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OBS RENTAL RULES CALLED INTO QUESTION

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Not long after the passage of the laws permitting physicians to operate accredited office based surgery practices ("OBSPs"), the Department of Health (the "Department") Website included a list of "Frequently Asked Questions" (individually, a "FAQ" or collectively, "FAQs") regarding OBSPs. Among the FAQs posted as of August 7, 2009, was FAQ number 49 which read as follows:

"49. If a physician leases space from an accredited OBS practice, does the accreditation of the practice extend to the leasing physician -- making the performance of OBS by the leasing physician legal?

Not necessarily - it depends on a number of factors. Each practice location performing OBS must be accredited. If the office location where the leasing physician wants to perform office based surgery is not accredited, then the leasing physician's practice is not accredited. The leasing physician would need to seek separate accreditation for the leased location in order to legally perform OBS there.

If the office location where the leasing physician wants to perform office based surgery is OBS accredited and the leasing physician, and all MD/PA/SA working with him/her, are credentialed/privileged by the OBS accredited practice they are leasing from, then the performance of OBS would be legal at that site."

With the publication of FAQ 49, many rental arrangements were structured in good faith reliance on the answer given by the Department. Under those rental arrangements, many physicians leased space, equipment and services and became credentialed by OBSPs, in accordance with the accrediting agency's credentialing

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requirements. Those physicians performed (and continue to perform) gastrointestinal procedures (such as colonoscopies), surgery, and anesthesia services under rental arrangements with accredited OBSPs. Typically, in such rental arrangements, the physician lessee pays a fair market fee to the accredited OBSP to use the space, equipment and some services. The physician lessee, in these arrangements, typically bills, collects and retains all reimbursement revenue for the services performed by the lessee on his/her patients at the OBSP. The physician lessee is not an owner or employee of the OBSP and the patients he treats at the OBSP are his or her own patients, and all revenue generated from the services rendered by such physician lessee belongs to such physician lessee.

Recently, we received a copy of a letter from the Department of Health, Division of Quality and Patient Safety, dated May 30, 2012, (the "May 30, 2012 Letter") addressed to counsel representing a no fault insurance carrier. The letter appears to have been in response to an inquiry posed by such no fault insurance attorney.

Significantly the letter states as follows:

"An accredited OBSP may not allow physicians or non physicians who are not in the practice to perform surgical or invasive procedures involving moderate or deep sedation or general anesthesia (OBS) in the accredited OBSP setting. The physicians who perform OBS must be, as applicable, shareholders of the corporation, members of the limited liability corporation or partners of the partnership; or the physicians must be employees of the OBSP performing OBS within the scope of their employment or working under a contract to perform services for and on behalf of the OBSP. Outside physicians who are not in accredited OBSP's may not perform OBS in an accredited setting on their own behalf simply because they have entered into arrangements, such as leases that allow them to use space in an accredited OB setting."

When we received this letter, we immediately turned to the Department website to review FAQ 49, only to discover that as of July, 2012, the FAQ's had been updated. With the updates of the FAQ's regarding OBSPs, we noted that the Department removed FAQ 49, but did not replace it nor provide explanation or further guidance regarding rental arrangements in OBSPs. With removal of FAQ 49, and in the face of the May 30, 2012 Letter, one might conclude that physician lessees, who previously entered into rental arrangements with OBSPs, and who are not shareholders, members, partners, employees or subcontractors of the accredited OBSP, are no longer operating within the law. Absent a final published guidance on the issue, we felt that we needed further guidance from the state.

Based on discussions we had with the Department's legal department and the OBS Program, we expect that the Department

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will issue a further refinement of the FAQs regarding leasing arrangements in OBSPs. We believe, that the Department will expand on the position articulated in the May 30, 2012 Letter, that prohibits physicians who are not shareholders, members, partners; or employees of an OBSP to perform OBS procedures at an OBSP. Rather, we anticipate that the Department will permit certain contractual arrangements between an OBSP on the one hand and physicians who are neither owners nor employees of the OBSP on the other hand. However, the Department will want to ensure that patients treated in an OBSP do not receive disparate levels of care.

In furtherance of protecting patient safety and quality assurance, we believe that the Department will ultimately arrive at an approach that will permit non-owner and non employee physicians to become credentialed under certain contractual arrangements with OBSP's, provided that such physicians comply with the OBSP's policies and procedures regarding patient safety and quality assurance. A new FAQ should be issued in the next few months which should cover this issue although it may contain other conditions beyond those focused on patient safety and quality assurance. Stay tuned and we will keep you updated of any developments as they arise.

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