration, discount, rebate, refund, dividend, distribution, subsidy, or other form of direct or indirect payment between a licensee and a person or entity to whom the licensee refers a person for a good or service. See Cal. Bus. & Prof. Code Section 650.02.

4 The new state law exception differs from the similar exception in federal law (42 USC 1395nn, the “Stark Law”) primarily because it contains a notice provision ensuring that the patient is aware of the physician’s financial arrangement and is informed of where to go to file a complaint should the need arise.

5 Ownership interests and compensation arrangements are broadly defined to include almost all financial interests—direct or indirect, in cash or in kind.

6 See Senate Bill 1907. Provisions with respect to the corresponding change in the workers’ compensation law require that written notice be provided at the time services are first provided, and subject certain compensation to statutorily-authorized fee schedules.

7 Although similar to the Federal Stark Law, PORA applies to all payors, specifies slightly different designated health services (e.g., outpatient drugs are not designated services under PORA), and contains different exceptions (e.g., PORA previously lacked a personal services exception, but has a “fair market value” exception not found in federal law).
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